

No. 19-20429

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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LORI WASHINGTON, as next friend of J.W.; J.W.,  
*Plaintiffs-Appellees,*

v.

ELVIN PALEY,  
*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of Texas  
No. 4:18-cv-1848

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**BRIEF OF DISABILITY RIGHTS TEXAS  
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Kym Davis Rogers  
Disability Rights Texas  
1420 W. Mockingbird Ln., Ste. 450  
Dallas, Texas 75247  
(214) 845-4045

Adam Pierson  
Cristina Torres  
DLA Piper LLP (US)  
1900 N. Pearl St., Ste. 2200  
Dallas, Texas 75201  
(214) 743-4500

*Attorneys for Amicus Curiae*

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief as required by Fifth Circuit Rule 29.2. This Statement of Interest is made so that the judges of this Court may determine possible disqualification or recusal.

**A.** Plaintiff-Appellees

Lori Washington, as next friend of J.W.

J.W.

**B.** Counsel for Plaintiff-Appellees

Andrew Joseph Willey  
Drew Willey Law  
P.O. Box 2813  
Houston, Texas 77252  
Telephone: (713) 510-1950

Martin Jay Cirkiel  
Cirkiel & Associates, P.C.  
1901 E. Palm Valley Blvd.  
Round Rock, Texas 78664  
Telephone: (512) 244-6658

Niolas Y. Riley  
Mary B. McCord  
Institute for Constitutional Advocacy and Protection  
Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, D.C. 20001

**C.** Defendant-Appellant

Elvin Paley

**D.** Counsel for Defendant-Appellant

Cristopher B. Gilbert  
Hailey Renee Janecka  
Thompson & Horton, LLP  
3200 Southwest Freeway, Ste. 2000  
Houston, Texas 77027  
Telephone: (713) 554-6767

**E.** *Amicus Curiae*

Disability Rights Texas

**F.** Counsel for *Amicus Curiae*

Kym Davis Rogers  
Disability Rights Texas  
1420 W. Mockingbird Ln., Ste. 450  
Dallas, Texas 75247  
Telephone: (214) 845-4045

Adam Pierson  
Cristina Torres  
DLA Piper LLP (US)  
1900 N. Pearl St., Ste. 2200  
Dallas, Texas 75201  
Telephone: (214) 743-4500

### **RULE 29(4)(A), (E) STATEMENTS**

*Amicus Curiae* has no parent corporations, subsidiaries, or affiliate that have issued shares to the public.

*Amicus Curiae* has no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though it and its members have a general interest in the issues and outcome of the case.

No party's counsel authored this brief, in whole or in part, and no party or their counsel contributed money to fund this brief.

## STATEMENT REGARDING ORAL ARGUMENT

*Amicus Curiae* Disability Rights Texas is an organization dedicated to protecting the rights of students with disabilities and ensuring that they obtain a free and appropriate public education. Counsel for *Amicus Curiae* respectfully suggests that oral argument is not likely to assist the Court in considering the implications that school disciplinary measures and the involvement of law enforcement officers have on students with disabilities, as explained herein. Thus, oral argument is not necessary in this interlocutory appeal.

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## **STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE**

Disability Rights Texas (“DRTx”) is the federally-designated legal protection and advocacy agency for people with disabilities in Texas. DRTx’s mission is to help people with disabilities understand and exercise their rights under the law and ensure their full and equal participation in society. DRTx accomplishes its mission by providing direct legal assistance to people with disabilities, protecting the rights of people with disabilities through the courts and justice system, and educating and informing policy makers about issues that impact the rights and services for people with disabilities.

DRTx is dedicated to protecting the rights of students with disabilities in this Circuit and beyond. A significant portion of DRTx’s work is representing students with disabilities and their families throughout the State of Texas to secure appropriate education services from public schools, including the right of students to be safe at school. Based on its experience in this area and its work to further the education and civil rights of students with disabilities, it is uniquely positioned to inform the Court of the implications of using forceful disciplinary techniques on students with disabilities.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

Children with disabilities are disproportionately affected by disciplinary action in schools. They face a significantly higher incidence of encounters with law enforcement—including arrests and use of force—and the disciplinary measures used against them are often more severe than those used on non-disabled students. This higher rate of disciplinary action and law enforcement involvement has a profoundly detrimental impact on those students’ development, ability to cope with their disability, and participation in the school learning environment. But the overuse of discipline against students with disabilities has other far-reaching consequences: the use of harsh disciplinary measures promotes a cycle of encounters with law enforcement and increases the likelihood that students with disabilities will enter the criminal justice system, forcing students into the “school-to-prison pipeline.”

School Resource Officers, like Officer Paley in this case, play a unique role as law enforcement officials placed in a school setting. However, they often lack the training needed to interact with students with disabilities. Such training is critical to ensure that officers exercise restraint and de-escalate, rather than aggravate, situations.

As a result, the inquiry as to whether use of force against a student with disabilities is objectively reasonable calls for a close examination of the distinct

challenges that students with disabilities face in schools and the grave implications of their higher rate of encounters with law enforcement. In this case, J.W.'s emotional disturbance and intellectual disability should be taken into consideration when evaluating whether Officer Paley's repeated use of a taser on him was objectively reasonable. In light of the circumstances, the District Court's decision to deny Officer Paley's motion for summary judgment on his qualified immunity defense on the excessive force claim should be affirmed.

### **ARGUMENT**

As this case illustrates, students with disabilities face unique challenges in their encounters with law enforcement in schools. As a result, courts should take students' disabilities into consideration when analyzing excessive force claims in the school context. Although the impact of school practices and policies on the treatment of students with disabilities is not dispositive of whether a violation of Fourth Amendment rights has occurred, such matters are nevertheless relevant to the inquiry and provide important context on the reasonableness of the use of force at issue. To assist the Court in this inquiry, DRTx presents an overview of the implications that school disciplinary measures and the involvement of law enforcement officers have on students with disabilities.

In its analysis of whether Officer Paley was entitled to qualified immunity on Plaintiffs-Appellees' excessive force and unreasonable seizure claim, this Court

should take into consideration J.W.’s disabilities—and the fact that Officer Paley was aware of those disabilities—and should affirm the District Court’s decision to deny Officer Paley qualified immunity based on the summary judgment record.

**I. Students With Disabilities Are Disproportionately Affected By School Disciplinary Measures.**

This lawsuit implicates not only the rights of students to be free from unconstitutional seizures and use of excessive force, but also the rights of students to be free from civil rights violations that lead to the cycle of inappropriate school discipline and law enforcement actions known as the “school-to-prison pipeline.”

The school-to-prison pipeline has a disproportionate impact on students with disabilities. According to the U.S. Department of Education Civil Rights Data Collection, students with disabilities (as defined by the Individuals with Disabilities Education Act) face a higher rate of referral to law enforcement and involvement in school-related arrests than non-disabled students: students with disabilities represent only 12% of the nationwide student population, but they account for 28% of arrests and referrals to law enforcement, and they represent 71% of students subjected to physical restraint.<sup>1</sup>

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<sup>1</sup> Office for Civil Rights, U.S. Dep’t of Ed., *2015-2016 Civil Rights Data Collection: Data Highlights on School Climate and Safety in Our Nation’s Public Schools* 1, 4, 12 (Apr. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

In Texas, of districts that could report school-based arrests and use-of-force incidents by student's disability, students with disabilities represented 9% of overall student enrollment but accounted for 24% of students arrested and 16% of use-of-force incidents at school.<sup>2</sup> An extensive study of Texas middle and high school students' records further revealed that “[n]early three out of four students who qualified for special education services during the study period were suspended or expelled at least once between their seventh- and twelfth-grade school years.”<sup>3</sup> Students who were suspended or expelled, in turn, “had a greater likelihood of contact with the juvenile justice system in their middle or high school years, particularly when they were disciplined multiple times.”<sup>4</sup>

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<sup>2</sup> Deborah Fowler, *et al.*, TEXAS APPLESEED & TEXANS CARE FOR CHILDREN, *Dangerous Discipline: How Texas Schools are Relying on Law Enforcement, Courts, and Juvenile Probation to Discipline Students* (2016), <http://stories.texasappleseed.org/dangerous-discipline>. Although few school districts are able to report this data, the reported data are consistent with anecdotal reports from students, parents, and attorneys for students with disabilities statewide. Deborah Fowler, *et al.*, TEXAS APPLESEED, *Texas' School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Schools, How the Myth of the "Blackboard Jungle" Reshaped School Disciplinary Policy* 95, 100, 113 (2010), <https://texasappleseed.org/sites/default/files/03-STPPTicketingandArrests.pdf>.

<sup>3</sup> Tony Fabelo, *et al.*, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* 47 (2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf).

<sup>4</sup> *Id.* at 61.

Further aggravating matters, most disciplinary actions taken are discretionary, with one Texas study concluding that “[o]nly 3 percent of the disciplinary actions were for conduct for which state law mandates suspensions and expulsions; the remainder of disciplinary actions was made at the discretion of school officials, primarily in response to violations of local schools’ conduct codes.”<sup>5</sup> As a result, non-threatening situations that may require minor and routine involvement by school officials may be escalated to law enforcement and result in more severe disciplinary action than is necessary or beneficial for the student’s long-term development. And even where law enforcement is not involved, the increased use of disciplinary measures (such as suspensions or expulsions) is linked to a greater likelihood of contact with the juvenile justice system later on.<sup>6</sup>

## **II. The Court Should Consider The Appropriate Limits On The Role And Responsibilities Of School Resource Officers.**

### **A. School Resource Officers Play A Unique Role In Law Enforcement.**

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<sup>5</sup> *Id.* at x. In a study of 928,940 students, 13% of whom qualified as having an educational disability, 98.1% of the discipline taken was in the form of suspensions or expulsions, and nearly all were discretionary. *Id.* at 50; *see also* Council of State Governments, *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System* 6 (2014), [http://csgjusticecenter.org/wp-content/uploads/2014/06/The\\_School\\_Discipline\\_Consensus\\_Report.pdf](http://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf).

<sup>6</sup> *Id.* at 61.



The evaluation of School Resource Officers' ("SROs") conduct should take into account the unique role that SROs play in schools. SROs are not traditional law enforcement officers, but instead serve a hybrid educational, correctional, and law enforcement role.<sup>7</sup> The use of SROs has significantly increased since the 1990s.<sup>8</sup>

Even though students with disabilities account for 12% of school enrollment nationwide, SROs often lack training on special education issues.<sup>9</sup> According to a study of 130 SROs, more than half had never received either academic training or in-service training on special education students.<sup>10</sup> The same SROs also estimated that 36.75% of the law-related incidents they responded to at school involved special

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<sup>7</sup> Nathan James & Gail McCallion, CONG. RESEARCH SERV. R43126, *School Resource Officers: Law Enforcement Officer In Schools 2* (2013); Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 CLEARING HOUSE 160, 161 (2011).

<sup>8</sup> *Id.*; To Protect & Educate: *The School Resource Officer and the Prevention of Violence in Schools*, NAT'L ASS'N SCH. RES. OFFICERS 9 (2017), <https://nasro.org/cms/wp-content/uploads/2017/10/NASRO-Protect-and-Educate.pdf>. According to 2007 estimates, more than 17,000 SROs are assigned to schools nationwide. Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 656 (2013).

<sup>9</sup> Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 156, 170 (2015).

<sup>10</sup> *Id.*

education students.<sup>11</sup> Of particular concern is that almost 85% “at least somewhat agreed” that students receiving special education services used their special education status as an excuse for their behavior to avoid accountability for their actions.<sup>12</sup> This highlights a lack of awareness of the nature of students’ disabilities and proper strategies for meeting the special needs of students with disabilities.

Studies show that “the presence of an SRO at a school significantly increased the rate of arrests” for minor disciplinary matters that could have been handled through in-school disciplinary measures.<sup>13</sup> Moreover, SROs often discipline students with disabilities far too often and using more severe measures than are necessary.<sup>14</sup> SROs are also rarely trained in how to de-escalate the behaviors of students with disabilities, which may provoke further behavioral problems.<sup>15</sup> This

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Elizabeth A. Shaver & Janet R. Decker, *Handcuffing a Third Grader? Interactions Between School Resource Officers and Students with Disabilities*, 2017 UTAH L. REV. 229, 247 (2017); see also Valerie Strauss, *Why Are We Criminalizing Behavior of Children with Disabilities?* Wash. Post, Apr. 25, 2017, <https://tinyurl.com/yd7lthkx>.

<sup>14</sup> Kriston Capps, *Why Disabled Students Suffer at the Hands of Classroom Cops*, City Lab (Oct. 28, 2015), <https://www.citylab.com/equity/2015/10/why-disabled-students-suffer-at-the-hands-of-classroom-cops/412723/>.

<sup>15</sup> *Id.*

increased rate of disciplinary action, in turn, contributes to the likelihood that students with disabilities will enter the criminal justice system.<sup>16</sup>

The prevalence of SROs' use of harsh disciplinary methods and the involvement of law enforcement techniques in schools is particularly concerning because students can suffer lasting harmful consequences after an interaction with law enforcement. Frequent and severe discipline and the use of law enforcement techniques in schools is rarely effective at teaching students to refrain from violent behavior, and it causes students to become disengaged and reluctant to learn.<sup>17</sup> Additionally, severe school discipline increases a child's odds of becoming delinquent, abusing substances, connecting with gangs, dropping out, and falling

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<sup>16</sup> Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 980 (2009/2010); Johanna Wald & Lisa Thureau, *First, Do No Harm: How Educators and Police Can Work Together More Effectively to Keep Schools Safe and Protect Vulnerable Students*, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST. 1 (2010) [hereinafter *First, Do No Harm*], <http://www.charleshamiltonhouston.org/wp-content/uploads/2013/11/FINAL-Do-No-Harm.pdf>; U.S. Dep't of Education, *Guiding Principles: A Resource Guide for Improving School Climate and Discipline 9-11* (Jan. 2014) [hereinafter *Guiding Principles*], <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

<sup>17</sup> Alice Farmer, *US: Protect Children with Disabilities from School Violence*, HUMAN RIGHTS WATCH (Oct. 14, 2011), <https://www.hrw.org/news/2011/10/14/us-protect-children-disabilities-school-violence#>.

into the school-to-prison pipeline.<sup>18</sup> Students may also feel traumatized, anxious, humiliated, and deeply fearful of school after law enforcement encounters.<sup>19</sup>

**B. SROs Should Have Clearly Defined Roles and Training, And They Should Not Criminalize Behavior Unnecessarily.**

Because of the severe consequences that interactions with SROs can have on students with disabilities, SROs should exercise restraint and should have a well-defined, limited role when interacting with students. SROs should not replace traditional discipline in schools. An SRO’s role “should be focused on school safety, with the responsibility for addressing and preventing serious, real, and immediate threats to the physical safety of the school and its community.”<sup>20</sup> The importance of

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<sup>18</sup> See Katherine Reynolds Lewis, *Why Schools Over-Discipline Children with Disabilities*, THE ATLANTIC (Jul. 24, 2015), <https://www.theatlantic.com/education/archive/2015/07/school-discipline-children-disabilities/399563/>; see also Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.U. L. REV. 1373 (2011/2012); Deb Delisle, *Asst. Secretary Delisle and Youth Lend Their Voices to Combatting the School-to-Prison Pipeline*, U.S. Dep’t of Education, <https://blog.ed.gov/2012/12/asst-secretary-delisle-and-youth-lead-their-voices-to-combatting-the-school-to-prison-pipeline/>; U.S. Dep’t of Education and U.S. Dep’t of Justice, *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* 4 (Jan. 8, 2014) [hereinafter *Dear Colleague Letter*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

<sup>19</sup> *First, Do No Harm*, *supra* note 16, at 13.

<sup>20</sup> *Guiding Principles*, *supra* note 16, at 10; see also Texas Education Code, § 37.081(d-4) (SROs should be “tasked only with duties related to law enforcement intervention and not tasked with behavioral or administrative duties better addressed by other district employees.”).

limiting the role of SROs was recognized by the Texas state legislature this year when enacting a law that prohibits school districts from assigning routine student discipline to SROs.<sup>21</sup> To preserve this narrow role and to ensure that SROs do not criminalize behavior that could be adequately addressed by educators and administrators, SROs should receive specialized training and should be required to adhere to clear policies.

SROs should use law enforcement actions, to include the use of force, only as a last resort, namely: (1) for serious criminal conduct or (2) when necessary to protect students and staff from a threat of immediate harm.<sup>22</sup> This narrow role will help ensure that SROs avoid violating students' civil rights while accomplishing their purpose: promoting the safety of schools and students.<sup>23</sup> However, this calls for additional training on interacting with students with disabilities—accounting for the student's developmental needs and limitations—with specific emphasis on techniques for de-escalating conflict.<sup>24</sup>

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<sup>21</sup> *Id.* at § 37.081(d-2)(1).

<sup>22</sup> *See id.*

<sup>23</sup> U.S. Dep't of Justice Office of Community Oriented Policing Services, *Fact Sheet, FY 2017 COPS Hiring Program School Resource Officer Mandatory Training*, (Aug. 2017), [https://cops.usdoj.gov/pdf/2017AwardDocs/chp/SRO\\_Mandatory\\_Training\\_Fact\\_Sheet.pdf](https://cops.usdoj.gov/pdf/2017AwardDocs/chp/SRO_Mandatory_Training_Fact_Sheet.pdf).

<sup>24</sup> *See* Council of State Governments, *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the*

**III. The Court Should Consider J.W.’s Disability When Determining Whether Officer Paley’s Conduct Was Objectively Reasonable.**

The Court should evaluate whether Officer Paley’s actions—tasing a high school student with a severe disability multiple times, handcuffing him, and then taunting him for his failure to follow instructions—were objectively reasonable in light of J.W.’s disabilities. In determining whether Officer Paley acted reasonably, the Court should consider the particularized facts and circumstances surrounding his encounter with J.W., as well as the long-term impact that employing force against a student with intellectual and emotional disabilities will have on the student’s development. These considerations—in addition to those noted by the District Court and raised by Plaintiffs-Appellees in these proceedings—demonstrate that the Court correctly denied summary judgment on Officer Paley’s qualified immunity defense.

**A. The Behavior Underlying The Incident Was A Manifestation Of J.W.’s Disability; J.W. Was Attempting To Follow His Behavior Plan When He Was Tased By Officer Paley.**

J.W. is a student with disabilities, and at the time of the incident was receiving special education services as a student with an Emotional Disturbance and an Intellectual Disability. ROA 1946. The committee responsible for developing his individual education plan found that his disabilities directly impacted his behavior, noting this fact many times in the year prior to the incident, including specifically:

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*Juvenile Justice System* 220-22, 234-35 (2014), [http://csgjusticecenter.org/wp-content/uploads/2014/06/The\\_School\\_Discipline\\_Consensus\\_Report.pdf](http://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf).

- J.W. struggles when he wants to communicate. ROA 1901.
- “He also struggles to verbalize feelings, which is a big part of his overreacting at times.” ROA 1901.
- “Due to his intellectual disability, he gets angry sometimes and overreacts when he does not understand social situations.” ROA 1901.

In May 2016, the committee’s notes described J.W. as a “[k]ind and gentle young man” whom the school wants to “help . . . get [past] the times when he gets frustrated.” ROA 1911.

Because J.W.’s behavior impeded his learning and the learning of others, federal law requires the use of positive behavioral interventions and supports to address the behavior. 20 U.S.C. § 1414(d)(3)(B)(i) (2018). Accordingly, in September 2016, the committee developed a behavior goal for J.W.: “[J.W.] will control temper in conflict situations with a peer and/or adult by using coping strategies (calm discussion, step away, etc.) in 1/5 situations.” ROA 1955. Thus, just two months before the incident, the committee’s goal for J.W. was that he would control his temper using coping strategies 20% of the time. He also had a behavior goal targeted to learning the use of self-control strategies “when feeling frustrated or an urge to use oppositional behavior . . . .” ROA 1960.

Additionally, the committee developed a behavior intervention plan. ROA 1973. The targeted behaviors that the plan addressed included physical aggression

toward peers and verbal aggression toward staff. ROA 1974-75. To replace the targeted behaviors, J.W. was to learn to ignore people and ask for a break. ROA 1976. His schedule of services provided for access to the PASS room, a behavioral support program, to assist with his behaviors. ROA 1976.

J.W.'s plans make clear that he experienced frustration that could lead to aggression as a direct result of his disabilities, and the goal was for him to learn calming and de-escalation techniques so that he could "get past the times he is frustrated." On November 30, 2016, this is exactly what J.W. was trying to do. After the altercation in class, he removed himself from the classroom and went to his assigned space to calm down. ROA 1556. His behavior escalated when he was unable to access that space, but he again removed himself from the situation and tried to go outside the school to calm down. ROA 1556. Instead of being permitted to deescalate, he was met with force, and tased by Officer Paley, who knew that J.W. was a special education student. ROA 813.

**B. The Court Should Consider J.W.'s Disability As A Central Aspect Of The Facts And Circumstances Of The Incident.**

In assessing the constitutionality of the use of force in the course of a Fourth Amendment seizure, courts are to determine whether the law enforcement officer's conduct was objectively reasonable. *Graham v. Connor*, 490 U.S. 386, 398 (1989). To determine whether a seizure was objectively reasonable, courts must pay "careful attention to the facts and circumstances" of the particular case, which include: (1)



“the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396. In light of the unique obstacles that students with disabilities face at school—and especially during disciplinary encounters—courts should place particular emphasis on the disability of a student when considering the various facts and circumstances of the incident.

The reasonableness of Officer Paley’s actions should be analyzed in light of J.W.’s disabilities and the school’s recommendations for addressing them. “[I]n examining a claim of excessive force, a court must ask whether the officers’ conduct was ‘objectively reasonable’ in light of the facts and circumstances confronting them. Just like any other relevant personal characteristic—height, strength, aggressiveness—a detainee’s known or evident disability is part of the Fourth Amendment circumstantial calculus.” *Bates ex rel. Johns v. Chesterfield Cnty., Va.*, 216 F.3d 367, 373 (4th Cir. 2000) (internal quotations and citations omitted).

The Court should thus consider whether the repeated use of a taser on J.W. was a response suited to a developmentally disabled teenager struggling to cope with a stressful situation. This is especially warranted here, where the behavior underlying the incident was a direct manifestation of J.W.’s disability. *See K.G. v. Sergeant Bluff-Luton Cmty. Sch. Dist.*, 244 F. Supp. 3d 904, 926 (N.D. Iowa 2017) (in denying defendants’ motion for summary judgment on excessive force claim,

court considered “evidence that [principal] was deliberately indifferent to the risk of harm to [student] from inadequate training and supervision of faculty and staff in the use of force and restraint when seizing special education students with disabilities”); *M.S. ex rel. Soltys v. Seminole Cnty. Sch. Bd.*, 636 F. Supp. 2d 1317, 1323 (M.D. Fla. 2009) (noting student had “developmental disabilities [that] must be considered in determining the need for force, the extent of injury, and the maliciousness of . . . actions,” and recognizing that student was “unable to communicate” and had “significant preexisting mental and emotional disabilities which require[d] special care”); *James v. Frederick Cnty. Pub. Sch.*, 441 F. Supp. 2d 755, 757-59 (D. Md. 2006) (allegations deemed “sufficient to state a claim that [officer] used excessive force” in handcuffing eight-year-old child with ADHD after child became “severely upset” and teachers could not calm him down); *Banks ex rel. Banks v. Modesto City Sch. Dist.*, No. CVF046284RECSMS, 2005 WL 2233213, at \*10 (E.D. Cal. Sept. 9, 2005) (denying motion to dismiss and stating “[t]hat school officials and/or a police officer working with school officials would use pepper-spray and handcuffs to restrain a thirteen year old mentally disabled child is shocking”); *see also Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903-04 (6th Cir. 2004) (qualified immunity denied to officers who lay atop an autistic man—whom they knew to be “mentally ill or retarded”—and continued to pepper spray him in the face after he had stopped resisting arrest and was not a flight risk); *Deorle v. Rutherford*, 272 F.3d 1272 (9th

Cir. 2001) (qualified immunity denied to officer who, without warning, fired a lead-filled bag into the face of a man with mental health issues resulting in damage to one eye and leaving lead in his skull, when the man had complied with officers' orders).

Here, the fact that J.W. was receiving special education services as a student with an Emotional Disturbance and an Intellectual Disability indicates that the disciplinary measures taken by school officials should have been aimed at assisting him in de-escalating stressful situations. J.W.'s disabilities impacted "his daily functioning, including his ability to communicate, control his emotion, and access regular emotional services without accommodations." ROA 2144. In addition, he was frequently "bullied and harassed" and had difficulty coping with stressful situations. *Id.* Katy School District staff were aware J.W. was being bullied and they suggested J.W. "walk it off" when he was bullied or in a stressful situation. ROA 2137. After being bullied on the date of the incident, an emotional and distraught J.W. was simply attempting to walk outside, in accordance with Katy School District staff's recommendations, when he was tased and taunted multiple times by Officer Paley. Critically, Officer Paley acknowledged that he "knew [J.W.] was a LifeSkill student" and had a disability. ROA 813; *see also* ROA 633.

The Court should also consider the consequences that Officer Paley's actions had on J.W.'s development. *See, e.g. Moretta v. Abbott*, 280 F. App'x 823, 824 (11th Cir. 2008) (holding police officers not entitled to qualified immunity where

excessive force violation was “obvious” when officers shot six-year-old student in school office with a Taser gun, causing the child to convulse violently and vomit, which caused “severe, significant and permanent injury to [the child], including extreme mental and physical suffering and loss of bodily function”). Following the incident, J.W. missed several months of school, suffered from severe anxiety, and is now both afraid of returning to school and of police officers. ROA 2118-19. Therefore, the Court should consider the extent to which the encounter exacerbated J.W.’s disabilities and hindered his development. Further, as detailed above, numerous studies show that such law enforcement encounters are linked to additional behavioral disturbances and increase the likelihood of repeated encounters with the juvenile justice system, fueling the school-to-prison pipeline. These considerations, although not dispositive, are relevant to whether Officer Paley’s actions were objectively reasonable and should be a central focus of the Court’s analysis.

### **CONCLUSION**

For the foregoing reasons, DRTx requests that this Court consider J.W.’s disabilities and Officer Paley’s knowledge of his disabilities and affirm the District Court’s denial of summary judgment on Defendant-Appellant Elvin Paley’s qualified immunity defense.

Dated: October 30, 2019

Respectfully submitted,

/s/ Cristina Torres\_\_\_\_\_

Adam Pierson

Cristina Torres

DLA Piper LLP (US)

1900 N. Pearl St., Ste. 2200

Dallas, Texas 75201

(214) 743-4500

Kym Davis Rogers

Disability Rights Texas

1420 W. Mockingbird Ln., Ste. 450

Dallas, Texas 75247

(214) 845-4045

*Attorneys for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g)(1), the undersigned counsel certifies that:

1. This document complies with the word limits of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B), because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 5,464 words; and

This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared using Microsoft Office Word 2016 and has a typeface of 14-point Times New Roman.

Dated: October 30, 2019

/s/ Cristina Torres

Adam Pierson

**CERTIFICATE OF SERVICE**

I hereby certify that this brief has been served through the Court's ECF system on all counsel for all parties required to be served on October 30, 2019.

Dated: October 30, 2019

/s/ Cristina Torres

Adam Pierson