EDUCATION LAW INTO PRACTICE

A MORE DELIBERATE, LESS GROSS LIABILITY STANDARD UNDER SECTION 504 AND THE ADA IN THE PUBLIC SCHOOL CONTEXT?*

by

Perry A. Zirkel, Ph.D., J.D., LL.M.**

Introduction

Although the Individuals with Disabilities Education Act (IDEA) remains the central focus for the legal rights of students with disabilities in P–12 public schools, Section 504 of the Rehabilitation Act (§ 504) and its sister statute, the Americans with Disabilities Act (ADA) are playing an increasingly important role for more than one reason.[1] First, in light of the broader relevant definition of disability under § 504 and the ADA, the proportion of public school students who are ''§ 504-only,'' meaning that they fit in the area of this definition beyond that of the IDEA,[2] have increased at a more rapid rate than the proportion of public students who are IDEA-eligible and, thus, ''double covered.''[3] Yet, unlike for the IDEA-eligible students, school districts do not receive any funding to meet their obligations to § 504-only students.[4]

Second, although § 504 and the ADA generally provide less specific requirements than does the IDEA, in a few areas they provide stronger student protections, such as the remedy

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** Dr. Zirkel is a retired professor and past president of the Education Law Association, who shares his research via his website perryzirkel.com.

1. 20 U.S.C. §§ 1400–19 (IDEA Part B); 29 U.S.C. § 794 (§ 504); 42 U.S.C. §§ 12131–34 (ADA Title II).

2. *See, e.g.*, CTL v. Ashland Sch. Dist., 743 F.3d 524, 529 (7th Cir. 2014) (''Because section 504 defines disability more broadly than the IDEA, some students . . . are covered by section 504 but not the IDEA.'').

3. According to federal governmental data from 2009–10 to 2020–21, which is the latest year of published analysis, the percentage of § 504-only students tripled from 1.0% to 3.3%. Perry A. Zirkel & Gina L. Gullo, *State Rates of § 504-Only Students in K–12 Public Schools: The Latest Update*, 417 EDUC. L. REP. 929, 931 (2024). The corresponding increase during this period for students identified by the public schools as IDEA-eligible was from 8.4% to 9.7%. U.S. Department of Education, 43rd and 44th Reports to Congress on the IDEA (2021, 2022) at Exhibit 19, https://nces.ed.gov/programs/digest/d11/tables/dt11_048.asp. Serving as a tangible indicator, the IDEA requires its eligible students to have an individualized education program (IEP), whereas § 504-only students typically have a non-required document, which is most often referred to as a 504 plan. *See, e.g.,* Perry A. Zirkel, *Does Section 504 Require a 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011). For a visual representation showing the differentiation of § 504-only and double-covered students as a result of the subsumed narrow definition of disability, *see* Perry A. Zirkel, *Exhaustion of Section 504 and ADA Claims under the IDEA: Resolving the Confusion*, 74 RUTGERS UNIV. L. REV. 123, 131 (2021).

4. The reason is that, like Title VI and Title IX, § 504 and the ADA are civil rights acts, whereas the IDEA started primarily as a funding act.

of money damages.[5] Although extending to § 504-only students, these plaintiff-favorable differences play a particularly advantageous role as additional or alternative bases for litigation for double-covered students.[6] This advantageous role has become particularly pronounced for money damages in the wake of the Supreme Court's 2023 decision that exempted double-covered students from the IDEA's exhaustion provision if the relief they seek is money damages.[7]

The Supreme Court recently agreed to decide a case that illustrates the role of money damages under § 504 and the ADA for a double-covered student.[8] The focus is on determining the applicable standard for obtaining this remedy and the alternative of injunctive relief. More specifically what level of, or proxy for, intent, if any, applies?[9] Moreover, depending on the scope of the Court's determination, the answer may extend to § 504-only students and beyond the public-school context. The purpose of this article is to provide an analysis that contributes to an informed and effective determination by the Court and understanding by interested individuals. Part I provides the factual contours and adjudicative history of the case. Part II summarizes the plaintiff-parents' petition for certiorari. Part III evaluates the plaintiff's descriptive foundation. Part IV identifies coverall considerations and likely choices for the Court's decision.

I. The Case Background[10]

The child in this case has a rare form of epilepsy that causes seizures that are particularly frequent throughout the night and the morning. As a result, she cannot attend school until noon. Although her condition also resulted in her being nonverbal, having limited cognitive ability, and requiring assistance for ambulation and toileting, she is alert and able to learn until about 6:00 pm. At her original school district, which was in Kentucky, she had an IEP

5. In contrast, the IDEA is limited to a broad range of equitable relief, including tuition reimbursement and compensatory education. *See, e.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. Nat'l Ass'n Admin. L. Judiciary 505 (2018). Other examples of stronger protections under § 504 or the ADA include service animals, effective communications, and retaliation. For a systematic comparison that identifies these and other examples, see Perry A. Zirkel, *The Latest Comprehensive Comparison of the IDEA and Section 504/ADA*, 416 Educ. L. Rep. 1 (2023).

6. *See, e.g.*, K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013) (ruling that compliance with the IDEA FAPE requirement does not necessarily meet the substantive standard of the ADA's Title II effective communication regulation). For an analysis of this case, closely related court decisions, and their possible limitations, *see* Perry A. Zirkel, *Three Birds with One Stone: Does Meeting the Requirements for an IDEA-Eligible Student Also Comply with the Requirements of Section 504 and the ADA?* 300 Educ. L. Rep. 29 (2014).

7. Perez v. Sturgis Pub. Schs., 598 U.S. 142 (2023) (ruling that the IDEA's exhaustion provision does not apply to claims under other federal statutes seeking either money damages or any other remedy not available under the IDEA). According to a previous decision, another exemption requirement from the IDEA's exhaustion provision is for claims on behalf of double-covered students that are not based on the IDEA's central obligation of a free appropriate public education (FAPE). Fry v. Napoleon Cmty. Schs., 580 U.S. 154 (2017). For an analysis of the interplay of these two decisions, *see* Perry A. Zirkel, *The Meaning of Perez v. Sturgis Public Schools: Neither Exhausting nor Exhaustive*, 409 Educ. L. Rep. 606 (2023).

8. A.J.T. v. Osseo Area Schs., Indep. Sch. Dist. 279, 145 S. Ct. 1122 (Jan. 17, 2025).

9. This generic use of ''intent,'' analogous to the example of recklessness as a tort, reflects a range of levels, including animus, bad faith or gross misjudgment, and deliberate indifference. These variants are generally characterized as ''tests for intentional discrimination.'' *See, e.g.*, Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011).

10. Because the Eighth Circuit's decision provides only an overview, this summary extends to the specific facts recited in the federal district court's decision in this case. Osseo Area Schs., Indep. Sch. Dist. 279 v. A.J.T., 2022 WL 4226097 (D. Minn. Sept. 13, 2022).

that provided for a delayed start of the school day and instruction at home in the early evening.

However, after her family moved to Minnesota in fall 2015, her new district was not as accommodating. From 2015–16 to 2018–19, when she was in elementary school, her new district provided her with intensive one-on-one instruction starting at noon until approximately the end of the school day at 4:00 pm, but refused its additional provision at-home in the early evening.[11] At the end of the 2018–19 school year, the IEP team met in preparation for her move to middle school, which had an ending time of 2:40 pm. Despite the shorter school day, the team rejected the parents' proposals to at least maintain the 4.25 hours of instruction, instead offering to extend the school days to 3:00 pm.[12] As a result, the parents filed for a due process hearing. After five sessions, the hearing officer issued a decision in the parents' favor, ordering 495 hours of compensatory education and a revised IEP that included at-home instruction for 4:30 to 6:00 each school day.[13]

In response to the school district's successive appeals, the federal district court and the Eighth Circuit upheld the hearing officer's rulings under the IDEA.[14] Both of these IDEA decisions were carefully individualized to this student based on the substantive standard in *Endrew F.* rather than establishing a general rule about a full school day.[15]

However, none of these decisions addressed the parents' parallel claim based on § 504 of the Rehabilitation Act and its sister statute, the Americans with Disabilities Act. Because this claim was for money damages, which is unavailable under the IDEA, it was directly an issue for the courts rather than the IDEA's process for administrative adjudication.[16]

As the first step, the federal district court issued a summary judgment in favor of the school district.[17] After reciting the history of the parents' § 504/ADA actions, including a complaint to the U.S. Department of Education's Office for Civil Rights that resulted in an independent educational evaluation, and reviewing the depositions of the school district's administrative representative and experts for both parties, the district court denied the parents' § 504/ADA claim for money damages based on their failure to prove that the school district officials acted in bad faith or with gross misjudgment.[18] In doing so, the court rejected the plaintiffs' alternative arguments that imported the reasonable accommodations analysis

11. After several IEP meetings, the district agreed to extend the individual child's day beyond the regular elementary school day to 4:15 pm. *Id*. at *2. The prior written notice to the parents' provided the district's reason for denying the requested addition—"the precedent it would start [for the district] . . . . and other districts across the area." *Id*. at *3.

12. *Id*. at *2. Upon the parents' refusal to agree with this offer and their prompt filing for a due process hearing, the child's school day was from noon to 4:15 based on the stay-put of the last-agreed upon IEP (*supra* note 11).

13. *Id.* at *8.

14. *Id*., *aff'd*, 96 F.4th 1062 (8th Cir. 2024), *denying rehearing en banc*, 2024 WL 2702397 (8th Cir. May 24, 2024).

15. *E.g., Osseo Area Schs., Indep. Sch. Dist. 279 v. A.J.T*., 2022 WL 4226097, at *12 ("The Court declines to reach the issue of whether the IDEA requires the presumption that every student is entitled to a full instruction day regardless of the start time. . . . Importantly, the ALJ found that AJT had been denied a FAPE without relying on such a presumption. Moreover, the Supreme Court's caselaw regarding FAPE provides a flexible standard of whether the IEP is 'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'").

16. *Supra* note 7.

17. A.J.T. v. Osseo Area Schs., Indep. Sch. Dist. 279, 2023 WL 2316893 (D. Minn. Feb. 1, 2023).

18. *Id*. at *6. In a separate ruling, the district court also granted the district's summary judgment motion for the parents' retaliation claim under § 504, concluding that they failed to meet the distinctly applicable multi-step test. *Id*. at *14–16. The parents did not challenge this separate ruling in their appeal.

for the employment context or the deliberate indifference standard for cases wholly unrelated to IEPs.[19] Instead, the court found that the applicable standard was bad faith or gross misjudgment, for which ''statutory non-compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent.''[20] After a rather fine-grained analysis of the parents' and district's actions in the light most favorable to the plaintiff-parents, the court concluded that the district's ''[f]ailure to provide extended schooling at home was at most negligent,'' thus not qualifying as bad faith or gross misjudgment.[21]

Upon the parents' appeal, the Eighth Circuit affirmed, agreeing that its precedents established that bad faith or gross misjudgment was the applicable standard for § 504/ADA claims based on educational services for students with disabilities.[22] In its rather brief opinion, the court commented, in seeming dicta, that the plaintiffs ''may have established a genuine dispute about whether the district was negligent or even deliberately indifferent.''[23] Yet, while acknowledging that delay in implementing accommodations for a child known to have a disability may constitute bad faith or gross misjudgment in some circumstances, the court concluded that in this case the district did not ''ignore [the child's] needs or delay its efforts to address them, even if its efforts were inadequate.''[24] Finally, in a footnote, the court acknowledged questions about its adherence to this standard for § 504/ADA monetary liability and concluded that ''for the time being, it remains the law of our circuit.''[25]

The parents sought Supreme Court review.

II. The Petition for Certiorari

The parents' petition for certiorari presented this question:

> Whether the ADA and [§ 504] require children with disabilities to satisfy a uniquely stringent ''bad faith or gross misjudgment'' standard when seeking relief for discrimination relating to their education?[26]

The petition does not make particularly clear that the relief to which they refer is injunctive, not just money damages. However, this extended scope is encompassed in this introductory contrast:

19. *Id*. at *8–9.

20. *Id*. at *9 (citing B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 887 (8th Cir. 2013)).

21. *Id*. at *13; *see also id*. at *11. The court also separately rejected the parents' retaliation claim under § 504/ADA. *Id*. at *13–15.

22. A.J.T. v. Osseo Area Schs. Indep. Sch. Dist. No. 279, 96 F.4th 1058, 1061 (8th Cir. 2024) (citing B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 887 (8th Cir. 2013); Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982)), *denying rehearing en banc*, 2024 WL 2845774 (8th Cir. June 5, 2024).

23. *Id*.

24. *Id*. More specifically, the Eighth Circuit credited the district for updating the child's IEP in the successive meetings, including the ''15-minute extension of her school day so that she could safely leave after the halls cleared'' and extending to an offer of ''16 three-hour sessions at home each summer.'' *Id*.

25. *Id*. at 1061 n.2. Partially revisiting the hierarchical distinction in its earlier comment (*supra* text accompanying note 21), the court started its footnote with this question: ''Why do we have such a high bar for claims based on educational services when we require much less in other disability-discrimination contexts?'' (citing contrasting case examples of deliberate indifference or no intent). *Id*.

26. Petition for a Writ of Certiorari, 2024 WL 4101390, at *i (U.S. Sept. 3, 2024). Conversely, the school district's version of the question is as follows:

> Whether the court of appeals erred in concluding that respondents were entitled to summary judgment on petitioner's discrimination claim under the ADA and the Rehabilitation Act because petitioner failed to establish a genuine dispute about whether respondents had discriminatory intent.

Response to Petition for Writ of Certiorari, 2024 WL 5201981, at *i (U.S. Dec. 18, 2024).

> As a general matter, plaintiffs suing under Title II of the ADA and Section 504 of the Rehabilitation Act can obtain injunctive relief without proving intentional disability discrimination, and they can recover compensatory damages by proving that the defendant was deliberately indifferent to their federally protected rights. But the Eighth Circuit and four other circuits have erected a more stringent test for children with disabilities who face discrimination in the school setting. Those plaintiffs—and only those plaintiffs—must prove that school officials acted with ''bad faith or gross misjudgment'' to obtain any kind of relief.[27]

In their petition, the plaintiffs offered two reasons for the Supremes to address their proffered issue: (a) ''a deep and entrenched 5-2 circuit split'' and (b) an ''asymmetric, atextual, and unduly harsh'' standard.[28] They attributed the genesis of both of these overlapping reasons to the Eighth Circuit's 1982 decision in *Monahan v. Nebraska*, which formulated the ''bad faith or gross misjudgment'' standard.[29] In this seminal decision, the Eighth Circuit postulated this standard for students with IEPs in light of the concomitant coverage of the IDEA.[30] The petition identified the Fourth, Fifth, Second, and Sixth circuits as successively falling ''in lockstep'' with *Monahan* for any § 504 claim within the P-12 education context regardless of the relief sought,[31] with the Eighth and Sixth Circuits recently signaling possible change.[32] On the opposite side, the petition identified the Third and Ninth Circuits as requiring ''no intent required for injunctive relief and only deliberate indifference . . . for damages—to anyone suing under the ADA and [§ 504], including children with disabilities.''[33]

Thus, in the view of the petition, the *Monahan* group's ''carve out'' for students with disabilities not only lacks any basis in the text of the IDEA but is also asymmetric and unduly harsh compared to the deliberate indifference standard that prevails outside this specific context in ''virtually all courts.''[34] The petition identified, as the basis for this otherwise prevalent standard for money damages under § 504 and the ADA, Supreme Court decisions that traced the ''intent'' connection to Title VI of the Civil Rights Act[35] and delineated its

27. Petition, *supra* note 26, at *2.

28. *Id*. at *14.

29. *E.g*., *id*. at *15.

30. Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982) (''We think, rather, that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children. It is our duty to harmonize [§ 504] and the [IDEA] to the fullest extent possible, and to give each of these statutes the full play intended by Congress.'').

31. Petition, *supra* note 26, at *15–17 (citing, *inter alia,* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998); D.A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 454 (5th Cir. 2010); G.C. v. Owensboro Pub. Schs., 711 F.3d 623, 635 (6th Cir. 2013); C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 841 (2d Cir. 2014)).

32. The petition cited the Eighth Circuit's aforementioned question (*supra* note 25) in *A.J.T*. about ''such a high bar for [damages] claims based on educational services.'' *Id.* at *12. The petition also repeatedly referred to the Eighth Circuit's standard as amounting to an ''impossibly high bar,'' attributing this characterization to the Sixth Circuit's decision in *Knox County v. M.Q*., 62 F.4th 978 (6th Cir. 2023). *Id*. at *4, 21, 30–31.

33. *Id*. at *17–18 (citing, *inter alia*, Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010); S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 262, 264 (3d Cir. 2013)).

34. *Id*. at *22. Elsewhere, the petition is less complete in characterizing the federal appellate courts as ''largely agree[ing]'' on this standard ''outside the educational setting.'' *Id*. at *8. Conversely, according to the petition, the courts of appeal agree that § 504/ADA claims do not require intent for injunctive relief. *Id*. at *6–7.

35. *Id*. at *22 (citing Alexander v. Sandoval, 532 U.S. 275, 282–83 (2001)).

contours in the analogous context of Title IX.[36] In conclusion, the petition asserted that under the deliberate-indifference standard, ''[AJT's] claims would have survived summary judgment, as the decision below explicitly acknowledged.''[37]

Thus, criticizing the Eighth Circuit's customized approach specific to the context of students with disabilities as violating the judicial obligation for consistency,[38] the petition was not entirely clear as to the proposed replacement standard upon a ''no'' answer for its proffered issue.[39] The primary candidate is adoption of the different pattern on the minority side of the 5-to-2 split, thereby ostensibly creating uniformity of a less stringent standard for money damages and no extra standard for injunctive relief within and also beyond the P–12 education context.[40] However, based on the possibility that the Supremes might agree on a less stringent standard for both of these types of relief, the petition seems to imply a back-up position of a generic deliberate indifference standard for both forms of relief. Specifically, at the start and end of the petition, the parents asserted without differentiation of the plaintiffs' claims for monetary and injunctive relief that under the deliberate indifference standard, ''[AJT's] evidence would have been sufficient to survive summary judgment.''[41]

III. An Impartial Account of the Decisional Foundation

To supplement if not supplant the petitioner's descriptive foundation for the Court's decision-making and whatever the defendant-district offers as a response, this analysis provides a relatively impartial perspective of the applicable federal appellate case law.[42] As a long-time neutral in the field of special education law who has served as an IDEA review officer, a trainer of IDEA and § 504 hearing officers, and a teacher-scholar for IDEA and § 504 issues in the public-school context, I offer additional accounts for several parts of the petition.

The Solid 5–2 Split

The petition's characterization of a deeply entrenched 5–2 split is not sufficiently accurate. As the left side of the Appendix herein illustrates, the more variable and complete pattern in the public-school context.[43] First, the identified majority of five circuits is not uniform in using the bad faith or gross misjudgment standard for § 504 claims in the

36. *Id*. at *23 (citing Gebser v. Lago Vista Unified Sch. Dist., 524 U.S. 274, 290 (1998)).

37. *Id.* at *3.

38. *Id*. at *24–25.

39. For its proffered issue, see *supra* text accompanying note 26.

40. *E.g., id.* at 2 (''[T]he normal standards that govern all other ADA and Rehabilitation Act cases—i.e., no intent for injunctive relief, and only deliberate indifference for damages—must govern [here]'').

41. *Id*. at 3; *see also id.* at 33:

> Under the normal rules governing most ADA and Rehabilitation Act cases outside the educational context—and that would have governed here too if [AJT] had sued in the Third or Ninth Circuits—[her] claims would have survived summary judgment, as the decision below explicitly acknowledged. [*Supra* text accompanying note 23] (noting that [she] had presented evidence showing deliberate indifference).

42. For my comprehensive canvassing within the past twenty-five years for rulings specific to a heightened standard under § 504/ADA, see the Appendix.

43. The Appendix is limited to federal appellate rulings under § 504/ADA since January 1, 2000, thus not extending to both seminal and outmoded earlier decisions. The additional exclusions: were (a) rulings specific to the separable issues of retaliation, employees, and facilities accessibility and (b) rulings that were indefinite as to the applicable standard, e.g., CTL v. Ashland Sch. Dist., 743 F.3d 524 (7th Cir. 2014); Nieves-Marquez v. Puerto Rico, 353 F.3d 109 (1st Cir. 2003), and (c) rulings that did not use a heightened standard. Moreover, the entries for the decisions that were not officially published are in smaller font.

public-school context. Instead, for at least peer harassment and in some cases for other § 504/ADA claims, such as reasonable accommodation, each circuit has relatively recent decisions that instead used deliberate indifference as the standard for money damages.[44] Second, at least one of these circuits has used a potentially differentiable third standard that is higher than deliberate indifference.[45] Third, on the minority side, the petition failed to account for two more circuits that have applied the deliberate indifference standard for money damages, making the split 5-4.[46]

Finally, the petition is overbroad as to (1) the scope of the application of bad faith and gross misjudgment in the five circuits and (2) the standard specifically applicable to injunctive relief under § 504 in all of the circuits. Although the five identified circuits have applied the *Monahan* bad faith or gross misjudgment standard broadly and indiscriminately to include claims for injunctive relief,[47] the *Monahan* holding was limited to money damages.[48] Neither these five circuit courts nor those that uniformly use the deliberate indifference standard for money damages have specifically addressed the issue of what, if any, standard applies to claims for injunctive relief.[49]

44. The decisions sequenced by the number of each circuit are as follows: B.C. v. Mount Vernon Sch. Dist., 660 F. App'x 93 (2d Cir. 2016); Frank v. Sachem Sch. Dist., 633 F. Appx 14 (2d Cir. 2016); S.B. v. Bd. of Educ. of Harford Cnty., 819 F.3d 69 (4th Cir. 2016); Harrison v. Klein Indep. Sch. Dist., 856 F. App'x 480 (5th Cir. 2021); PlainsCapital Bank v. Keller Indep. Sch. Dist., 746 F. App'x 355 (5th Cir. 2018); Nevills v. Mart Indep. Sch. Dist., 608 F. App'x 217 (5th Cir. 2015); Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014); R.K. v. Bd. of Educ. of Scott Cnty., 637 F. App'x 922 (6th Cir. 2016); S.S. v. E. Ky. Univ., 532 F.3d 445 (6th Cir. 2008); Hill v. Bradley Cnty. Bd. of Educ., 295 F. App'x 740 (6th Cir. 2008); Estate of Barnwell v. Watson, 880 F.3d 998 (8th Cir. 2018).

45. R.W. v. Clear Creek Indep. Sch. Dist., 2025 WL 801360 (5th Cir. Mar. 13, 2025); J.W. v. Paley, 81 F.4th 440 (5th Cir. 2023) (''something more than deliberate indifference''); *cf.* D.B. v. Esposito, 675 F.3d 26, 40 (1st Cir. 2012) (not making clear whether ''disability-based animus'' referred to deliberate indifference, a third standard, or just an undecided encompassing formulation).

46. J.V. v. Albuquerque Pub. Sch., 813 F.3d 1289 (10th Cir. 2016); J.S. v. Hous. Cnty. Bd. of Educ., 877 F.3d 979 (11th Cir. 2017); Long v. Murray Cnty. Sch. Dist., 522 F. App'x 576 (11th Cir. 2013); Liese v. Indian River Hosp. Dist., 701 F.3d 334 (11th Cir. 2012).

47. The clear majority of these decisions did not even mention whether the relief at issue was injunctive, monetary, or both. *Compare, e.g.,* Li v. Revere Loc. Sch. Dist., 2023 WL 3302062 (6th Cir. May 8, 2023); D.H.H. v.; Richardson v. Omaha Sch. Dist., 957 F.3d 869 (8th Cir. 2020); Parrish v. Bentonville Sch. Dist., 896 F.3d 889 (8th Cir. 2018); C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist., 641 F. App'x 423 (5th Cir. 2016); C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2d Cir. 2014); G.C. v. Owensboro Pub. Schs., 711 F.3d 623 (6th Cir. 2013) (unspecified), *with* Baker v. Bentonville Sch. Dist., 75 F.4th 810 (8th Cir. 2023); D.A. v. Hous. Indep. Sch. Dist., 629 F.3d 450 (5th Cir. 2010); M.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885 (8th Cir. 2008) (money damages); B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882 (8th Cir. 2013) (both).

48. *Monahan v. Nebraska*, 687 F.2d at 1169. The Eighth Circuit affirmed the dismissal without prejudice of the claim for injunctive relief due to then applicable requirement for exhaustion. *Id.* Moreover, as the Sixth Circuit recognized (Knox Cnty. Tenn. v. M.Q., 62 F.3d 978, 1002 (6th Cir. 2023)), *Monahan*'s dicta that emphasized the need for § 504 not to extend district's tort liability strengthens the conclusion that its bad faith or gross misjudgment standard does not necessarily apply to injunctive relief.

49. All of the supposedly supporting decisions cited in the Petition were in the P–12 public school context, and none of the, specifically addressed whether a heightened standard applies to injunctive relief. Petition, *supra* note 26, at 7 n.1. *See, e.g*., Sosa v. Mass. Dep't of Corr., 80 F.4th 15, 30 (1st Cir. 2023); Richardson v. Clarke, 52 F.4th 614, 619 (4th Cir. 2022) (relying on nature of claim, not type of relief); Charles v. Johnson, 18 F.4th 686, 703 (11th Cir. 2021); Hamilton v. Westchester Cnty., 3 F.4th 86, 91 (2d Cir. 2021) (ruling instead specifically on threshold issue of disability eligibility). Indeed, some of these cited decisions were specific to money damages, not injunctive relief. *See, e.g*., Brooks v. Colo. Dep't of Corr., 12 F.4th 1160, 1176 (10th Cir. 2021); Hall v. Higgins, 77 F.4th 1171, 1177 (Cir. 2023). Even in the federal appellate decisions that applied different standards for money damages and injunctive relief, the courts did not directly address what the standard was for injunc-

The Asymmetric, Atextual, and Impossible Standard

As the right side of the Appendix shows, the use of the deliberate indifference standard is largely uniform in the far less frequent federal appellate decisions concerning a heightened standard § 504/ADA in other, non-employee contexts. Thus, they only non-dramatically meet the ''asymmetric'' descriptor for the public-school sector in the five bad faith/gross misjudgment circuits.[50] The accompanying ''atextual'' descriptor is a red herring, because the relevant textual provisions of § 504 and the ADA are so lacking in detail that many issues in their adjudicative application, including the remedial standards, are beyond their text.[51] But most importantly, describing the bad faith/gross misjudgment standard as so uniquely stringent to amount to an ''impossibly high bar'' is hyperbole.[52] First, the petition omitted the limited parts of the cited Sixth Circuit's characterization, including ''for many plaintiffs.''[53] Even in the Eighth Circuit, this standard has not been too high for all plaintiffs.[54] Second, the alternative of deliberate indifference is also stringent, with plaintiffs falling short in most cases.[55] Third, and perhaps most importantly, it is not at all clear that, as the petition asserted, the child in this case would have survived summary judgment under the deliberate indifference standard.[56] First, in the cited basis for this assertion, the Eighth Circuit dicta was speculation that she ''*may have* established a genuine dispute about whether the district was negligent or *even* deliberately indifferent.''[57] Second, the district court, which was a least as familiar with the facts in this case, characterized the district's conduct as ''*at most negligent*.''[58]

IV. Likely Resolution of This Case

Overall Considerations

Three overall and partially overlapping merit consideration. First, although both bad faith/gross misjudgment and deliberate indifference are generally understood to be relatively ''high'' standards,[59] they are both rather vague and, as a result, not clearly different from each

tive relief under § 504 and why it was different from that for money damages. *See, e.g.,* K.K. v. Pittsburgh Sch. Dist., 590 F. App'x 148, 153–54 (3d Cir. 2014) (ruling that the plaintiffs did not meet the lower standard); *cf.* S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 262 & n.21 (3d Cir. 2013) (clarifying that its previous ruling that the plaintiff need not prove intent ''was intended to address the requirements for showing a *violation* of § 504, not the requirements for particular remedies'' and that the alternate view is questionable in light of the intervening Supreme Court decisions in *Alexander v. Sandoval* and *Barnes v. Gorman*).

50. Basta v. Novant Health, Inc., 56 F.4th 307 (4th Cir. 2022); Meagley v. City of Little Rock, 639 F.3d 384 (8th Cir. 2011).

51. The relevant parts of § 504 and the ADA amount, respectively, to two largely parallel sentences that prohibit discrimination based on disability, with minor differences that are of no direct import in answering the question presented in this case. 29 U.S.C. § 794; 42 U.S.C. § 12132.

52. *Supra* note 32.

53. Knox County v. M.Q., 62 F.4th 978, 1002 (6th Cir. 2023): ''requiring students with disabilities to prove bad faith or gross misjudgment—*including for mere injunctive relief* . . . —would impose an impossibly high bar *for many plaintiffs*'' (emphasis added).

54. M.P. v. Indep. Sch. Dist. No. 721, 439 F.3d 865 (8th Cir. 2006).

55. *See, e.g.*, Csutoras v. Paradise Valley High Sch., 12 F.4th 960, 969 (9th Cir. 2021) (characterizing deliberate indifference, in rejecting the plaintiff's reasonable accommodation claim, as '''a mens rea of intentional discrimination''' that is a ''high bar.'').

56. *Supra* note 36 and accompanying text.

57. A.J.T. v. Osseo Area Schs., Indep. Sch. Dist. 279, 96 F.4th 1058, 1061 (8th Cir. 2024) (emphasis added).

58. *Supra* text accompanying note 21.

59. *Supra* notes 53, 55. In the federal appellate decisions in the public school context listed on the left side of the Appendix, the parents survived dismissal or

other. For example, a Fifth Circuit panel attempted to differentiate the two standards, effectively determining that bad faith/gross misjudgment was a higher bar than deliberate indifference,[60] but the court rather quickly vacated this determination as ''difficult'' and, in this case, unnecessary.[61]

Second, a similarly confounding factor is that courts often categorize § 504 student cases in terms of theories rather than relief. More specifically, various courts determine whether a heightened standard, as in effect a proxy for intent, applies by categorizing the theory of the case as intentional, reasonable accommodation, or disparate impact.[62] The problem with these categories is that plaintiffs are unlikely to argue intentional discrimination and can instead fashion the reasonable accommodation theory to extend to what otherwise might be regarded as disparate impact, thus avoiding the intent requirement.[63] As a result, in several of the cases in the Appendix, the parents took the reasonable accommodations route and yet faced one wrongful-intent standard or another without any differentiation as to whether they sought injunctive relief, money damages, or both.

Finally, the courts have failed to carefully address not only whether any of the competing heightened standards applies to injunctive relief,[64] but also what the boundary is between injunctive relief and money damages.[65]

Decisional Choices

The Supreme Court's choice among the various options in this case will depend on the breadth of its formulation of question and answer in this case. Although the petition set forth a question and the response to the petition countered with a narrower version, both parties'

summary judgment in only 14% of the rulings, with the survival rate being lower for bad faith/gross misjudgment than for deliberate indifference but the respective subsamples not being sufficiently large and representative to determine whether the difference was statistically significant.

60. The panel's 2-to-1 decision was to dismiss their § 504 claim under the deliberate indifference standard, although characterizing it as an '''extremely high [bar],''' but not under the gross misjudgment/bad faith standard. Stewart v. Waco Indep. Sch. Dist., 711 F.3d at 519–22.

61. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513 (5th Cir. 2013), *vacated*, 599 F. App'x 534 (5th Cir.2013). Remanding the § 504 issue to the district court to address the defendant's claims of untimeliness and lack of exhaustion, the en banc reasoned that ''[the plaintiff's] § 504 claim presents difficult questions that, in our view, should not be reached unless necessary.'' *Id*. Other cases have avoided differentiating and choosing between the two standards. *See, e.g.,* Est. of A.R. v. Muzyka, 543 F. App'x 363, 366 (5th Cir. 2013); M.P. v. Indep. Sch. Dist. No. 721, 439 F.3d 865, 982 (8th Cir. 2006).

62. *See, e.g*., J.V. v. Albuquerque Pub. Schs., 813 F.3d 1289, (10th Cir. 2016) (''Courts have recognized three ways to establish a discrimination claim: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation:''); CTL v. Ashland Sch. Dist., 743 F.3d at 528–29 (''To prove disability discrimination, a plaintiff must show that '''(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people.''').

63. Disparate impact is a more uphill slope for plaintiffs. *See, e.g*., Mark H. v. LeMahieu, 513 F.3d 922, 935 (9th Cir. 2013) (citing Alexander v. Sandoval, 532 U.S. 235 (2001)). Yet, a disproportional effect of a facially neutral policy, such as a 9-to-3 school day, can be argued as the failure to make a reasonable accommodation for a student with a disability, such as AJT.

64. *Supra* notes 47–48 and accompanying text.

65. *E.g., compare* Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 370–71 (1985) (declaring that the remedy of tuition reimbursement is not money damages), *with* Sch. Dist. of Phila. v. Kirsch, 722 F. App'x 215, 228 (3d Cir. 2018) (classifying tuition reimbursement as money damages rather than injunctive relief). It should be clear from the originating basis, which is the broad equitable authority of adjudicators under the IDEA, that reimbursement and its derivative of compensatory education, that this relief is injunctive. *See generally* Zirkel, *supra* note 5.

positions have not been particularly clear or consistent as to the answer.

One of the options would be for the Court to sidestep the merits via a procedural technicality. For example, the Court could conclude that changes in either or both parties' positions during the various stages of the Supremes' proceedings warrant a remand based on judicial estoppel. Much less likely at one extreme of the merits would be for the Court to adopt the more stringent standard of animus or intentional discrimination.[66] Almost as unlikely as the opposite extreme, the choice would be to conclude that § 504/ADA has no extra, or heightened, standard for any type of relief in reasonable accommodation cases, whether within or beyond the public school context.

Instead, given the composition of the current Court, the likely choice is within the more limited range demarcated by two options. The choice includes either option or an intermediate variation within their range.[67]

Option A:

First, on the more case-based side that hews closely to plaintiff-*A.J.T.*'s factual boundaries,[68] the Court could modify the Eighth Circuit's decision by holding that the bad faith/gross misjudgment standard applies to damages and injunctive relief under § 504/ADA that is beyond what the plaintiff has obtained under the IDEA. This ruling would be limited to students covered by the IDEA, as compared to ''§ 504-only'' students,[69] who have—like AJT—obtained relief under the IDEA and seek additional relief under § 504/ADA.

The advantage of Option A is that it fits in a more careful and cogent ''carve-out'' than the prevailing rather indiscriminate interpretation of *Monahan.* Given its restricted boundaries, those students within the carve-out are the relatively few who have obtained one or more of the wide range of equitable remedies under the IDEA, without having any effect on those—unlike AJT—who either did not obtain any relief via its adjudicative process or who, based on *Fry* and *Perez*, went directly to court for their § 504 relief.[70] Moreover, while providing a disincentive to over-extending the transaction as well as costs of litigation in special education that largely fall on over-burdened school district budgets, Option A also avoids wading into the murky complexity of the standard applicable for these alternative forms of relief in the variety of theories and contexts that reveal the dramatic consequences of a much more generally applicable ruling.[71]

A major legal difficulty of Option A is squaring it with the language in the IDEA's exhaustion provision that prohibits ''restrict[ing] or limit[ing] the rights, procedures, and

66. *See, e.g.*, D.B. v. Esposito, 675 F.3d 26, 40 (1st Cir. 2012) (disability-based animus); Delano-Pyle v. Victoria Cnty., 302 F.3d 567, 575 (5th Cir. 2002) (intentional discrimination); Garcia v. S.U.N.Y. Health Sci. Ctr., 280 F.3d 98, 111 (2d Cir. 2001) (discriminatory animus or ill will).

67. Examples include Option A with no intent requirement for any additional injunctive relief.

68. The unmodified alternative of affirming the Eighth Circuit's decision based on the broad rationale of *Monahan* would be difficult to defend, as indirectly evident in the school district's seeming retreat in its responding briefs. For example, the ascribed remedial protection of the IDEA does not apply to either IDEA-eligible students go directly to court under *Fry* or *Perez* (*supra* note 7) or § 504-only students, who are not entitled to the rights and remedies under the IDEA.

69. For the differentiation between and relative proportions of IDEA-eligible and § 504-only students, *see supra* notes 2–3 and accompanying text.

70. These successive Supreme Court decisions ruled that the IDEA's exhaustion provision does not apply to claims on alternative federal grounds, such as § 504, if the gravamen of the case is not FAPE or if the plaintiff seeks money damages. *Supra* note 7.

71. If the Appendix of this article is extended to include court decisions concerning relief under § 504/ADA, including, for example, (a) those below the appellate level, (b) those addressing accessibility, employment, and retaliation, and (c) those addressing the alternate

remedies available under . . . [§ 504/ADA] or other Federal laws protecting children with disabilities.''[72] Given that the purpose of this language from the 1986 amendments was to reverse the Supreme Court's ruling in *Smith v. Robinson* that the IDEA was the exclusive avenue for pursuing such alternative claims,[73] it may argued that the carve-out approach aligns with this provision's accompanying exhaustion requirement and does not limit the availability of the remedies under § 504/ADA, instead only providing an equitably tailored standard that may or may not extend to the varying other contexts in which § 504/ADA applies.[74] Moreover, it accords with what the petition characterizes as the deeply entrenched majority view for the remedies available under § 504 in the public school context.[75]

Option B:

The other and more likely choice is replacing the bad faith/gross misjudgment standard with the deliberate indifference standard. This option has the advantage of uniformity with the other contexts subsumed with the Appendix.

However, this seemingly attractive approach has at least two major complexities. One is determining whether this or any intent-based standard also applies to injunctive relief. This determination is potentially more significant than the standard for money damages, because (a) bad faith/gross misjudgment and deliberate indifference are not clearly distinguishable from each other,[76] (b) money damages is not expansive under § 504/ADA,[77] and (c) injunctive relief includes the retrospective remedies of tuition reimbursement and compensatory education.[78] Yet, the Spending Clause rationale, which seems to support limiting an intent-based standard to money damages, fails to take into account the potential extent and transaction costs of injunctive relief, including attorneys' fees and enforcement measures, and the difference between notice upon accepting federal funding and the difficulty of exiting this funding. For example, if a state or local education agency chose to avoid the liability for injunctive relief under § 504, it would have to surrender federal financial assistance. This theoretical choice would eliminate the essential support of the IDEA as well as other funding statutes, such as the Every Student Succeeds Act, which amounts to a nuclear option that would be devastating for students with disabilities as well as school districts more generally.[79] If the Court opts to continue rather than revisit this rationale or otherwise determine that no heightened standard applies to injunctive relief, the door is not wide open for plaintiff victories in the public school context and beyond. In addition to the overall defenses of undue hardship and fundamental alteration,[80] what is a reasonable accommodation under the

theories that clearly do not require any level of intent, such as disparate impact, the largely two-option pattern turns into a crazy-quilt of variety and complexity.

72. 20 U.S.C. § 1415(*l*).

73. Smith v. Robinson, 468 U.S. 992, 1013 (1984).

74. The implicit basis for this specific boundary is that these children have already received the full measure of relief under the IDEA and are seeking extra recompense, thus not being in the clean-slate position of all other children whether covered by the IDEA or not.

75. *Supra* note 28 and accompanying text.

76. *Supra* notes 59–61 and accompanying text.

77. *Infra* notes 89–90 and accompanying text.

78. *Supra* notes 5, 65.

79. The potential all-or-nothing effect of this purported choice is illustrated the § 504 class action lawsuit that caused New Mexico to reverse its initial non-acceptance of participation in the IDEA. N.M. Ass'n for Retarded Citizens v. N.M., 678 F.2d 847 (10th Cir. 1980).

80. *See, e.g.,* P.F. v. Taylor, 914 F.3d 467 (7th Cir. 2019) (ruling that open enrollment law that depend on existing capacity to meet the needs of transferring student does not violate § 504/ADA based on fundamental alteration limit); Austin v. Town of Farmington, 826 F.3d 622 (2d Cir. 2016) (preserving issue of

circumstances is not necessarily what the plaintiff seeks.[81] For example, perhaps the alternative of remote instruction would be a reasonable accommodation for AJT's early evening sessions.

The other complexity is that, unlike the operational definition, or test, that gives meaning to bad faith/gross misjudgment,[82] deliberate indifference is a more amorphous standard with an operational definition, or test, that is based on potentially flexible notions of knowledge and omission.[83] Inasmuch as deliberate indifference is based on the Supreme Court's Title IX standards, per the explanation in the Petition in this case,[84] if the Court chooses option B, it should clearly import all the relevant elements from the underlying decision to give it specific meaning, including ''actual'' knowledge of an ''appropriate person'' and failure to ''adequately'' respond.[85] Nevertheless, the knowledge that is the foundation for this test is, unlike the basis for qualified immunity of clearly settled law,[86] unclear as to the extent that the legal violation must be obvious to the appropriate person.

Finally, the application of the Court's chosen option warrants, as an illustration, its application to the parties in this case. If the Court chooses option A, a remand would be warranted for the limited purpose of offering the plaintiff the opportunity to seek additional relief, which is beyond the almost 500 hours of compensatory education and the purely prospective order for revising the IEP for 1.5 hours of in-home instruction for the two-year denial of FAPE.[87] For this purpose, based on the state-specific applicable statute of limitations for § 504 claims of six years, the plaintiff could potentially seek money damages and injunctive relief in the form of compensatory education for the previous three years in the district depending on the accrual date and related procedural factors.[88]

reasonable accommodation for consideration of various balancing factors, including whether the request posed undue fiscal hardship or administrative burden on defendant).

81. *See, e.g.*, Doe v. Knox Cnty. Bd. of Educ., 56 F.4th 1076 (6th Cir. 2023) (remanding to determine whether school's plan for a student with disabilities was a reasonable accommodation under § 504/ADA and, if not, whether parents' proposed accommodation was reasonable).

82. ''[The defendant's] statutory non-compliance must deviate so substantially from accepted professional Judgment, practice, or standards as to demonstrate that [it] acted with wrongful intent.'' *See, e.g.*, A.J.T. v. Osseo Area Schs., 96 F.4th at 1061. For the roots of this formulation in the constitutional context, see Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

83. The plaintiff must show the defendant ''(1) [had] knowledge that a federally protected right is substantially likely to be violated ..., and (2) fail[ed] to act despite that knowledge.'' *See, e.g.,* D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 269 (3d Cir. 2014).

84. *Supra* note 36 and accompanying text.

85. *Gebser v. Lago Visa Indep. Sch. Dist*., 524 U.S. at 290. For a relatively rare example of this requisite full importation, see Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 349–50 (11th Cir. 2012).

86. *See, e.g*., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (basing this individual immunity on objective knowledge of ''clearly established law'' at the time of the occurrence).

87. *Supra* note 13 and accompanying text.

88. Gaona v. Town & Country Credit, 324 F.3d 1050, 1056 (8th Cir. 2003) (ruling that the statute of limitations under § 504/ADA is six years in Minnesota). The limitations period and exceptions under § 504/ADA range widely, with various states not considerably exceeding the IDEA. *See, e.g.*, J.S. v. Isle of Wight Cnty. Sch. Bd., 402 F.3d 468, 475 (4th Cir. 2005) (one year in Virginia); I.L. v. Knox Cnty. Bd. of Educ., 257 F. Supp. 3d 946, 964–65 (E.D. Tenn. 2017) (one year plus minority tolling in Tennessee); Castelino v. Rose-Hulman Inst. of Tech., 999 F.3d 1031, 1037 (7th Cir. 2021) (two years in Indiana); P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 736–37 (3d Cir. 2009) (same as under the IDEA in Delaware, New Jersey, and Pennsylvania); Bishop v. Child. Ctr. for Dev. Enrichment, 618 F.3d 533, 536–38 (6th Cir. 2010); Duncan v. Eugene Sch. Dist. 4J, 431 F. Supp. 3d 1193, 1202–03 (D. Or. 2020) (two years plus minority tolling in Ohio and Oregon); Pagan-Negron v. Seguin Indep. Sch. Dist., 974 F. Supp. 2d 1020, 1031 (W.D. Tex. 2013) (two years plus continuing violations in Texas); Smith v. Kalamazoo Pub. Schs., 703 F. Supp. 3d 822, 828–29 (W.D. Mich. 2023); Luong v. E. Side Union High Sch. Dist., 265 F. Supp. 3d 1045, 1050 (W.D. Cal. 2017);

Instead, if the Court chooses option B, a remand would be warranted for the more extensive purpose of considering money damages under the deliberate indifference standard and injunctive relief under whatever standard the Court decides is applicable for the entire applicable two-or-more year period.

In either event, any money damages award would be limited because it may not include emotional distress[89] or punitive damages.[90] Moreover, the total amount of attorneys' fees for the parties, which will largely be borne by the school district,[91] are likely to be far more than the total relief that the plaintiff obtains in this case.

Piazza v. Fla. Union Free Sch. Dist., 777 F. Supp. 2d 669, 688–89 (S.D.N.Y. 2011) (three years in California, Michigan, and New York); Nat'l Fed'n of the Blind, Inc. v. Lamone, 438 F. Supp. 3d 510, 523–24 (D. Md. 2020) (three years plus continuing violations in Maryland).

89. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022); *see also* Smith v. Kalamazoo Pub. Schs., 703 F. Supp. 3d 822, 828–29 (W.D. Mich. 2023) (extending Cummings to the ADA). It is also arguable that it should provide effective credit for the injunctive relief that AJT already received under the IDEA.

90. Barnes v. Gorman, 536 U.S. 181 (2002).

91. The extent of the district's majority portion of these fees will depend on the ultimate outcome for the plaintiff's § 504/ADA claims.

APPENDIX: FEDERAL APPELLATE COURT § 504 RULINGS SINCE 2000
SPECIFIC TO HEIGHTENED STANDARD UNDER § 504/ADA*

	K–12 Context			Other Contexts		
Cir. Ct.	**Bad Faith/Gross Misjud. (BFGM)**	**Deliberate Indifference**	**Other**	**BFGM**	**Deliberate Indifference**	**Other**
1st			*D.B.* (2012)[1]			
2d	*C.L.* (2014)[2] *Bryant* (2011)[3]	***B.C.* (2016)[4]** ***Frank* (2016)[5]**			*Loeffler* (2009)[6]	*Garcia* (2001)[7]
3d		***M.J.G.* (2019)[8]** ***Kirsch* (2018)[9]** ***K.K.* (2014)[10]** ***T.F.* (2014)[11]** ***Shadie* (2014)[12]** *D.E.* (2014)[13] *S.H.* (2013)[14] ***A.G.* (2013)[15]** ***Chambers* (2013)[16]**			*Furgess* (2019)[17]	
4th		*S.B.* (2016)[18]			*Basta* (2022)[19]	
5th	***D.H.H.* (2021)[20]** **C.C. (2016)[21]** ***Estrada* (2014)[22]** *D.A.* (2010)[23]	***Harrison* (2021)[24]** ***PlainsCapital* (2018)[25]** ***Nevills* (2015)[26]** *Est. of Lance* (2014)[27] ***Est. of A.R.* (2013)[28]**	***R.W.* (2025)[29]** *J.W.* (2023)[30] ***B.S.* (2023)[31]**			*Delano-Pyle* (2002)[32]
6th	*Knox Cnty.* (2023)[33] ***Li* (2023)[34]** ***Crochran* (2018)[35]** *G.C.* (2013)[36] ***Campbell* (2003)[37]**	***R.K.* (2016)[38]** ***S.S.* (2008)[39]** ***Hill* (2008)[40]**				
7th					*McDaniel* (2024)[41] *Lacy* (2020)[42]	
8th	*A.J.T.* (2024) *Baker* (2023)[43] *Richardson* (2020)[44] *Parrish* (2018)[45] *I.Z.M.* (2017)[46] *B.M.* (2013)[47] *M.Y.* (2008)[48] *M.P.* (2006)[49] *Sonkowsky* (2003)[50] *Bradley* (2002)[51]	*Barnwell* (2018)[52]			*Meagley* (2011)[53]	
9th		*Csutoras* (2021)[54] ***R.D.* (2021)[55]** *A.G.* (2016)[56] *T.B.* (2015)[57] *Mark H.* (2010)[58]			*Lovell* (2002)[59] *Duvall* (2001)[60]	
10th		*J.V.* (2016)[61]			*Havens* (2018)[62] *Barber* (2009)[63]	
11th		*J.S.* (2017)[64] ***Long* (2013)[65]** ***Liese* (2012)[66]**			*Silberman* (2019)[67] *Crane* (2018)[68] *Silva* (2017)[69]	
D.C.						

Endnotes for Appendix

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* The darker and lighter shaded rows respectively indicate the purported 5-2 circuit court split. Moreover, the abbreviated entries for the not officially published decisions are in bold font.

[1] D.B. v. Esposito, 675 F.3d 26 (1st Cir. 2012) (disability-based animus); *cf.* Falmouth Sch. Comm. v. Doe, 44 F.3d 23 (1st Cir. 2022) (assuming this standard based on plaintiff-pleading).

[2] C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2d Cir. 2014).

[3] Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202 (2d Cir. 2011) (assuming arguendo).

[4] B.C. v. Mount Vernon Sch. Dist., 660 F. App'x 93 (2d Cir. 2016).

[5] Frank v. Sachem Sch. Dist., 633 F. Appx 14 (2d Cir. 2016).

[6] Loeffler v. State Island Univ. Hosp., 582 F.3d 268 (2d Cir. 2009).

[7] Garcia v. S.U.N.Y. Health Sci. Ctr., 280 F.3d 98 (2d Cir. 2001) (discriminatory animus or ill will).

[8] M.J.G. v. Sch. Dist. of Phila., 774 F. App'x 736 (3d Cir. 2019).

[9] Sch. Dist. of Phila. v. Kirsch, 722 F. App'x 215 (3d Cir. 2018).

[10] K.K. v. Pittsburgh Sch. Dist., 590 F. App'x 148 (3d Cir. 2014).

[11] T.F. v. Fox Chapel Area Sch. Dist., 589 F. App'x 594 (3d Cir. 2014).

[12] Shadie v. Hazleton Area Sch. Dist., 580 F. App'x 67 (3d Cir. 2014).

[13] D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260 (3d Cir. 2014).

[14] S.H. v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013).

[15] A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194 (3d Cir. 2013).

[16] Chambers v. Sch. Dist. of Phila., 537 F. App'x 90 (3d Cir. 2013).

[17] Furgess v. Pa. Dep't of Corrections, 933 F.3d 285 (3d Cir. 2019).

[18] S.B. v. Bd. of Educ. of Harford Cnty., 819 F.3d 69 (4th Cir. 2016).

[19] Basta v. Novant Health, Inc., 56 F.4th 307 (4th Cir. 2022).

[20] D.H.H. v. Kirbyville Consol. Indep. Sch. Dist., 2021 WL 4948918 (5th Cir. Oct. 22, 2021).

[21] C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist., 641 F. App'x 423 (5th Cir. 2016).

[22] Estrada v. San Antonio Indep. Sch. Dist., 575 F. App'x 541 (5th Cir. 2014).

[23] D.A. v. Hous. Indep. Sch. Dist., 629 F.3d 450 (5th Cir. 2010).

[24] Harrison v. Klein Indep. Sch. Dist., 856 F. App'x 480 (5th Cir. 2021).

[25] PlainsCapital Bank v. Keller Indep. Sch. Dist., 746 F. App'x 355 (5th Cir. 2018).

[26] Nevills v. Mart Indep. Sch. Dist., 608 F. App'x 217 (5th Cir. 2015).

[27] Est. of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014).

[28] Est. of A.R. v. Muzyka, 543 F. App'x 363 (5th Cir. 2013).

[29] R.W. v. Clear Creek Indep. Sch. Dist., 2025 WL 801360 (5th Cir. Mar. 13, 2025) ("'something more than deliberate indifference'").

[30] J.W. v. Paley, 81 F.4th 440 (5th Cir. 2023) ("something more than deliberate indifference").

[31] B.S. v. Waxahachie Sch. Dist., 2023 WL 2609320 (5th Cir. Mar. 23, 2023) ("something more than deliberate indifference").

[32] Delano-Pyle v. Victoria Cnty., 302 F.3d 567 (5th Cir. 2002) (intentional discrimination, not deliberate indifference).

[33] Knox Cnty. v. M.Q., 62 F.3d 978 (6th Cir. 2024) (dicta).

[34] Li v. Revere Loc. Sch. Dist., 2023 WL 3302062 (6th Cir. May 8, 2023).

[35] Crochran v. Columbus City Schs., 748 F. App'x 682 (6th Cir. 2018).

[36] G.C. v. Owensboro Pub. Schs., 711 F.3d 623 (6th Cir. 2013).

[37] Campbell v. Bd. of Educ. of Centerline Sch. Dist., 58 F. App'x 162 (6th Cir. 2003).

[38] R.K. v. Bd. of Educ. of Scott Cnty., 637 F. App'x 922 (6th Cir. 2016).

[39] S.S. v. E. Ky. Univ., 532 F.3d 445 (6th Cir. 2008).

[40] Hill v. Bradley Cnty. Bd. of Educ., 295 F. App'x 740 (6th Cir. 2008).

[41] McDaniel v. Syed, 115 F.4th 805 (7th Cir. 2024); *cf.* Shaw v. Kemper, 54 F.4th 331 (7th Cir. 2022) (earlier stage but will have to show deliberate indifference at subsequent stage).

[42] Lacy v. Cook Cnty., 897 F.3d 847 (7th Cir. 2020).

[43] Baker v. Bentonville Sch. Dist., 75 F.4th 810 (8th Cir. 2023).

[44] Richardson v. Omaha Sch. Dist., 957 F.3d 869 (8th Cir. 2020).

[45] Parrish v. Bentonville Sch. Dist., 896 F.3d 889 (8th Cir. 2018).

[46] I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch., 863 F.3d 966 (8th Cir. 2017).

[47] B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882 (8th Cir. 2013).

[48] M.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885 (8th Cir. 2008).

[49] M.P. v. Indep. Sch. Dist. No. 721, 439 F.3d 865 (8th Cir. 2006).

[50] Sonkowsky v. Bd. of Educ. of Indep. Sch. Dist. No. 721, 327 F.3d 675 (8th Cir. 2003).

[51] Bradley v. Ark. Dep't of Educ., 301 F.3d 952 (8th Cir. 2002).

[52] Est. of Barnwell v. Watson, 880 F.3d 998 (8th Cir. 2018).

[53] Meagley v. City of Little Rock, 639 F.3d 384 (8th Cir. 2011).

[54] Csutoras v. Paradise Valley High Sch., 12 F.4th 960 (9th Cir. 2021).

[55] R.D. v. Lake Wash. Sch. Dist., 843 F. App'x 80 (9th Cir. 2021).

[56] A.G. v. Paradise Valley Unified Sch. Dist. 69, 815 F.3d 1195 (9th Cir. 2016).

[57] T.B. v. San Diego San Diego Unified Sch. Dist., 806 F.3d 451 (9th Cir. 2015).

[58] Mark H. v. Hamamoto, 620 F.3d 1090 (9th Cir. 2010

[59] Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002).

[60] Duvall v. Cnty. of Kitsap, 260 F.3d 1124 (9th Cir. 2001) (rather than discriminatory animus).

[61] J.V. v. Albuquerque Pub. Sch., 813 F.3d 1289 (10th Cir. 2016).

[62] Havens v. Colo. Dep't of Corr., 897 F.3d 1250 (10th Cir. 2018).

[63] Barber v. Colo. Dep't of Rev., 562 F.3d 1222 (10th Cir. 2009).

[64] J.S. v. Hous. Cnty. Bd. of Educ., 877 F.3d 979 (11th Cir. 2017).

[65] Long v. Murray Cnty. Sch. Dist., 522 F. App'x 576 (11th Cir. 2013).

[66] Liese v. Indian River Hosp. Dist., 701 F.3d 334 (11th Cir. 2012).

[67] Silberman v. Miami Dade Transit, 927 F.3d 1123 (11th Cir. 2019).

[68] Crane v. Lifemark Hosps. Inc.., 898 F.3d 1130 (11th Cir. 2018).

[69] Silva v. Baptist Health S. Fla., Inc., 856 F.3d 824 (11th Cir. 2017).