NO. 11-4200

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMBER BLUNT, *et al.*,
Appellants,

v.

LOWER MERION SCHOOL DISTRICT, *et al.*,
Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 07-3100

PETITION OF APPELLANTS LYDIA JOHNSON, *et al.*, FOR REHEARING EN BANC

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I. REQUIRED STATEMENT FOR REHEARING EN BANC

In accordance with Federal Rule of Appellate Procedure 35(b)(1) and Local Rule of Appellate Procedure 35.1, the undersigned counsel express a belief, based on a reasoned and studied professional judgment, that:

(1) The panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. The panel's decision is contrary to the decisions of this Court in *S.H. v. Lower Merion School District*, 729 F.3d 248 (3d Cir. 2013) (Greenaway, J.) (deliberate indifference sufficient to show intentional racial discrimination) and *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (en banc) (Sloviter, J.), *cert. denied*, 521 U.S. 1129 (1997) (summary judgment standard in discrimination cases) and its progeny.

(2) This matter also involves questions of exceptional public importance. First, this is a case about whether a public school district may with impunity deprive minority students of educational opportunities commensurate with their individual abilities by wrongly and disproportionately classifying them as having learning disabilities based on their race, and whether this Court should effectively deprive victims of such difficult-to-prove racial discrimination of remedies under civil rights laws by imposing a heightened – and nearly insurmountable – summary judgment standard. *See Blunt v. Lower Merion Sch. Dist.*, No. 11-4200, slip op. at

52 (3d Cir. Sept. 12, 2014) (McKee, C.J., concurring in part and dissenting in part). Second, the panel decision conflicts with decisions of the Supreme Court of the United States and five other United States Courts of Appeals that have addressed the legal test of "deliberate indifference" in similar civil rights cases. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334 (11th Cir. 2012), *Meagley v. City of Little Rock*, 639 F.3d 384 (8th Cir. 2011), *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268 (2d Cir. 2009), *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008), and *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147 (10th Cir. 1999).

II. STATEMENT OF THE CASE

The record contains evidence of the following key points:

Lower Merion School District ("LMSD") wrongly classified African-American students, including Appellants, as learning disabled and placed them in special education and "lower track" classes. Slip op. at 117 (Greenberg, J.); *id.* at 31, 45-48 (McKee, C.J., concurring in part and dissenting in part); *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 753-756 (E.D. Pa. 2011) (Bartle, J.) ("Dist. Ct. op.").

LMSD committed various procedural irregularities in wrongly classifying African-American students as learning disabled. Slip op. at 28, 50 (McKee, C.J.); Dist. Ct. op. at 760.

LMSD also committed procedural irregularities in destroying testing records that justified placing students in special education, thereby making it impossible for parents to review or challenge those records. Slip op. at 47 (McKee, C.J.). Furthermore, in at least one instance, a school official lied to an Appellant's family and legal counsel, falsely stating that the student's testing record had been destroyed. (A-1399-1400.) *See also S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 254 (3d Cir. 2013) (Greenaway, J.).

African-American students in LMSD were statistically overrepresented in special education classes at nearly twice their ratio in the general student population. At the same time, they were excluded almost entirely from "high expectation" or advanced placement classes. The distribution of Caucasian students followed no such pattern, and disparities of this kind over many years indicated that "there is something systematic about the LMSD practices related to Ethnicity." Slip op. at 28-29, 30-34 (McKee, C.J.).

A document entitled "Minority Achievement Program" ("MAP"), produced by LMSD in discovery and identified on its first page as part of a "Teacher Workshop" for "Lower Merion HS," describes racially tinged characteristics of, and teaching strategies allegedly appropriate for, "African American students."[1]

[1] For example, "many African American students prefer … more kinesthetic/tactile learning" and "subdued lighting rather than bright light," and

Slip op. at 104-106 (Greenberg, J.) (noting "purposeful use of such strategies may show racial bias and would be repugnant"); *id.* at 39-45 (McKee, C.J.). (A-1837-39.)

According to LMSD's own Education Diversity Consultant, LMSD implemented at least some of the concepts described in the MAP. Slip op. at 105-106 (Greenberg, J.); *id.* at 42-44 (McKee, C.J.).

LMSD teachers acting in the course of their duties informed the same LMSD consultant that African-American students were disproportionately disciplined and disproportionately represented in "lower track" classes, and that LMSD staff held unfavorable stereotypes of "black children who were poorer" from the South Ardmore portion of the district. (A-1413, 1417.)

LMSD had actual knowledge of allegations that: some African-American students were being improperly evaluated as learning disabled; LMSD staff improperly destroyed testing reports used for special education placements; and African-American students were consistently overrepresented in special education and "lower track" classes. Slip op. at 47-48, 51-52 (McKee, C.J.); Dist. Ct. op. at 753-56 (detailing African-American parents' objections to special education placements and unsuccessful attempts to remove their children from such classes).

"respond better to rewards such as praise, smiles, pats on the back, and the like." (A-1838-39.)

III. ARGUMENT

A. The Panel's Decision Conflicts With This Circuit's Precedential Opinion in *S.H. v. Lower Merion School District* and Decisions of the Supreme Court and Other Circuits by Requiring Appellants to Prove Explicit Racial Animus.

Recently, in *S.H.*, a case of first impression, this Court made an important choice between two very different standards for intentional discrimination: "discriminatory animus" and "deliberate indifference." Circuit Judge Greenaway, writing for a unanimous panel, rejected the restrictive discriminatory animus standard and adopted the more realistic deliberate indifference standard. 729 F.3d at 260, 262-63. In reaching this result, Circuit Judge Greenaway, joined by Circuit Judge Rendell, agreed with the holdings of other Courts of Appeals that have adopted the same test. *Id.* (citing *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344-45 (11th Cir. 2012); *Meagley v. City of Little Rock*, 639 F.3d 384, 388-89 (8th Cir. 2011); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275-76 (2d Cir. 2009); *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152-53 (10th Cir. 1999)). Those Courts of Appeals followed the Supreme Court, which set forth a deliberate indifference standard for similar discrimination claims in cases such as *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286-91 (1998) (O'Connor, J.).

According to the *S.H.* decision, and consistent with other Circuits, to demonstrate deliberate indifference a plaintiff need only show (1) "knowledge that

a harm to a federally protected right is substantially likely" and (2) "a failure to act upon that likelihood." 729 F.3d at 263 (citing *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)). A plaintiff need *not* show "prejudice, spite or ill will," which is required only under the discriminatory animus standard. *Id.* (citation omitted). In other words, a plaintiff need not produce a "smoking gun" but may instead rely on the totality of the circumstantial evidence to establish a prima facie case of intentional discrimination. *See* slip op. at 109-10 (Greenberg, J.); *id.* at 29 (McKee, C.J.). In so holding, the Court in *S.H.* noted that under Supreme Court precedent, "deliberate indifference *is a form of* intentional discrimination, and not a pseudonym for disparate impact." 729 F.3d at 264 n.24 (emphasis in original).

In this case, the panel majority acknowledges the binding authority of *S.H.* but, like the District Court, imposes a wholly inconsistent test requiring plaintiffs to proffer some explicit evidence of racial animus in order to survive summary judgment. *See* slip op. at 19 (McKee, C.J.) ("it is clear that the Plaintiffs here do not have to prove discriminatory animus, as the District Court held and as my colleagues' analysis implies"). For example, in dismissing statistical evidence that African-American students were overrepresented in LMSD special education classes, the majority states, "if the same evaluation procedures are used for all students regardless of their race there simply is no discrimination." Slip op. at 117. In other words, in the majority's view, Appellants herein would have to

demonstrate that LMSD intentionally used an overtly discriminatory evaluation procedure to establish a prima facie case. At the same time, record evidence that multiple African-American students were victims of "procedural irregularities" resulting in erroneous and harmful educational placements – in other words, that the same evaluation procedures were *not* used for all students regardless of their race – was essentially excluded from the majority's analysis.

Similarly, the majority writes (quoting LMSD's counsel) that Appellants did not show that LMSD's erroneous placements of African-American students were related to race because Appellants did not affirmatively rule out every other possible explanation. Slip op. at 117-18. Requiring racial discrimination victims to make an explicit showing that the treatment to which they were subjected could not possibly have been due to any reason other than race is tantamount to requiring a showing of racial animus and is thus entirely contrary to the Court's unanimous holding in *S.H.* In this way, the requirement to demonstrate explicit racial animus, though soundly rejected in *S.H.*, creeps into the majority's opinion by the back door, resulting in inconsistent panel decisions of this Court.

The discrepancy between the carefully reasoned standard announced in *S.H.* and the one actually applied by the majority in this case creates an intra-Circuit conflict that only the Court en banc can definitively resolve. Likewise, the majority's opinion raises a doubt as to whether this Court is now standing alone

and diverging from the holdings of the Courts of Appeals for the Second, Eighth, Ninth, Tenth, and Eleventh Circuits cited approvingly in *S.H.*, thereby creating an inter-Circuit split.

For both of these reasons, district courts in future cases in this Circuit involving the "deliberate indifference" intentional discrimination standard will be confronted with a dilemma as to whether or not the plaintiffs before them may rely on evidence from which inferences of discrimination and deliberate indifference can reasonably be drawn (as Appellants here have done), or whether plaintiffs must instead produce evidence explicitly showing the defendant's animus (as very few civil rights plaintiffs in "deliberate indifference" cases will likely be able to do). Confusion in the district courts and needless appeals can be avoided if the Court en banc confirms that the precedential panel opinion in *S.H.* meant exactly what it said and that no showing of express racial animus is required.

B. The Panel Majority Adopts a Summary Judgment Standard for Civil Rights Cases That Conflicts With Longstanding Precedent in This and Other Circuits and the Supreme Court.

The summary judgment standard in civil rights cases is well settled. The moving party "bears the burden of demonstrating the absence of any genuine issues of material fact"; "the facts asserted by the nonmoving party, if supported by affidavits or other evidentiary materials, must be regarded as true"; and "the inferences to be drawn from the underlying facts *must* be viewed in the light most

favorable to the party opposing the motion." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080-81 (3d Cir. 1996) (Lewis, J.) (citations omitted).

In addition, this Court sitting en banc has recognized that "[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence." *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (en banc) (Sloviter, J.) (internal citation omitted), *cert. denied*, 521 U.S. 1129 (1997). Discriminatory intent is "clearly a factual question," so "summary judgment … is rarely appropriate." *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 509 (3d Cir. 1996) (Sarokin, J.).

Moreover, "a prima facie showing of discriminatory intent may be proven indirectly … on the totality of the relevant facts." *Pennsylvania v. Flaherty*, 983 F.2d 1267, 1273 (3d Cir. 1993) (Mansmann, J.) (internal quotation omitted). Indeed, "the totality of the evidence … must guide [a court's] analysis rather than the strength of each individual argument. … A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Bray v. Marriott Hotels*, 110 F.3d 986, 991 (3d Cir. 1997) (McKee, J., with Alito, J.) (citation omitted).

Finally, it is axiomatic that a court may not "make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence is to be believed and all justifiable inferences are to be drawn in his favor." *Marino v. Indus. Crafting Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (Rendell, J.) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). As this Court held sitting en banc, a court "may not pretermit the jury's ability to draw inference from testimony, including the inference of intentional discrimination." *Sheridan*, 100 F.3d at 1072.

Although the panel majority in this case does not disavow these settled precepts, it follows the District Court in drastically departing from them. Indeed, the majority adopts a *de facto* summary judgment standard for discrimination cases under which a district court is free to evaluate each piece of evidence discretely instead of viewing the record in its totality, to weigh evidence and make credibility determinations instead of leaving those functions to a jury, and to decline to draw reasonable inferences in a civil rights plaintiff's favor. In short, "the summary judgment standard has been ignored." Slip op. at 27 (McKee, C.J.).

The very structure of the majority's opinion highlights its dismissal of key evidentiary points in isolation without considering the record evidence as a whole. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) (Rosenn, J., with Becker and Cowen, JJ.) ("discrimination analysis must concentrate not on

individual incidents, but on the overall scenario"). In separate segments, the majority discounts in turn: the MAP document and testimony about its implementation (slip op. at 104-6); evidence of disproportionate adverse treatment and stereotyping of African-American students by LMSD staff (*id.* at 111-13); multi-year statistical evidence that African Americans are systematically overrepresented in special education classes at nearly twice their ratio in the student population while being essentially excluded from "high achievement" classes (*id.* at 114-17); and – in a single dismissive sentence – the crucial evidence that LMSD wrongly labeled these particular African-American students as learning disabled and improperly placed them in special education classes (*id.* at 117).

The panel majority also departed from settled precedent in this Circuit by weighing plaintiffs' evidence. *Lawrence v. Nat'l Westminster Bank New Jersey*, 98 F.3d 61, 67 (3d Cir. 1996) (Scirica, J.) (significance of the evidence "should be determined by the fact finder"). For example, the majority acknowledged that undisputed statistical evidence showed "it was more likely that an African American student than a Caucasian student would be placed in a special education course" but insisted that further (unexplained) evidence was needed to justify an inference of discrimination. Slip op. at 117. Yet the record contains expert testimony that the statistics show "there is something systematic about the LMSD practices related to Ethnicity." Slip op. at 34 (McKee, C.J.). The majority never

refers to that expert testimony, in effect either assigning it a weight of zero or making an implicit credibility determination about Appellants' expert witness.

Similarly, as to the MAP document detailing what the majority concedes are "repugnant" practices toward African-American students, the majority declines to give it any weight at all because "we do not see any record evidence from which we could conclude that the LMSD ever used or implemented this presentation." Slip op. at 105. But under this Court's precedents, the finder of fact should determine how much weight to give a document dated October 2010 and produced by LMSD in the course of discovery with the words "Teacher Workshop" and "Lower Merion HS" emblazoned on the cover. (A-1837.) The finder of fact should also determine the credibility of the LMSD racial consultant who testified that various MAP strategies were, in fact, implemented at LMSD. (A-1413, 1417.) The majority follows the District Court in determining for itself the weight of this key evidence, the veracity of which was not in question, and, in doing so, it effectively changes the standard for summary judgment.

Finally, the majority does not draw all reasonable inferences in Appellants' favor. For example, a fact-finder considering as a whole just the key pieces of evidence summarized at the beginning of this Petition could reasonably infer that there are serious problems of racial bias in LMSD's placement tests and that such bias is causally related to the egregious mislabeling of Appellants as learning

disabled. But the majority echoes the District Court in refusing to draw an inference that it must draw under Third Circuit summary judgment standards. *See* slip op. at 29 (McKee, C.J.) ("I am … at a complete loss to understand how the District Court could have looked at this record and concluded that Plaintiffs had not put forth more than a scintilla of evidence that the LMSD acted with a racially discriminatory purpose [*i.e.* deliberate indifference].") (internal quotation omitted).

This is not merely a case in which a court followed settled law but applied it erroneously to given facts. It is instead a case in which the District Court applied a new and different legal standard to a summary judgment motion, and that different standard has carried over into the panel majority's opinion. As such, and because summary judgment analysis is invoked in a great many district court opinions, the majority's ruling presents an especially problematic threat of an intra-Circuit split.

The potential harm is all the greater in that the majority's decision may signal to district courts that the summary judgment standard should be more stringent in discrimination cases than in other cases – a result that would not only generate needless appeals to this Court but would also be in direct conflict with the various Third Circuit precedents cited above that require a *less* stringent summary judgment analysis of discrimination claims. As Chief Judge McKee stated in his dissenting opinion, "Although we are assured that plaintiffs in cases such as this need not produce the proverbial 'smoking gun,' it certainly appears that after

today, they will be required to produce something akin to evidence of either a muzzle flash or a surveillance video in order to survive summary judgment." Slip op. at 29. The full Court deserves an opportunity to give careful consideration to such a momentous shift in the summary judgment standard before it becomes law.

C. Applying the Correct Legal Standards to the Totality of the Record, There Are Genuine Issues of Material Fact as to Whether Lower Merion School District Was Deliberately Indifferent to Racial Discrimination Against Appellants.

A fact-finder considering the evidence in its totality could reasonably infer that LMSD deprived Appellants of educational opportunities to which they were entitled by wrongly classifying them as learning disabled, that LMSD did so based on race, that LMSD officials had actual knowledge of such problems but failed to act, and that the harm to Appellants is the result of LMSD's policy, practice, or custom. Appellants are therefore entitled to a trial on the merits of their claims under Title VI and 42 U.S.C. § 1983. *See* slip op. at 52 (McKee, C.J.) (noting "the laudable caution of Judge Baylson in *Doe 1*, in explaining: '[this] Court is particularly reluctant to grant summary judgment and to deny Plaintiffs the right to trial in this case, which involves issues of public policy and great concern to the community'" (citing *Doe 1 v. Lower Merion Sch. Dist.*, 689 F. Supp. 2d 742, 755 (E.D. Pa. 2010))). To hold otherwise is to proclaim that school officials may take no action in the face of substantial evidence of racial discrimination against the

students in their charge, yet have no fear that our civil rights laws will compel them to answer for their conduct before a jury of their fellow citizens.[2]

IV. CONCLUSION

For the reasons stated above, Appellants request rehearing by the Court en banc and entry of an order vacating the panel's judgment and majority opinion, reversing the District Court's summary judgment order, and remanding the case for trial on the merits. In addition, because the District Court denied Appellants' September 16, 2011 *Daubert* motion as moot upon granting summary judgment, Appellants request that the remand order provide that that motion shall be deemed renewed when the District Court resumes jurisdiction over the case.

Dated: September 26, 2014

Respectfully submitted,

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[2] As Circuit Judge Ambro aptly stated elsewhere, "failing to hold a school accountable for violence done to students creates an incentive for school administrators to pursue inaction when they are uniquely situated to prevent harm to their students." *Morrow v. Balaski*, 719 F.3d 160, 185 (3d Cir. 2013) (Ambro, J., concurring in part and dissenting in part), *cert. denied*, 134 S. Ct. 824 (2013).

CERTIFICATE OF SERVICE

I, Jeffry W. Duffy, hereby certify that on September 26, 2014, the foregoing Entry of Appearance was served electronically via ECF on the following:

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