No. _____

In the Supreme Court of the United States

A.J.T., BY AND THROUGH HER PARENTS, A.T. AND G.T.,

Petitioner,

V.

OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279; OSSEO SCHOOL BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Rehabilitation Act) require public entities and organizations that receive federal funding to provide reasonable accommodations for people with disabilities. In the decision below, the Eighth Circuit held that, for discrimination claims "based on educational services" brought by children with disabilities, these statutes are violated only if school officials acted with "bad faith or gross misjudgment." App.3a.

That test squarely implicates an entrenched and acknowledged 5-2 circuit split over the standard governing such claims. It is also plainly mistaken on the merits: As the Eighth Circuit itself acknowledged, the test lacks "any anchor in statutory text," App.5a n.2, and it arbitrarily departs from the more lenient standards that all courts—including the Eighth Circuit—apply to ADA and Rehabilitation Act claims brought by plaintiffs outside the school setting.

The question presented is:

Whether the ADA and Rehabilitation Act require children with disabilities to satisfy a uniquely stringent "bad faith or gross misjudgment" standard when seeking relief for discrimination relating to their education.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition under Rule 14.1(b)(iii):

- *A.J.T. v. Osseo Area Schools*, No. 23-1399, United States Court of Appeals for the Eighth Circuit, judgment entered March 21, 2024 (96 F.4th 1058), rehearing denied June 5, 2024.
- *A.J.T. v. Osseo Area Schools*, No. 21-cv-1760, United States District Court for the District of Minnesota, judgment entered February 1, 2023 (2023 WL 2316893).

The following proceedings involve the same parties and operative facts:

- *Osseo Area Schools v. A.J.T.*, United States Court of Appeals for the Eighth Circuit, judgment entered March 21, 2024 (96 F.4th 1062), rehearing denied May 24, 2024.
- *Osseo Area Schools v. A.J.T.*, No. 21-cv-1453, United States District Court for the District of Minnesota, judgment entered September 13, 2022 (2022 WL 4226097).

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PETITION FOR A WRIT OF CERTIORARI

A.J.T., by and through her parents A.T. and G.T., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App.1a-5a) is published at 96 F.4th 1058. The court's denial of rehearing en banc (App.44a-45a) is not published, but available at 2024 WL 2845774. The opinion of the United States District Court for the District of Minnesota granting Osseo Area Schools' motion for summary judgment (App.6a-43a) is not published but available at 2023 WL 2316893.

JURISDICTION

The court of appeals entered judgment on March 21, 2024 (App.1a-5a) and denied A.J.T.'s timely petition for rehearing en banc on June 5, 2024 (App.44a-45a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the petition appendix. App.46a-48a.

INTRODUCTION

This case once again raises a frequently recurring question of exceptional importance for children with disabilities seeking to vindicate their federal statutory rights against discrimination. As in *Perez v. Sturgis Public Schools*, 598 U.S. 142 (2023), *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 580 U.S. 386 (2017), and *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017), this Court should grant certiorari to resolve deep divisions in the lower courts and enforce the plain terms of key statutes protecting vulnerable children from discrimination by their schools.

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. App.5a n.2.

The Eighth Circuit's test has absolutely no basis in the relevant statutory text. Neither the ADA nor the Rehabilitation Act requires "bad faith or gross misjudgment" or authorizes courts to apply a uniquely stringent standard to children with disabilities bringing claims against their schools. On the contrary, Congress mandated that "any person" seeking relief under those statutes would have the

same rights and remedies as those available under Title VI of the Civil Rights Act, which makes no distinction between schoolchildren and other plaintiffs. *See* 29 U.S.C. § 794a(a)(2); 42 U.S.C § 12133.

The Eighth Circuit's atextual approach also implicates a deep circuit split. Whereas the Second, Fourth, Fifth, and Sixth Circuits have adopted the Eighth Circuit's asymmetric interpretation disfavoring children with disabilities, the Third and Ninth Circuits apply the same standards to those children as they do to all other ADA and Rehabilitation Act plaintiffs. Indeed, the circuit split has been acknowledged by multiple federal courts—as well as by the respondents here.

Below, an Eighth Circuit panel rejected ADA and Rehabilitation Act claims brought by petitioner A.J.T. ("Ava"), a teenage girl who suffers from severe epilepsy. The panel expressly acknowledged that Ava had presented evidence showing that her Minnesota school district had been "negligent or even deliberately indifferent" in refusing reasonable accommodations that her prior Kentucky school district had provided for years. App.3a. Nonetheless, the panel rejected her claims because it was "constrained" by the Eighth Circuit's prior decision in *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), which first established the bad-faith-or-gross-misjudgment standard. App.4a-5a. In the Third and Ninth Circuits, Ava's evidence would have been sufficient to survive summary judgment. But in the Eighth Circuit—and in the four other circuits embracing *Monahan*'s uniquely stringent standard—"that's just not enough." *Id.* at 3a.

Remarkably, the Eighth Circuit panel sharply criticized *Monahan* for jacking up the standard for schoolchildren to bring disability claims. The panel observed that *Monahan*'s "judicial gloss" on the ADA and Rehabilitation Act was "without any anchor in statutory text" and built instead on misguided "speculat[ion]" about Congress's intent. *Id.* at 5a n.2. That criticism echoed the Sixth Circuit's recent discomfort with its own circuit precedent applying *Monahan*'s "impossibly high bar" to children with disabilities bringing education-related claims—and to no one else. *Knox County v. M.Q.*, 62 F.4th 978, 1002 (6th Cir. 2023). After Ava filed an en banc petition asking the Eighth Circuit to overrule *Monahan*, Judges Grasz, Stras, and Kobes dissented from the denial of rehearing.

This case presents an exceptionally important issue for children with disabilities and their families. Both the ADA and Rehabilitation Act provide much-needed relief for educational discrimination, which often has life-altering consequences for children with disabilities. Yet as this case illustrates, the atextual rule imposed in five circuits makes it far harder for them to prove their claims—for no good reason. That has real consequences: Literally hundreds of decisions have relied on *Monahan* (or its equivalent in other circuits) to deny relief to children like Ava.

Only this Court can resolve the circuit split and restore the full measure of protection that Congress guaranteed to vulnerable children with disabilities. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. Multiple federal laws protect children with disabilities from education-related discrimination. The Individuals with Disabilities Education Act (IDEA)—like its predecessor, the Education for All Handicapped Children Act (EHA)—guarantees all children a "free appropriate public education [or FAPE]." 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA ensures that children with disabilities receive an "'individualized education program [or IEP]'" that "spells out a personalized plan to meet all of the child's 'educational needs.'" *Fry*, 580 U.S. at 158 (citations omitted).

The IDEA creates specialized procedures for speedily resolving IEP-related disputes between families and schools, 20 U.S.C. § 1415, but it allows courts to award only "equitable relief," *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). Such relief may include an injunction, *see id.*, or "reimburse[ment]" for educational expenses, *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985). But the IDEA "d[oes] not allow for damages." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 254 n.1 (2009).

The ADA and Rehabilitation Act provide additional protection. As relevant here, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act contains a similarly phrased prohibition that

applies to recipients of federal funding. *See* 29 U.S.C. § 794(a). Unlike the IDEA, which concerns only school-age children with respect to their education, the ADA and Rehabilitation Act protect all Americans, both inside and outside the school setting.

The ADA and Rehabilitation Act both recognize that failing to provide "reasonable accommodations" to people with disabilities that would enable them to "participate equally" in a given service or program constitutes disability discrimination. *Fry*, 580 U.S. at 170. Accommodations are reasonable so long as they do not entail "a fundamental alteration" of the service in question or cause "undue financial or administrative burdens." *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (citation omitted); *see also K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013).

2. The ADA and Rehabilitation Act "expressly incorporate[]" the same set of "rights and remedies provided under Title VI" of the Civil Rights Act of 1964. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022); *see* 29 U.S.C. § 794a(a)(2); 42 U.S.C § 12133. The ADA and Rehabilitation Act thus follow Title VI in "authoriz[ing] individuals," including children with disabilities, "to seek redress for violations" by "bringing suits" not just "for injunctive relief," but also for "money damages." *Fry*, 580 U.S. at 160; *see also Alexander v. Sandoval*, 532 U.S. 275, 278-80 (2001) (observing that "private individuals may sue" under "Title VI and obtain both injunctive relief and damages").

In cases outside the educational context, the courts of appeals agree that all ADA and Rehabilitation Act plaintiffs are eligible for injunctive relief if they show, on the merits, that the defendant

failed to provide a reasonable accommodation to a covered person with a disability. Such plaintiffs need not make any specific showing of wrongful intent to obtain such relief.[1]

For compensatory damages, however, every circuit requires "a showing of intent[]." *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262 (3d Cir. 2013) (collecting cases). Because "private individuals [may] not recover compensatory damages under Title VI except for intentional discrimination," *Sandoval*, 532 U.S. 275, 282-83, and because the ADA and Rehabilitation Act expressly incorporate Title VI's rights and rights, *supra* at 6, people with disabilities may not obtain damages under the ADA or Rehabilitation Act without proving intent. *See S.H.*, 729 F.3d at 262.

The "vast majority" of courts hold that this intent requirement for damages demands proof that the defendant was—at a minimum—"deliberately indifferent" to the plaintiff's federally protected rights. *Pierce v. Dist. of Columbia*, 128 F. Supp. 3d 250, 278-79 (D.D.C. 2015) (Jackson, J.) (collecting

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[1] *See Sosa v. Massachusetts Dep't of Corr.,* 80 F.4th 15, 30 (1st Cir. 2023); *Hamilton v. Westchester County*, 3 F.4th 86, 91 (2d Cir. 2021); *Durham v. Kelley*, 82 F.4th 217, 225-26 (3d Cir. 2023); *Richardson v. Clarke*, 52 F.4th 614, 619 (4th Cir. 2022); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005); *Finley v. Huss*, 102 F.4th 789, 820 (6th Cir. 2024); *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 750-51 (7th Cir. 2006) (en banc); *Hall v. Higgins*, 77 F.4th 1171, 1180-81 (8th Cir. 2023); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021); *Brooks v. Colo. Dep't of Corr.*, 12 F.4th 1160, 1167 (10th Cir. 2021); *Charles v. Johnson*, 18 F.4th 686, 702 (11th Cir. 2021); *Chenari v. George Washington Univ.*, 847 F.3d 740, 746-47 (D.C. Cir. 2017).

cases). Those courts have done so based on this Court's precedent adopting a deliberate indifference standard under Title IX, which was likewise "modeled after Title VI." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 290 (1998).[2]

Although the circuits largely agree on the standards for applying the ADA and Rehabilitation Act's protections outside the educational setting, they are intractably divided over whether those same standards apply to children with disabilities bringing education-related claims. Two circuits—the Third and Ninth—apply the same standards in these cases as they do in all others. But five circuits—led by the Eighth—apply a different test. Ever since *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), the Eighth Circuit has held that "bad faith or gross misjudgment" must be shown before a violation of the Rehabilitation Act (and thus the ADA) "can be made out" in "the context of education of handicapped children." *Id.* at 1170-71. Since then, the Second, Fourth, Fifth, and Sixth Circuits have followed suit. *See infra* at 14-20 (describing circuit split in greater detail).

B. Factual And Procedural Background

1. Ever since she was six months old, Ava has suffered from "a rare form of epilepsy" that severely impacts her ability to function. App.50a (opinion in

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[2] *See Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009); *S.H.*, 729 F.3d at 263-64; *Basta v. Novant Health Inc.,* 56 F.4th 307, 316-17 (4th Cir. 2022); *Lacy v. Cook County*, 897 F.3d 847, 863 (7th Cir. 2018); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008); *Powers v. MJB Acquisition Corp.,* 184 F.3d 1147, 1153 (10th Cir. 1999); *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019).

related case). Even now, as a teenager, Ava "requires assistance with everyday tasks like walking and toileting." *Id.* She has seizures that "are so frequent in the morning that she can't attend school before noon." *Id.* From then on, however, "she's alert and able to learn until about 6:00 p.m." *Id.*

"Before moving to Minnesota in 2015," when she was 10 years old, Ava's public school district in Kentucky adequately addressed her needs, including by providing "evening instruction at home." *Id.* But her Minnesota district, respondent Osseo Area Schools (the District), refused to accommodate her. *Id.* "Year after year, it denied [Ava's] parents' requests for evening instruction" based on "a series of shifting explanations." *Id.* Initially, the District "claimed that state law d[id] not require" adjusting Ava's instructional hours. *Id.* Then, the District "said it needed to avoid setting unfavorable precedent for itself and other districts." *Id.* "And later, it said that the home environment would be too restrictive," while demanding more "data" to justify a "programming change." *Id.* All told, over her first three years in Minnesota, Ava received only 4.25 hours of instruction per day—more than two hours less than her non-disabled peers. *Id.*; *see id.* at 8a.

Then, in 2018, the District insisted on truncating Ava's instructional time even further. As Ava prepared to enter middle school, the District abruptly amended her IEP to "cut[] back her day to about 3 hours"—less than half of what her peers would receive. App.51a; *see id.* at 8a. Despite this latest setback, Ava's parents continued to engage with the District, seeking a workable compromise. They made "various proposals to at least maintain [Ava's] 4.25-hour day," including keeping her at the

elementary school, where the school day was longer. *Id.* at 51a. The District rejected all of them. *Id.*

2. After years of frustration, Ava's parents "[r]ealiz[ed] that an agreement [with the District] was beyond reach" and filed an IDEA complaint with the Minnesota Department of Education. *Id.* After a five-day hearing, an administrative law judge (ALJ) found that the District had denied Ava a FAPE in violation of the IDEA.

The ALJ found that the District's "prevailing and paramount consideration" had never been Ava's "need for instruction," but rather its own desire "to maintain the regular hours of the school's faculty." CA8 Appellant's App. 367. The ALJ accordingly ordered the District to "revise" Ava's IEP to include evening instruction and other services. *Id.* at 368-69. The ALJ also ordered "495 hours of compensatory education instruction," limiting relief to what the ALJ believed was the proper two-year "limitations period" under the IDEA. *Id.* at 366, 369.

3. The parties then proceeded to federal court. The District challenged the ALJ's IDEA ruling. For her part, Ava sued the District under the ADA and Rehabilitation Act, seeking an injunction that would "permanently secure [Ava]'s rights to a full school day," as well as "compensatory damages" for the entire duration of her mistreatment. *Id.* at 21-22, 25, 28; *see also* 20 U.S.C. § 1414(d)(4) (IDEA provision permitting school officials to revise IEPs "periodically"). By bringing these claims, Ava was able to take advantage of the six-year limitations period governing ADA and Rehabilitation Act claims brought in Minnesota. *See Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 (8th Cir. 2003).

The district court upheld Ava's victory on her IDEA claim. The court explained that Ava "requires more than 4.25 hours of schooling a day to have an educational program" that "will allow her to meet challenging objectives." CA8 Appellant's App. 789. The court thus agreed that "[e]xtending her instructional day until 6:00pm and including compensatory hours of instruction" was "the appropriate remedy" under the IDEA. *Id.*

As to the ADA and Rehabilitation Act, however, the district court granted summary judgment against Ava and in favor of the District. The court explained that, under *Monahan*, Ava had to show that the District had acted with either "bad faith or gross misjudgment." App.24a-25a; *see Monahan*, 687 F.2d at 1171. Applying *Monahan*'s heightened standard, the district court concluded that the District's actions "did not rise to th[at] level." App.30a.

4. In two published opinions by Judge Kobes, a panel of the Eighth Circuit unanimously affirmed both rulings. *See* App.49a-57a (IDEA decision); *id.* at 1a-5a (ADA and Rehabilitation Act decision).

In the IDEA case, the panel agreed that Ava had not received a FAPE based on "[s]everal" facts. *Id.* at 54a. First, Ava had made "only slight progress in a few areas" while in the District's care. *Id.* Second, Ava "regressed in toileting" so drastically that the District had "removed her toileting goal" altogether, citing only a "lack of time in the short day—not [a] lack of ability to improve." *Id.* at 55a-56a. Third, "expert testimony" confirmed that Ava "would have made more progress" with "evening instruction." *Id.* at 56a-57a. The panel also sharply criticized the District, emphasizing that its decisions had

"[n]ever been grounded in [Ava]'s individual needs." *Id.* at 57a.

Despite ruling for Ava on her IDEA claim, the Eighth Circuit regretfully rejected her ADA and Rehabilitation Act claims. Like the district court, the panel considered itself duty-bound under *Monahan* to require Ava to establish "bad faith or gross misjudgment" by the District. *Id.* at 3a-4a (quoting *Monahan*, 687 F.2d at 1171). The panel recognized that Ava "may have established a genuine dispute about whether the district was negligent or even deliberately indifferent." *Id.* at 3a. "[B]ut under *Monahan*," the panel explained, "that's just not enough." *Id.* Because her case involved "'educational services for disabled children,'" Ava had to "prove that school officials acted with 'either bad faith or gross misjudgment.'" *Id.* (citations omitted). The panel held that Ava "ha[d] failed to identify conduct clearing *Monahan*'s bar"—and thus could not obtain any relief as a matter of law. *Id.* at 4a-5a.

Notably, the panel expressed deep discomfort with *Monahan*'s holding imposing "such a high bar for claims based on educational services" brought by children with disabilities. *Id.* at 5a n.2. The panel observed that "much less" is required "in other disability-discrimination contexts." *Id.* Indeed, the panel explained that in every other scenario, "no intent [is] required" to obtain injunctive relief on a "failure-to-accommodate claim," while "damages" claims require only "deliberate indifference." *Id.*

Monahan's carve-out for school-age children with disabilities, the panel continued, is "without any anchor in statutory text." *Id.* The court noted that *Monahan* had "speculated that Congress intended the IDEA's predecessor"—the EHA—"to limit [the

Rehabilitation Act]'s protections" (and thus the ADA's). *Id.* But the panel pointed out that "Congress rejected [that] premise" in amendments to the EHA enacted "just a few years later." *Id.* The panel concluded that *Monahan* has thus rightly "been questioned"—and stands as "a lesson in why" courts should not "'add provisions'" to "'federal statute[s]'" that aren't there. *Id.* (alteration in original) (quoting *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010)). Nevertheless, the panel observed, *Monahan* "remains the law of [this] circuit," at least "for the time being." *Id.*

5. On June 5, 2024, the Eighth Circuit denied Ava's petition for rehearing en banc. *Id.* at 44a-45a. Judges Grasz, Stras, and Kobes dissented, noting that they would grant the petition. *Id.* at 44a.

REASONS FOR GRANTING THE WRIT

This petition readily satisfies all the traditional criteria for certiorari. *See* Sup. Ct. R. 10(a). By adhering to circuit precedent imposing a uniquely stringent standard on children with disabilities bringing education-related claims, the Eighth Circuit further solidified a deep and entrenched circuit conflict. Five circuits single out such children for disfavored treatment under the ADA and Rehabilitation Act, while two circuits adjudicate their claims under the same standards that apply to everyone else. Even the District acknowledged the circuit split below.

Certiorari is also warranted because the Eighth Circuit has incorrectly resolved an important question of federal law. This Court has firmly rejected the "dangerous principle that judges can give the same statutory text different meanings in

different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005). Yet five circuits do exactly that by interpreting the ADA and Rehabilitation Act's generally applicable provisions to impose a heightened standard on children with disabilities and no one else. This heightened standard lets school districts off the hook even when, as here, their behavior evinces deliberate indifference to students' federally protected rights. This Court should reject that asymmetric, atextual, and unduly harsh regime.

The question presented comes up frequently in litigation brought by children with disabilities. It should now be resolved by this Court. The circuit conflict has caused substantial harm to vulnerable children across the country by making it exceedingly difficult to obtain much-needed relief under the ADA and Rehabilitation Act. Only this Court can resolve the split, and this case provides an ideal vehicle to do so. The petition should be granted.

I. The Decision Below Solidifies A Deep And Entrenched 5-2 Circuit Split

The Eighth Circuit's decision confirms a 5-2 circuit split on whether the ADA and Rehabilitation Act require children with disabilities bringing education-related claims to satisfy a more stringent standard than other plaintiffs under those same statutes. The District has conceded the existence of a "circuit split on this issue." CA8 Resp. to Reh'g Pet. 2. Several federal courts have acknowledged it as well. *See, e.g.*, *Hamilton Sch. Dist. v. Doe*, 2005 WL 3240597, at *10 (E.D. Wis. Nov. 29, 2005); *O.F. ex rel. N.S. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409, 420 (E.D. Pa. 2002).

A. Five Circuits Apply A Uniquely Stringent Standard To Children With Disabilities Alleging Discrimination By Their Schools

On one side of the split, the Second, Fourth, Fifth, Sixth, and Eighth Circuits all hold that, unlike other ADA and Rehabilitation Act plaintiffs, children with disabilities bringing education-related claims must prove "bad faith or gross misjudgment" to obtain relief of any kind. District courts within the D.C. Circuit consistently follow the same rule.

The Eighth Circuit first invented this stringent, context-specific standard in *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982). There, the court affirmed the dismissal without prejudice of a "cryptic" Rehabilitation Act claim alleging an "improper educational placement." *Id.* at 1169-70. To offer "a few words [of] guidance" on remand, the court opined that "bad faith or gross misjudgment should be shown" before a Rehabilitation Act "violation can be made out" in "the context of education of handicapped children." *Id.* at 1170-71.

Monahan justified imposing a heightened standard based on a perceived "duty to harmonize the Rehabilitation Act" with the IDEA's predecessor—the EHA—given that the EHA specifically addressed the educational needs of children with disabilities. *Id.* at 1171. According to *Monahan*, the heightened standard was necessary to "give each of these statutes the full play intended by Congress" and achieve "what [the court] believe[d] to be a proper balance between the rights of handicapped children, the responsibilities of state education officials, and the competence of courts to make judgments in technical fields." *Id.*

Ever since *Monahan*, the Eighth Circuit has adhered to this dicta and "consistently held" that a bad-faith-or-gross-misjudgment standard applies whenever "alleged ADA and [Rehabilitation Act] violations are based on educational services for disabled children," regardless of the relief sought. *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013); *see, e.g.*, *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 982 (8th Cir. 2003). And here, the Eighth Circuit rejected Ava's ADA and Rehabilitation Act claims because of *Monahan*'s uniquely stringent standard, recognizing that it "remains the law of [the] circuit." App.5a n.2.

The Fourth Circuit has applied the Eighth Circuit's approach for decades. In *Sellers ex rel. Sellers v. School Board of the City of Manassas*, 141 F.3d 524 (4th Cir. 1998), the Fourth Circuit explicitly "agree[d] with" *Monahan* "'that either bad faith or gross misjudgment should be shown'" for children with disabilities to prevail on ADA and Rehabilitation Act claims related to their education. *Id.* at 529 (quoting *Monahan*, 687 F.2d at 1171). The Fourth Circuit relied on that heightened standard to affirm the dismissal of a lawsuit that, in the court's view, alleged only "negligence." *Id.*

The Fifth Circuit has similarly fallen in lockstep with the Eighth Circuit. In *D.A. ex rel. Latasha A. v. Houston Independent School District*, 629 F.3d 450 (5th Cir. 2010), the Fifth Circuit held that "bad faith or gross misjudgment must be shown in order to state a cause of action" under the ADA and Rehabilitation Act "in th[e] educational context." *Id.* at 454. Expressly "concur[ring]" with *Monahan*'s reasoning, the Fifth Circuit denied relief of any kind to a child who, according to the court, could demonstrate "no

more than negligence" by school officials. *Id.* at 454-55; *see, e.g., D.H.H. ex rel. Rob Anna H. v. Kirbyville Consol. Indep. Sch. Dist.*, 2021 WL 4948918, at *2 (5th Cir. Oct. 22, 2021) (applying bad-faith-or-gross-misjudgment standard); *C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist.*, 641 F. App'x 423, 426 (5th Cir. 2016) (same).

The Second and Sixth Circuits similarly "require[] proof of bad faith or gross misjudgment" for ADA and Rehabilitation Act claims "in the context of educating children with disabilities." *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 841 (2d Cir. 2014); *see, e.g.*, *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013); *Li v. Revere Loc. Sch. Dist.*, 2023 WL 3302062, at *12-13 (6th Cir. May 8, 2023). And while "the D.C. Circuit has never squarely adopted" *Monahan*'s heightened standard, district courts in that circuit consistently require "bad faith or gross misjudgment" in this single factual context. *Reid-Witt ex rel. C.W. v. District of Columbia*, 486 F. Supp. 3d 1, 7 (D.D.C. 2020) (collecting cases).

B. Two Circuits Apply The Same Standards To All Plaintiffs

On the other side of the split, the Third and Ninth Circuits treat children with disabilities bringing education-related claims just like everyone else. Those two circuits apply the same established standards—i.e., no intent required for injunctive relief, and only deliberate indifference required for damages—to anyone suing under the ADA and Rehabilitation Act, including children with disabilities. In addition, the Seventh Circuit has recognized that no intent is required for children with disabilities to obtain education-related injunctive

relief. And district courts within the Tenth Circuit uniformly apply the baseline standards, not *Monahan*'s special rule disfavoring schoolchildren.

Below, the District rightly conceded that the Third Circuit does not apply a *Monahan*-like "'bad faith or gross misjudgment' standard" in the context of "discrimination claims involving special education services." CA8 Resp. to Reh'g Pet. 14. For example, in *D.E. v. Central Dauphin School District*, 765 F.3d 260, 265 (3d Cir. 2014), the Third Circuit confronted a lawsuit brought by a child with serious "behavior and social issues" who had been "mistakenly identified as having mental retardation," rather than seeing his "emotional and behavioral needs" properly addressed. *Id.* at 265-66. Even though the case was brought by a child with disabilities and asserted education-related claims under the ADA and Rehabilitation Act, the Third Circuit applied the same standards for (1) "ma[king] out the prima facie case" of a statutory violation, and (2) obtaining "compensatory damages." *Id.* at 269. That is, the Third Circuit required "intentional" misconduct only for damages, and held that a "showing of deliberate indifference satisfies that" intent requirement. *Id.*; *see, e.g.*, *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262, 264 (3d Cir. 2013) (applying the same baseline standards to ADA and Rehabilitation Act claims brought by a child with disabilities); *Sch. Dist. of Phila. v. Kirsch*, 722 F. App'x 215, 228-29 (3d Cir. 2018) (same).

The Ninth Circuit likewise applies the baseline standards for children with disabilities bringing education-related claims, just as it does in other ADA and Rehabilitation Act cases. In *Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010), the Ninth

Circuit reversed a grant of summary judgment in favor of the Hawaii Department of Education, concluding that the Department was "on notice" that two autistic children needed "autism-specific services, but did not provide those services," even though they "were available as a reasonable accommodation." *Id.* at 1097. The court held that the Department's failure to provide a reasonable accommodation was sufficient to show a statutory violation, while "deliberate indifference" exposed it to "liab[ility] for damages." *Id.*; *see, e.g.*, *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1206-07 (9th Cir. 2016) (applying the same baseline standards to ADA and Rehabilitation Act claims brought by a child with disabilities); *R.D. ex rel. Davis v. Lake Washington Sch. Dist.*, 843 F. App'x 80, 83 (9th Cir. 2021) (same).

The Seventh Circuit has explicitly recognized that education-related ADA and Rehabilitation Act claims brought by children with disabilities do "not require a showing of intentional discrimination," so long as they seek only declaratory or injunctive relief. *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 n.4 (7th Cir. 2014). In that respect, the Seventh Circuit fully aligns with the Third and Ninth Circuits. And while the Seventh Circuit has not yet "decide[d] the appropriate [intent] standard for damages," *id.*, a district court within the Seventh Circuit has explicitly "decline[d] to apply a bad faith or gross misjudgment standard," because the Seventh Circuit has never "adopted this requirement," *Brown v. Dist. 299–Chicago Pub. Schs.*, 762 F. Supp. 2d 1076, 1084 n.8 (N.D. Ill. 2010).

Although the Tenth Circuit has not weighed in on the question presented, district courts within that circuit uniformly reject the *Monahan* approach and

treat education-related claims brought by children with disabilities like ADA and Rehabilitation Act claims brought by anybody else. *See, e.g.*, *Clasen v. Unified Sch. Dist. No. 266*, 2019 WL 4034476, at *8 (D. Kan. Aug. 27, 2019). Several decisions have explicitly refused to apply the bad-faith-or-gross-misjudgment standard because "the Tenth Circuit has not adopted that view." *Miles v. Cushing Pub. Schs.*, 2008 WL 4619857, at *2 (W.D. Okla. Oct. 16, 2008); *see also Swenson v. Lincoln Cnty. Sch. Dist. No. 2*, 260 F. Supp. 2d 1136, 1145-47 (D. Wyo. 2003) (similar). Indeed, the Tenth Circuit consistently applies the same baseline standards in ADA and Rehabilitation Act cases, regardless of factual context. *See, e.g.*, *Hampton v. Utah Dep't of Corr.*, 87 F.4th 1183, 1191 (10th Cir. 2023) (no intent for injunction); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) (deliberate indifference for damages).[3]

C. This Court Should Resolve The Split

The circuit split described above is clear and undeniable. If Ava had brought her ADA and

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[3] District courts within the First and Eleventh Circuits are divided amongst themselves over the proper standard. Faced with education-related claims brought by children with disabilities, some district courts apply the baseline standards that govern ADA and Rehabilitation Act claims of all stripes. *See, e.g.*, *Ms. K v. City of South Portland*, 407 F. Supp. 2d 290, 295 (D. Me. 2006); *T.H. ex rel. T.B. v. DeKalb Cnty. Sch. Dist.*, 564 F. Supp. 3d 1349, 1360 (N.D. Ga. 2021). Others, however, adhere to *Monahan*'s context-specific rule. *See, e.g.*, *S.W. v. Holbrook Pub. Sch.*, 221 F. Supp. 2d 222, 228 (D. Mass. 2002); *E.W. v. Sch. Bd. of Miami-Dade Cnty. Fla.*, 307 F. Supp. 2d 1363, 1370-71 (S.D. Fla. 2004). This confusion and disarray only reinforce the need for this Court's review.

Rehabilitation Act claims in the Third or Ninth Circuits, she would have been subject to the same baseline standards as any other plaintiff suing under those statutes. So too, in all likelihood, if she had sued in the Seventh or Tenth Circuits. But because Ava had the misfortune of attending school in the Eighth Circuit, she was subject to a far more stringent standard. She would have faced the same impossibly long odds if her case had arisen in the Second, Fourth, Fifth, or Sixth Circuits (and likely the D.C. Circuit, at least at the district court level).

This deep divide in the lower courts will not fix itself. Just last year, a unanimous panel of the Sixth Circuit sharply criticized its circuit precedent adopting *Monahan*'s bad-faith-or-gross-misjudgment standard. *See Knox County v. M.Q.*, 62 F.4th 978, 1002 (6th Cir. 2023). The Sixth Circuit panel called *Monahan*'s test "an impossibly high bar" that is "hard to square" with "statutory protection[s] that," by their terms, "reach[] even the unintentional denial of services." *Id.* Nevertheless, the full Sixth Circuit did not take the case en banc.

In this case, a unanimous panel of the Eighth Circuit leveled similar criticisms. App.5a n.2. The panel attacked *Monahan*'s "judicial gloss" on the Rehabilitation Act—and by extension, the ADA—as lacking "any anchor in statutory text," resting on a "premise" that Congress later "rejected," and having rightly "been questioned" by courts and commentators alike. *Id.* Yet the Eighth Circuit denied Ava's petition for rehearing en banc, over three dissents. *Id.* at 44a-45a.

Federal statutory protections should not vary by geography. This Court should grant review to resolve the entrenched circuit split on the question presented.

II. The Eighth Circuit's Atextual Rule Is Wrong

Certiorari is also warranted because, as the decision below recognized, the rule invented by the Eighth Circuit in *Monahan* is wrong. Imposing a uniquely stringent standard on children with disabilities bringing education-related discrimination claims—and on nobody else—cannot be squared with statutory text, structure, or purpose.

1. The text of the ADA and Rehabilitation Act lends no support for *Monahan*'s rule. *Monahan* addressed Section 504 of the Rehabilitation Act, which provides in relevant part: "No otherwise qualified individual with a disability" shall "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The Rehabilitation Act also expressly incorporates "[t]he remedies, procedures, and rights set forth in [T]itle VI of the Civil Rights Act." 29 U.S.C. § 794a(a)(2). The ADA establishes a materially identical prohibition for public entities and incorporates the same set of rights and remedies. *See* 42 U.S.C. §§ 12132, 12133; *supra* at 5-7.

Neither the ADA nor the Rehabilitation Act expressly sets forth an intent requirement for obtaining injunctive relief or compensatory damages. But as to damages, virtually all courts—including the Eighth Circuit—have recognized that plaintiffs outside the educational setting must prove intent, consistent with this Court's case interpreting Title VI. *Supra* at 6 & n.1 (collecting cases); *see also Alexander v. Sandoval*, 532 U.S. 275, 282-83 (2001) (intent required for damages under Title VI). The

overwhelming majority have held that plaintiffs may satisfy this intent requirement for damages by proving that the defendant was deliberately indifferent to their federally protected rights. *Supra* at 7 & n.2 (collecting cases); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding that deliberate indifference is sufficient to show such intent under Title IX, which was likewise "modeled after Title VI"); *Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002) (looking to Title IX precedent in determining the scope of private damages remedies available under the ADA, Rehabilitation Act, and Title VI).

Monahan was wrong to carve out from these baseline standards an exception that applies solely to education-related claims brought by children with disabilities. The substantive prohibitions set forth in Section 202 of the ADA and Section 504 of the Rehabilitation Act create a single standard governing all claims for review under each statute. *See* 42 U.S.C. § 12132 (ADA); 29 U.S.C. § 794(a) (Rehabilitation Act). Nothing in either provision remotely suggests that education-related claims brought by children with disabilities should be analyzed differently from all other claims seeking relief under the same operative provision. Rather, the ADA and Rehabilitation Act's prohibitions apply no matter a plaintiff's age, the nature of her disability, or the factual context in which she suffered discrimination.

The same goes for the ADA and Rehabilitation Act's remedial provisions. Section 203 of the ADA incorporates "[t]he remedies, procedures, and rights set forth in [the Rehabilitation Act]." 42 U.S.C § 12133. And Section 505 of the Rehabilitation Act

provides that "[t]he remedies, procedures, and rights set forth in [T]itle VI" are "available to any person aggrieved" in violation of Section 504. 29 U.S.C. § 794a(a)(2). "Any person" means just that—*any* person. This language requires equal treatment of all ADA and Rehabilitation Act plaintiffs. It forecloses *Monahan*'s view that education-related claims brought by children with disabilities must satisfy more stringent standards than those governing all other claims.

As for Title VI, that statute establishes an evenhanded remedy for any person subjected to discrimination in federally-funded programs or activities "on the ground of race, color, or national origin." 42 U.S.C. § 2000d. That across-the-board prohibition offers no basis for imposing a uniquely stringent standard on any class of plaintiffs, let alone school-age children. Indeed, no Title VI case has ever adopted a *Monahan*-like "bad faith or gross misjudgment" rule in the school setting. It follows that the 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 in this one too.

Monahan perceived a need to establish a bespoke standard "in the context of education of handicapped children," given the existence of another statute protecting their interests (the EHA, now the IDEA), and the fact that "[e]xperts often disagree on what the special needs of a handicapped child are." 687 F.2d at 1170-71. But the unstated premise of that reasoning rests on the "dangerous"—and firmly rejected—"principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005). Federal

courts have an "obligation to maintain the consistent meaning of words in statutory text." *United States v. Santos*, 553 U.S. 507, 523 (2008). They may not do what *Monahan* did: Give "the same word[s], in the same statutory provision, different meanings in different factual contexts." *Id.* at 522 (emphasis omitted).

The ADA and Rehabilitation Act are not "chameleon[s]." *Id.* (quoting *Clark*, 543 U.S at 382). Their meaning "cannot change" whenever a child with disabilities alleges discrimination at the hands of school officials. *Id.* By reading the same operative language to establish a different standard in this single context, *Monahan* engaged in nothing less than "interpretive contortion." *Id.*

2. *Monahan* justified its atextual rule primarily based on "speculat[ion] that Congress intended the IDEA's predecessor" statute—the EHA—"to limit [the Rehabilitation Act's] protections." App.5a n.2. *Monahan* perceived a need to "harmonize" the two statutes and prevent the Rehabilitation Act from becoming a cause of action "for educational malpractice" that would supplant the EHA. 687 F.2d at 1170-71. According to *Monahan*, this step was needed to "give each of these statutes the full play intended by Congress." *Id.* at 1171.

Soon after the Eighth Circuit decided *Monahan*, this Court took *Monahan*'s logic one step further. In *Smith v. Robinson*, 468 U.S. 992 (1984), the Court held that the EHA provided the "*exclusive* avenue" for children with disabilities to bring discrimination claims related to their education. *Id.* at 1009 (emphasis added).

Crucially, though, Congress swiftly repudiated *Smith*—and with it, *Monahan*'s reasoning. In 1985, Congress amended the EHA (now the IDEA) to "'reaffirm[] the viability' of federal statutes like the ADA [and Rehabilitation Act] 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children.'" *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 161 (2017) (quoting H.R. Rep. No. 99-296, at 4, 6 (1985)). Now codified at 20 U.S.C. § 1415(*l*), this IDEA amendment provides, in relevant part, that "[n]othing in the [IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], [Rehabilitation Act], or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*).

Congress thus expressly declared that the IDEA does *not* "restrict or limit" the ability of children with disabilities to obtain relief under the ADA or Rehabilitation Act. *Id.* Yet *Monahan* asserted that the IDEA (formerly the EHA) requires interpreting the ADA and Rehabilitation Act to require children with disabilities to show bad faith or gross misjudgment to prevail on education-related discrimination claims. 687 F.2d at 1171. That is, *Monahan* interpreted the IDEA to "restrict" and "limit" the "rights" and "remedies" available to children like Ava under the ADA and Rehabilitation Act. 20 U.S.C. § 1415(*l*). That is precisely what Section 1415(*l*) forbids. So as the panel here recognized, Congress "rejected *Monahan*'s premise just a few years later." *See* App.5a n.2.

3. *Monahan*'s rule singling out education-related claims brought by children with disabilities is also

fundamentally at odds with the purpose of the ADA and Rehabilitation Act.

Congress perceived "[d]iscrimination against the handicapped" to be "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295-96 (1985). The baseline standards for ADA and Rehabilitation Act claims respect that principle. But *Monahan*'s directive that children with disabilities must show bad faith or gross misjudgment—rather than the mere "indifference," "thoughtlessness," or "benign neglect" required from other plaintiffs—defies it. *Id.* By giving a free pass to actions driven by educational officials' "apathetic attitudes," *Monahan* immunized "much of the conduct that Congress sought to alter in passing the Rehabilitation Act," as well as the ADA. *Choate*, 469 U.S. at 296-97. And in so doing, *Monahan* imposed an artificial barrier to relief that is "difficult if not impossible" for children with disabilities to surmount. *Id.*; *see also Knox*, 62 F.4th at 1002.

All of this is anathema to the ADA and Rehabilitation Act's purpose of protecting people with disabilities from passive mistreatment or neglect. There is simply no reason to think that Congress wanted to single out perhaps the most vulnerable subset of such people—school-age children—for disfavored treatment under laws enacted to combat disability discrimination.

Of course, *Monahan* claimed to be implementing, rather than directly undermining, Congress's goals. It insisted that imposing a uniquely stringent standard in this single context would strike "a proper balance between the rights of handicapped children, the responsibilities of state educational officials, and

the competence of courts to make judgments in technical fields," as "Congress [supposedly] intended." 687 F.2d at 1171. But Congress later made its intent clear, in unequivocal statutory text: "Nothing" in the IDEA "restrict[s]" or "limit[s]" the "rights" and "remedies" provided by the ADA or Rehabilitation Act. 20 U.S.C. § 1415(*l*); *see supra* at 25-26.

In any event, *Monahan*'s atextual appeal to policy makes little sense, even on its own terms. *Monahan* doubted "the competence of courts to make judgments" about decisions by "educational officials" in this "technical field[]." 687 F.2d at 1171. But the IDEA *demands* inquiry into the "adequacy of a given" child's education—and thus judicial examination of the "decisions" made by educational officials, with appropriate respect for the "expertise and the exercise of judgment by school authorities." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 404 (2017). Such respectful examination of schools' decisionmaking is equally proper under the ADA and Rehabilitation Act.

More fundamentally, just last Term this Court resoundingly rejected the notion, echoed in *Monahan*, that some matters are simply too "technical" for courts to review independently. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024). Federal courts are surely capable of showing due respect for educational officials' experience and expertise while adjudicating discrimination claims in the school setting—just as they do in any other context. It is a mistake to distort statutory text out of a misplaced fear that courts cannot responsibly decide cases implicating sensitive or technical matters.

Monahan's atextual rule also leads to extremely bizarre results. It requires pre-K, elementary,

middle, and high school students suing under the ADA and Rehabilitation Act to prove bad faith or gross misjudgment. *See, e.g.*, *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 863 F.3d 966, 968, 972-73 (8th Cir. 2017). But *college* students bringing the same claims do not have to clear that hurdle, even in circuits that apply *Monahan*'s heightened standard. *See, e.g.*, *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 314 (6th Cir. 2001); *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076-77 (8th Cir. 2006). There is no good reason why a graduation ceremony should drastically alter the standard for demonstrating disability discrimination in the educational context. And nothing suggests that this nonsensical asymmetric treatment was part of Congress's design.

4. In short, *Monahan*'s "speculat[ion]" about Congress's intent was fundamentally misguided. App.5a n.2. Small wonder, then, that *Monahan* has been sharply—and widely—criticized. *See, e.g.*, *id.*; *Knox*, 62 F.4th at 1002; *Howell ex rel. Howell v. Waterford Pub. Schs.*, 731 F. Supp. 1314, 1318 (E.D. Mich. 1990); Mark C. Weber, *Accidently on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. Rev. 1417, 1456-60 (2015); Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47 Drake L. Rev. 761, 822-23 & nn.370-71 (1999).

This Court should now fix *Monahan*'s error. In recent years, the Court has repeatedly enforced the plain text of federal civil rights statutes that protect members of society—including children with disabilities—from discrimination. *See, e.g., Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 146-47 (2023);

Fry, 580 U.S. at 158; *Endrew F.*, 580 U.S. at 399; *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024); *Groff v. DeJoy*, 600 U.S. 447, 468-70 (2023); *Babb v. Wilkie*, 589 U.S. 399, 402 (2020); *Mount Lemmon Fire Dist. v. Guido*, 586 U.S. 1, 6-8 (2018). These decisions vindicate the promise of textualism as a method of statutory interpretation that is "neutral as a matter of politics and policy." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2135 (2016).

This case calls for continuing that important work. The Court should grant review to enforce the plain meaning of the ADA and Rehabilitation Act.

III. The Question Presented Is Exceptionally Important And Merits Review In This Case

Whether children with disabilities must satisfy *Monahan*'s uniquely stringent standard when bringing education-related claims under the ADA and Rehabilitation Act is a critically important question of federal law. The issue "holds consequences not just for [Ava] but for a great many children with disabilities and their parents." *Perez*, 598 U.S. at 146. The question presented warrants this Court's review, and this case is an ideal vehicle for answering it.

1. Far too many children with disabilities are "shunted aside, hidden, and ignored" while at school. *Choate*, 469 U.S. at 295-96. When that happens, the ADA and Rehabilitation Act provide crucial means of "protecting their interests," just as those statutes assist other plaintiffs facing disability discrimination in other contexts. *Fry*, 580 U.S. at 159. Yet under the atextual standard pioneered by the Eighth Circuit, only children with disabilities face an "impossibly

high bar" for obtaining much-needed relief under these statutes. *Knox*, 62 F.4th at 1002.

That disparity matters. It is hard enough for parents to muster the resources needed to fight for their child's federally protected rights and remediate life-altering educational gaps in the meantime. Yet five circuits have erected an additional barrier to relief, while blunting incentives for schools to fulfill their responsibilities in the first place.

In this case, Ava's parents spent years fighting for the District to provide her the same reasonable accommodations that her prior school district in Kentucky had provided without issue. App.50a-51a. But over and over again, the District refused, offering "a series of shifting explanations" that had nothing to do with Ava's "individual needs." *Id.* at 50a, 57a. The decision below acknowledged this and other evidence showing that the District had been "negligent or even deliberately indifferent" in denying the reasonable accommodations she desperately needed. *Id.* at 3a. That should have been sufficient for Ava to obtain relief, including compensatory damages, under both the ADA and Rehabilitation Act. *Id.* at 5a n.2; *see supra* at 6-7. "[B]ut under *Monahan*, that's just not enough." App.3a.

Ava's experience is all too common. A Westlaw search reveals hundreds of district court decisions applying *Monahan*'s bad-faith-or-gross-misjudgment standard in ADA and Rehabilitation Act cases, with the overwhelming majority denying relief.[4] Whether

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[4] *See, e.g.*, *S.F. v. Union Cnty. Bd. of Educ.*, 2024 WL 1316229, at *3-4 (W.D.N.C. Mar. 27, 2024); *Torres v. Stewart Cnty. Sch. Sys.*, 2023 WL 6368186, at *5-6 (M.D. Tenn. Sept. 28,

that standard is correct matters in every lawsuit brought under the ADA and Rehabilitation Act by children with disabilities alleging discrimination by their schools. And every such lawsuit involves education—a matter of the utmost concern to such children and their families. It is impossible to overstate the importance of the question presented to some of the most vulnerable members of our society.

2. This case is a perfect vehicle for resolving these issues. The outcome here turned entirely on the bad-faith-or-gross-misjudgment test. Under the normal rules governing most ADA and Rehabilitation Act cases outside the educational context—and that would have governed here too if Ava had sued in the Third or Ninth Circuits—Ava's claims would have survived summary judgment, as the decision below explicitly acknowledged. App.3a (noting that Ava had presented evidence showing deliberate indifference).

2023); *N.P. v. Kenton Cnty. Pub. Schs.*, 2023 WL 1822833, at *5-6 (E.D. Ky. Feb. 8, 2023); *Baker v. Bentonville Sch. Dist.*, 610 F. Supp. 3d 1157, 1166 (W.D. Ark. 2022), *aff'd*, 75 F.4th 810 (8th Cir. 2023); *P.W. v. Leander Indep. Sch. Dist.,* 2022 WL 19003381, at *5-7 (W.D. Tex. Nov. 10, 2022); *Jacksonville N. Pulaski Sch. Dist. v. D.M.*, 2021 WL 2043469, at *5 (E.D. Ark. May 21, 2021); *Richardson v. Omaha Sch. Dist.*, 2019 WL 1930129, at *7-9 (W.D. Ark. Apr. 30, 2019), *aff'd*, 957 F.3d 869 (8th Cir. 2020); *Lawrence Cnty. Sch. Dist. of Lawrence Cnty. v. McDaniel*, 2018 WL 1569484, at *5-6 (E.D. Ark. Mar. 30, 2018); *McMinn v. Sloan-Hendrix Sch. Dist.*, 2018 WL 1277719, at *2 (E.D. Ark. Mar. 12, 2018); *Doe v. Pleasant Valley Sch. Dist.*, 2017 WL 8792704, at *3-5 (S.D. Iowa Dec. 5, 2017), *aff'd*, 745 F. App'x 658 (8th Cir. 2018); *Doe v. Osseo Area Sch. Dist., ISD No. 279*, 296 F. Supp. 3d 1090, 1098 n.7 (D. Minn. 2017); *Parrish v. Bentonville Sch. Dist.*, 2017 WL 1086198, at *18-19 (W.D. Ark. Mar. 22, 2017), *aff'd*, 896 F.3d 889 (8th Cir. 2018); *Est. of Barnwell ex rel. Barnwell v. Watson*, 2016 WL 11527708, at *4-5 (E.D. Ark. June 2, 2016).

But under the atextual rule embraced by the Eighth Circuit—along with the Second, Fourth, Fifth, and Sixth Circuits—her claims failed. *Id.*

Throughout this litigation, Ava has fully preserved the argument that the heightened standard embraced by the Eighth Circuit and others is wrong. *See, e.g.*, CA8 Pet. for Reh'g 8-15; CA8 Appellant Br. 35-36. Nothing about her argument turns on disputed facts. What standard should apply under the ADA and Rehabilitation Act is a pure question of law. That question is cleanly presented and exceedingly important. It should be resolved in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 3, 2024

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

A.J.T., a minor child, BY AND THROUGH her parents, A.T. and G.T., Plaintiff - Appellant

v.

OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279; Osseo School Board, Defendants - Appellees

Council of Parent Attorneys and Advocates, Inc., Amicus on Behalf of Appellant(s)

Minnesota Administrators for Special Education; Minnesota Association of School Administrators; Minnesota School Boards Association, Amici on Behalf of Appellee(s)

No. 23-1399

Submitted: October 18, 2023

Filed: March 21, 2024

[96 F.4th 1058]

OPINION

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

This case involves the same circumstances as those described in *Osseo Area Schools, Independent School District No. 279 v. A.J.T. ex rel. A.T.*, 96 F.4th 1062 (8th Cir. 2024). But here, A.J.T. sued Osseo Area Schools (the District) for disability

discrimination. The district court[1] granted the District's motion for summary judgment, and we affirm.

A.J.T. has epilepsy, and her seizures are so severe in the morning that she can't go to school until noon. Her parents asked for evening instruction to give her a school day closer in length to that of her peers, but District officials denied their repeated requests. So A.J.T. sued through her parents, alleging violations of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). The district court granted the District's motion for summary judgment, concluding that the District could not be held liable because it did not act with bad faith or gross misjudgment.

We review a district court's grant of summary judgment *de novo*, affirming only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *B.M. ex rel. Miller v. S. Callaway R–II Sch. Dist.*, 732 F.3d 882, 886 (8th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). We view all facts in favor of A.J.T. and give her "the benefit of all reasonable inferences in the record." *Argenyi v. Creighton Univ.*, 703 F.3d 441, 446 (8th Cir. 2013).

Claims under Section 504 and the ADA live and die together, as "the enforcement, remedies, and rights are the same under both." *B.M.*, 732 F.3d at 887 (citation omitted); 42 U.S.C. § 12133. Section 504 requires federal grantees to give "otherwise qualified" people with disabilities "meaningful access" to their

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

benefits. *See Argenyi*, 703 F.3d at 448 (quoting *Alexander v. Choate,* 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985)); 29 U.S.C. § 794(a). And Title II of the ADA requires public entities to provide meaningful access to their services, programs, or activities. *Segal v. Metro. Council*, 29 F.4th 399, 404 (8th Cir. 2022); 42 U.S.C. § 12132. "Meaningful access" often requires "reasonable accommodations." *Choate*, 469 U.S. at 301, 105 S.Ct. 712.

That said, when the alleged ADA and Section 504 violations are "based on educational services for disabled children," a school district's simple failure to provide a reasonable accommodation is not enough to trigger liability. *B.M.*, 732 F.3d at 887 (citation omitted). Rather, a plaintiff must prove that school officials acted with "either bad faith or gross misjudgment," *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), which requires " 'something more' than mere non-compliance with the applicable federal statutes," *B.M.*, 732 F.3d at 887 (citation omitted). The district's "statutory non-compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that [it] acted with wrongful intent." *Id.*

A.J.T. may have established a genuine dispute about whether the district was negligent or even deliberately indifferent, but under *Monahan*, that's just not enough. She points out that her parents repeatedly notified the District that its refusal to provide evening instruction violated Section 504 and the ADA. And she says that the District violated accepted professional standards by failing to follow its own policies and procedures requiring its staff to report, investigate, and respond to complaints of discrimination. As evidence, she notes that the

District's Director of Student Services, who oversees Section 504 compliance, testified that she was unaware of the parents' complaints and did not know that the District's policies permit at-home schooling as an accommodation. But the Director's non-compliance does not amount to a deviation "so substantial[]" that it demonstrates "wrongful intent." *Id.*

True, "notice of a student's disability coupled with delay in implementing accommodations can show bad faith or gross misjudgment" under some circumstances. *Id.* at 888; *see also M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 982 (8th Cir. 2003) (finding genuine dispute as to bad faith or gross misjudgment where school district knew about disability-based harassment of a student, ignored the mother's repeated calls, offered patently unworkable solutions, and reneged on its offer to cover transportation costs to a new school after the student transferred). But here, the District did not ignore A.J.T.'s needs or delay its efforts to address them, even if the efforts were inadequate. District officials met with A.J.T.'s parents and updated her individualized education program (IEP) each year. Her IEP included a variety of services, like intensive one-on-one instruction and a 15-minute extension of her school day so that she could safely leave after the halls cleared. And the District even offered 16 three-hour sessions at home each summer. Regardless of whether these actions were enough to provide meaningful access, they do not show wrongful intent.

A.J.T. has failed to identify conduct clearing *Monahan*'s bar, so we are constrained to hold that

summary judgment was proper.[2] We affirm the district court's judgment.

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[2] Why do we have such a high bar for claims based on educational services when we require much less in other disability-discrimination contexts? *See, e.g.*, *Withers v. Johnson*, 763 F.3d 998, 1003 (8th Cir. 2014) (no intent required for failure-to-accommodate claim); *Meagley v. City of Little Rock*, 639 F.3d 384, 388–89 (8th Cir. 2011) (deliberate indifference required for damages); *accord S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 260–65 (3d Cir. 2013) (collecting cases). The answer is a lesson in why "[w]e do not . . . add provisions to . . . federal statute[s]." *Alabama v. North Carolina*, 560 U.S. 330, 352, 130 S.Ct. 2295, 176 L.Ed.2d 1070 (2010).

In *Monahan*, we speculated that Congress intended the IDEA's predecessor to limit Section 504's protections, and without any anchor in statutory text, we added a judicial gloss on Section 504 to achieve that end. 687 F.2d at 1170–71. Congress rejected *Monahan*'s premise just a few years later. *See* Handicapped Children's Protection Act of 1986, Pub. L. No. 99–372, 100 Stat. 796; 20 U.S.C. § 1415(*l*). But nonetheless, its bad faith or gross misjudgment rule spread like wildfire. *See I.Z.M. v. Rosemount–Apple Valley–Eagan Pub. Schs.*, 863 F.3d 966, 973 n.6 (8th Cir. 2017) (collecting cases).

Monahan has been questioned. *See, e.g.*, *Knox Cnty. v. M.Q.*, 62 F.4th 978, 1002 (6th Cir. 2023); Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. Rev. 1417, 1455–64 (2015); *AP ex rel. Peterson v. Anoka–Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1125, 1145–46 (D. Minn. 2008); *Howell ex rel. Howell v. Waterford Pub. Schs.*, 731 F. Supp. 1314, 1318–19 (E.D. Mich. 1990). But for the time being, it remains the law of our circuit.

[2023 WL 2316893]
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA.

A.J.T., by and through her parents, A.T. and G.T., individually and jointly,

Plaintiffs,

v.

OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279, and OSSEO SCHOOL BOARD,

Defendants.

MEMORANDUM OF LAW AND ORDER

Civil File No. 21-1760 (MJD/DTS)

Filed Under Seal

Amy J. Goetz, School Law Center, LLC, Counsel for Plaintiffs.

Christian R. Shafer, Elizabeth M. Meske, Laura Tubbs Booth, and Timothy A. Sullivan, Ratwik, Roszak & Maloney, PA, Counsel for Defendants.

I. INTRODUCTION

Plaintiff AJT is a teenage girl with a severe form of epilepsy called Lennox-Gastaut Syndrome ("LGS"). As a result of her disability, AJT has significantly diminished intellectual capacities and has seizures throughout the day. Since moving to Defendant

Osseo School District ("the District") in 2015 from Kentucky when she was in fourth grade, AJT and the District have agreed that she is unable to begin school until noon due to morning seizure activity.

In 2021, an administrative law judge ("ALJ") held a hearing ("the administrative hearing"), found the District had violated the Individuals with Disabilities Education Act ("IDEA"), and ordered the District to provide AJT with eye gaze technology and compensatory hours of education, among other things. (Def. Ex. 25 (ALJ Decision) at 20.) On September 13, 2022, the Court affirmed the ALJ's Decision. Osseo Area Schs. v. A.J.T., Civil File No. 21-1453 (MJD/DTS), 2022 WL 4226097, at *21 (Sept. 13, 2022) [hereinafter, "Osseo Area Schools"].

In the instant case, Plaintiffs assert three claims against the District: (1) violations of the IDEA; (2) violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"); and (3) violations of the Americans with Disabilities Act ("the ADA"). (Amend. Compl. ¶¶ 113-47.)

Currently before the Court is the District's Motion for Summary Judgement. (Doc. 31.) The Court heard oral argument via Zoom on October 12, 2022.

As discussed in detail below, the evidence in the record supports granting Defendants' Motion for Summary Judgment. Even assuming AJT was denied the benefits of a program or activity of a public entity receiving federal funds and/or discriminated against based on her disability, the District did not act with bad faith or gross misjudgment when making educational decisions regarding AJT. In addition, even if the District took all the actions Plaintiffs allege it took, there is no evidence it did so to retaliate

against AJT's parents for their advocacy on behalf of AJT. Finally, Plaintiffs' IDEA claims are foreclosed for a number of reasons. Thus, the District's Motion for Summary Judgment is granted.

II. BACKGROUND

The facts of the case are well-known to the Court and the Parties and detailed in the Court's Order in Osseo Area Schools. The Court only includes facts here that are relevant to discussion of the instant motion. The relevant facts relate to AJT's elementary and middle school schedules. The Parties have briefed another motion related to AJT's high school schedule. See Osseo Area Schs. v. A.J.T., No. CV 21-1453 (MJD/DTS), 2022 WL 17082826, at *1 (D. Minn. Nov. 18, 2022) (Order Denying Def's Motion for an Order to Show Cause Why Pl. Should Not be Found in Contempt) [hereinafter, Osseo Area Schs. II].

A. Scheduled School Day in Kentucky Versus in Minnesota

According to the Amended Complaint, while a student in Kentucky, AJT received instruction from the public school from noon until 6:00 p.m. each day, mostly in-school but supplemented with hours of instruction in her home, which resulted in the same number of instructional hours as her nondisabled peers. (Amend. Compl. ¶¶ 42-43.) AJT's school days always began at noon.

For the most part, a typical school day for a student in the District is 6.50 hours. That has been the goal for AJT's parents, AT and GT, since they moved to the District. However, due to AJT's unavailability for instruction before noon, the District never provided AJT 6.50 hours of in-school instruction.

After several negotiations including different proposed IEPs, AJT has been in school 4 hours and 15 minutes each day for most of her years in the District receiving intensive special education services. She always has one or two adults working solely with her providing services and working on her learning goals. (Def. Ex. 25 (ALJ Decision) at 9.)

B. Negotiations Between AJT's Parents and the District

Plaintiffs assert that before the family moved from Kentucky to Minnesota, they received assurances from the District that it would adopt AJT's Kentucky IEP "in its entirety." (AT Aff. ¶ 12.)

When AJT entered the District in October 2015, the IEP team, including AJT's parents, agreed that starting the school day at noon was appropriate given AJT's individual needs. (Def. Ex. 16 (Oct. 16, 2015 Prior Written Notice ("PWN")) at 2 (stating that AJT "can not [sic] come to school in the morning due to her seizure activity through the night and in the morning").)

When AJT's IEP team first met in 2015, the District proposed an IEP that "generally accepted the goals and objectives on AJT's most recent IEP from Kentucky." Osseo Area Schs., 2022 WL 4226097, at *4. AJT's parents requested two more IEP meetings, which were held on October 14 and 20, 2015. At the October 14 meeting, AT asked if the school would provide support in the evening and was told that the school did "not provide both homebound and school support (modified)." (Pl. Ex. D at 2.) The District's notes from the October 14, 2015 IEP team meeting state that AT said that he felt the District's failure to provide educational support in the evening "might

conflict with the ADA. He wants statute. His position [was] that [AJT] can handle a full day, it just can't start until noon." (Id.)

Following those meetings, the District proposed an IEP that accepted the goals and objectives from AJT's Kentucky IEP and included minutes of special education service commensurate with those in the Kentucky IEP. Osseo Area Schs., 2022 WL 4226097, at *4. The Kentucky IEP called for 125 minutes of special education in school daily and 90 minutes of in-home special education daily, for a total of 215 minutes of special education instruction per day. (Def. Ex. 9 at 8.) The District's IEP included 240 minutes of direct special education daily and 20 minutes of direct speech services weekly. (Def. Ex. 11.)

During AJT's years in the District, the Parties had several IEP meetings and the District issued more PWNs. At one point, AJT's parents complained "the District has not scheduled sufficient IEP team meetings to discuss appropriate accommodations . . . and/or engage[d] in the interactive process" to meet AJT's needs. (Def. Ex. 10 at 1.) After negotiation, the Parties agreed that AJT's school day would be from noon to 4:15 p.m., which was extended after the usual elementary school day ended at 4:00 p.m. The IEP containing this schedule was the last-agreed upon IEP between the Parties—the "stay-put" IEP that remained in place during the pendency of disputes between the Parties. Osseo Area Schs., 2022 WL 4226097, at *5. Thus, AJT's school days have been 4.25 hours rather than the 6.50 hours her parents requested.

Beginning in February 2018, in preparation for AJT's transition from elementary school to middle

school, AJT's parents met with Former District Special Education Site Coordinator Joy Fredrickson to discuss AJT's middle school day. (AT Aff. ¶ 27.) A typical middle school day ends at 2:40 p.m. and AJT's parents were "distraught" to learn that AJT would have shorter school days in middle school. (Id.) On March 16, AJT's parents again met with Fredrickson and provided six options for 4.25-hour middle school days for AJT. (Id. ¶ 28.) On April 3, the District sent AT and GT a PWN proposing a noon to 3:00 p.m. school day. (Id. ¶ 29.) At an April 5, 2018 IEP meeting, AJT's parents found it "incredible" that the District "made the decision to reduce hours before [they] had an IEP Team meeting to discuss program goals and objectives for the next year, [AJT's] needs or whether she needed a shortened day." (Id. ¶ 30.) In the end, AJT's middle school day schedule continued to be from 12:00 to 4:15 p.m. under the stay-put IEP. Osseo Area Schs., 2022 WL 4226097, at *5.

On April 23, 2018, AT sent an email to the District stating that he felt the District's acts were discriminatory and retaliatory based, in part, on AJT's "disability . . . and or parental protected activity" of advocating for AJT during the IEP process. (AT Aff. ¶ 31.) AT attested that "just as in years prior," the District did not investigate or resolve his complaints and did not provide him with its nondiscrimination policy or complaint procedures. (Id. ¶ 32.) He avers that this is when the District began treating him differently. (Id. ¶ 33.) On April 30, 2018, AT sent an email to Fredrickson stating, inter alia, that he had filed complaints with the Minnesota Department of Education ("MDE"), the U.S. Department of Education Office for Civil Rights,

and the U.S. Department of Justice Civil Rights Division. (Id. ¶ 35; Def. Ex. 23.) This dispute was apparently resolved by "the Parties agreeing to an Independent Education Evaluation (IEE) of [AJT by Dr. Reichle], and a later triennial evaluation, and using these materials to guide later educational planning." (Def. Ex. 25 (ALJ Decision) at 3-4.)

Throughout the process, the District has refused to provide evening instruction because, variously, the District does not provide "both homebound and school support" (Pl. Ex. D (Dist. Oct. 14, 2015 IEP meeting notes) at 2); state law does not mandate it (Def. Ex. 16 (Oct. 16, 2015 PWN) at 2); and/or the District was worried about the precedent it would start not only in the District, but for area school districts (Def. Ex. 18 (June 6, 2016 PWN) at 1).

Each year, AJT's parents provide the District with a letter from AJT's treating neurologist requesting that she be "exempted from school attendance before noon in order to manage her seizure activity." Osseo Area Schs., 2022 WL 4226097, at *5 (cleaned up). The District offers to serve AJT whenever she is available during the regular school day, including before 12:00 p.m. (See, e.g., Def. Ex. 22 (April 2, 2018 PWN) at 2.)

C. Dr. Joe Reichle's IEE and Trial Tests

In 2019, at the Parties' request, Dr. Joe Reichle conducted an independent educational evaluation ("IEE") of AJT. Osseo Area Schs., 2022 WL 4226097, at *7. Among Dr. Reichle's recommendations was as much instruction time as possible "during [AJT's] alert hours," which optimally are "between approximately noon and 6:00 p.m." Id. (brackets in original).

In autumn 2020, AJT's parents hired Dr. Reichle to conduct a series of discrete trial tests "to assess how interventions in the mid and late afternoons might impact [AJT's] learning." Id. (brackets in original). Dr. Reichel performed trials of late afternoon instruction from 4:15 to 5:30 p.m. in AJT's home, which he compared to instruction conducted in AJT's home from noon to 1:15 p.m. Id. During the trials, AJT made gains on skills she was learning in school. Id.

D. Statements Made by Special Education Director Katheryn ("Kate") M. Emmons

AJT's parents have participated in many meetings with her IEP team and District officials, including the District's highest special education administrator, Special Education Director Kate Emmons, to ask that AJT receive a full day of school beginning at noon. (Amend. Compl. ¶ 59; AT Aff. ¶¶ 17-32.)

In her role, Emmons develops and promotes suitable procedures for "identification, evaluation, and instructional programming of children eligible for Special Education . . . services" and evaluates "the school system's approaches and students' responses to specialized programs for children not achieving in special . . . education programs," among other duties. (Pl. Ex. G at 3 (Emmons' Position Description).)[1] She is also "responsible for program development, coordination, and evaluation; in-service training; and general special education supervision and administration." (Id. at 15 (District Total Special

[1] Plaintiffs' Exhibit G contains many documents and is divided into several parts (G1, G2, G3, etc.) in the Court's CMECF filing system.

Education System).) Emmons is not only responsible for the District's special education programs but also oversees implementation and enforcement of Section 504, which prohibits a federally-funded program from discriminating against a disabled individual solely by reason of that person's disability. (Def. Ex. 1 (Emmons Dep.) at 41-42)[2]; 29 U.S.C. § 794(a).) She supervises Coordinators who, among other things, ensure compliance with policies, procedures, and rules. (Def. Ex. 1 (Emmons Dep.) at 15-26.)

Emmons testified that District policy requires investigation of all complaints of disability discrimination but that she was unaware of any investigation regarding AJT. (Id. at 70-71.) The District's Nondiscrimination Policy 102 requires discrimination complaints be reported to the § 504 Coordinator, whom Emmons testified was Jill Lesné. (Id. at 48-49; Pl. Ex. G2 (Osseo Area Schools Employee Handbook) at 50.)

Although the Employee Handbook listed Emmons as the § 504 Coordinator in 2020-21, she testified she was not and did not know why the Handbook stated she was. (Def. Ex. 1 (Emmons Dep.) at 49.) Emmons testified that she would report any discrimination she became aware of to Ms. Lesné. (Id. at 48-49.) Emmons noted that it is every employee's responsibility to comply with the District's nondiscrimination policies and everyone's responsibility to report noncompliance with § 504

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[2] Plaintiffs cited pages of Plaintiffs' Exhibit G that did not contain this information. (See Doc. 38 at 11 n.20.) It was obvious to the Court that this and other information cited to Plaintiffs' Exhibit G came from Emmons' deposition, which is Defendants' Exhibit 1. The Court has corrected the citations.

once they are aware of it. (Id. at 44-45, 56.) On the other hand, she testified that IDEA disputes would be handled via other avenues such as conciliation conferences and mediation. (Id. at 48.)

At Emmons' deposition, Plaintiffs' Counsel noted that the District's Total Special Education System ("TSES") says that "students can have a combination of alternate methods of instruction, including homebound and in-person instruction." (Id. at 176-77.) Emmons responded, "No, where is that? We might have to modify that." (Id. at 177; see also Pl. Ex. G at 23 (TSES) ("Program alternatives are comprised of the type of services provided, the setting in which services occur. . . . A pupil may receive special education services in more than one alternative based on the IEP.") (emphasis added).)

When asked about a discrimination investigation involving AJT in her deposition, Emmons stated she knew nothing about it. However, AT attests that he and GT met with her more than once to complain about discriminatory treatment toward AJT. (AT Aff. ¶ 50.) He states that Emmons' response was to tell them to hire a personal care attendant ("PCA") after school hours instead of extending AJT's school day, which "reflect[ed] stereotyped misperceptions that [AJT] was not worthy of a full day of instruction." (Id.) Plaintiffs assert that other school employees also disclaimed knowledge of AJT's parents' complaints regarding the number of hours of instruction she received every day. (Doc. 38 at 11 (citing AT Aff; Emmons Dep.; Ex. G to Goetz Aff., all without pinpoint citations).) The only support for this statement in AT's Affidavit is AT's assertion that he and GT met with Emmons. (AT Aff. ¶ 50.)

E. Expert Reports

AJT filed one expert report and updates thereto and the District filed three expert reports. In relevant part, the reports provide the following opinions.

1. Dr. Joe Reichle's Expert Reports

Dr. Joe Reichle, opined, in brief, "the lack of a full school day has significantly contributed to limit [AJT's] learning opportunities" and that there was a lack of a comprehensive augmentative communication plan resulting from a comprehensive assessment of AJT's needs both prior to his 2019 assessment and after the ALJ's 2021 Decision. (Pl. Ex. F at 3-4.) He explained that when he designed his December 2019 communication trial, he considered morning, early afternoon, and late afternoon sessions to compare "performance as a function of time of day," but AJT's parents were unwilling to take this "substantial health risk" based on their physicians' opinions "regarding the potential danger of disrupting AJT's sleep pattern." (Pl. Ex. F2 at 12.) He noted that "Dr. Breningstall and his predecessors are physicians directed by medical knowledge and experience. Their recommendations and support of the parents' position . . . led to [him conducting] only early p.m. and late p.m. . . . sessions." (Id. at 13.)

2. The District's Experts

a) Dr. Wills' Expert Reports

Dr. Karen Wills is a neuropsychologist and is licensed to practice clinical psychology in Minnesota. (Def. Ex. 2 at 1.) Dr. Wills stated that parents perceive their children "through rose colored glasses" and overestimate their competencies. (Id. at 3.) In relevant part, Dr. Wills opined that AJT's rate of progress was not demonstrably better in Kentucky

than in the District, that AJT has not regressed since enrolling in the District, and that most of AJT's fellow students' instructional days include non-instructional time. (Id. at 3-7, 11, 15).

b) Marcy Doud's Expert Report

The District did not provide Marcy Doud's credentials. (Def. Ex. 28.) Doud opined that "given [AJT's] disabilities and abilities and her medical needs," the District chose a reasonable course of education and 1:1 instruction with limited distractions was the "single common denominator" for AJT's optimal learning environment, regardless of the time. (Id. ¶ 6.) She also stated that AT was at the IEP meeting where the IEP with the 12:00 to 4:15 school day was proposed, that AJT's parents received the PWN stating that the IEP would be implemented unless they objected, and that they did not do so. (Id. ¶¶ 12-13.)

c) Howard C. Shane, Ph.D's Expert Report

Dr. Shane is an associate professor of otolaryngology at Harvard Medical School. (Def. Ex. 29 at 1.) Dr. Shane stated that the central question in this case is how AJT's school day is divided between home and school. (Id.) He opined that without a systematic review of AJT's seizure pattern across several different weekdays and weekend days over time, it is impossible to make definitive conclusions about the best times for AJT to learn. (Id. at 2.) He notes that a table by school staff tracking AJT's seizures during school hours for a month in 2021 showed AJT had multiple seizures in the afternoons at school, some so severe that she could not return to instruction. (Id. at 2-3.) Since AJT has regular

afternoon seizures at school, Dr. Shane states that "it does not seem practical" to base AJT's schedule "on parental reporting (or preference) of seizure frequency and severity during the morning and certainly not without a careful analysis of the occurrence and severity of seizure activity in the [morning]." (Id. at 4, 16.)

Other facts will be discussed as necessary

E. Desired Relief

The District has filed a motion for summary judgment. Although Plaintiffs have not filed a similar motion, they nonetheless assert they are entitled to summary judgement. In the alternative, Plaintiffs argue that issues of material fact exist that make summary judgment for the District inappropriate.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. Celotex, 477 U.S. at 323. "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case." Amini v. City of Minneapolis, 643 F.3d 1068, 1074 (8th Cir. 2011) (citation omitted).

B. ADA and Rehabilitation Act Claims

1. Legal Standards

> Title II of the ADA prohibits public entities from discriminating based on disability in services, programs, or activities. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." These statutes provide[] the same rights, procedures, and remedies against discrimination.

I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs., 863 F.3d 966, 972 (8th Cir. 2017) (alterations in original) (internal citations omitted). Claims under the ADA and Section 504 are analyzed using the same standard. See AP v. Anoka-Hennepin ISD No. 11, 538 F. Supp. 2d 1125, 1139 (D. Minn. 2008).

> A plaintiff's prima facie case . . . requires a showing that the plaintiff (1) was a qualified individual with a disability; (2) was denied the benefits of a program or activity of a public entity receiving federal funds; and (3) was discriminated against based on [her] disability. More specifically, we have said that a claim under § 504 in the context of education of handicapped children requires parents to show that the school district acted in bad faith or with gross misjudgment by departing substantially from accepted professional judgment, practice or standards as to

> demonstrate that those responsible actually did not base the decision on such a judgment.

Est. of Barnwell v. Watson, 880 F.3d 998, 1004 (8th Cir. 2018) (citations omitted).

In this case, there is no dispute that AJT is a qualified individual with a disability. In addition, elements 2 and 3 are inextricably intertwined because Plaintiffs assert AJT was denied the same length school day as her nondisabled peers based on her disability. However, even assuming AJT was denied the benefits of a program or activity of a public entity receiving federal funds and discriminated against based on her disability, Plaintiffs' arguments fail because the District did not act with bad faith or gross misjudgment.

2. Bad Faith or Gross Misjudgment

"[W]here alleged ADA and § 504 violations are based on educational services for disabled children, the plaintiff must prove that school officials acted in bad faith or with gross misjudgment." B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 887 (8th Cir. 2013) (quotation omitted). Something more than a "mere violation of the IDEA must be shown to demonstrate a violation of § 504." Brantley ex rel. Brantley v. ISD No. 625, 936 F. Supp. 649, 657 (D. Minn. 1996).

a) Plaintiffs' Arguments

Plaintiffs argue that intent should not be required in failure to accommodate claims for disability discrimination in elementary or secondary education because (1) intent is not a burden imposed by § 504 or the ADA or their interpretive regulations and is not required in all circuits; (2) requiring intent is contrary to Supreme Court precedent stating that intent is not

a required element of disability discrimination claims (citing Alexander v. Choate, 469 U.S. 287, 295, 309 (1985) (a case dealing with reduction in Medicaid benefits); (3) Eighth Circuit precedent does not require intent in employment or post-secondary education reasonable accommodation claims and there is no reason to treat elementary and secondary education claims differently; and (4) proof of intent is not required in other jurisdictions (citing Ability Ctr. v. City of Sandusky, 385 F.3d 901, 912 (6th Cir. 2004); Henrietta D. v. Bloomberg, 331 F.3d 261, 277-78 (2d Cir. 2003); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 253 (3d Cir. 1999); Washington v. Ind. High Sch. Athletic Ass'n Inc., 181 F.3d 840, 846 (7th Cir. 1999)). (Doc. 38 at 31-33.)

While Plaintiffs admit that the Eighth Circuit requires proof of intent in disability discrimination in education cases based on failure to accommodate and disparate treatment claims, they argue that in failure to accommodate claims, the standard is "softened," requiring "only notice of the need for a reasonable accommodation and school district inaction, delay, or ineffective action." (Id. (citing M.P. v. ISD No. 721, 326 F.3d 975, 982-83 (8th Cir. 2003)).

In M.P., the court held that a jury could find that a school district acted in bad faith or with gross misjudgment when it failed to answer a mother's daily phone calls about bullying her son suffered due to a district employee making his schizophrenia diagnosis public and never taking steps to protect the boy's safety and academic interests after knowing about the bullying. 326 F.3d at 982-83. Plaintiffs assert that M.P. is similar to this case because Plaintiffs also raised issues of "failure to provide reasonable accommodations at school, failure to

investigate complaints of disability discrimination, and failure to take appropriate and effective remedial measures upon notice to school authorities." (Doc. 38 at 37.) Plaintiffs note that in M.P., the court held that "[u]nder some circumstances, notice of a student's disability coupled with delay in implementing accommodations can show bad faith or gross misjudgment." (Id. at 38.)

Plaintiffs argue that under either a disparate treatment theory or failure to accommodate approach, the District discriminated against them with bad faith, a gross departure from professional standards, and deliberate indifference. (Id. at 37 (citing, inter alia, M.P., 326 F.3d at 982; Monahan v. State of Neb., 687 F.2d 1164, 1171 (8th Cir. 1982).) Plaintiffs assert that "ignoring six years of disability discrimination complaints by A.T. and G.T. was not within the scope of professionally acceptable choices because the District's own policies expressly prohibit that response." (Id. at 34-35.) Plaintiffs state that the District fails to meet its initial burden to establish a lack of discriminatory intent.

Plaintiffs also argue that the familiar McDonnell Douglas burden-shifting analysis used in employment discrimination cases is appropriate in this case and that they have evidence sufficient to survive summary judgment under this analysis. (Id. at 39.)

b) Analysis

Before reaching the merits of Plaintiffs' arguments, two threshold issues must be decided: (1) whether the employment cases cited by Plaintiffs are inapposite and (2) whether the "deliberate indifference" standard championed by Plaintiffs is

proper for a challenge to a student's educational programming.

i. Plaintiffs' Employment Cases are Inapposite

Plaintiffs cite several employment cases that only require plaintiffs to prove defendants failed to provide a "reasonable accommodation" to survive summary judgment. (Id. at 27, 32.) It is inappropriate to rely on these cases. See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, 111 LRP 76408 (OCR 2011) at 11 (courtesy copy provided as attachment to Defendant's Reply). The Department of Education ("the DOE") cautions that the term "reasonable accommodation" is "a term used in the employment context" that is "sometimes used incorrectly to refer to related aids and services in the elementary and secondary school context . . . ." Id. Opinions from agencies are entitled to at least some deference. Doe v. Osseo Area Sch. Dist., 296 F. Supp. 3d 1090, 1098 (D. Minn. 2017) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)) (holding that an agency's interpretation of its own regulations is entitled to "substantial deference"); see also 34 C.F.R. § 104.33 (schools are required to provide a free appropriate public education ("FAPE") to disabled students, not "reasonable accommodations"). Deference to the DOE is especially reasonable here where the McDonnell Douglas analysis from employment law could have been adopted into the education discrimination context and the courts declined to do so.

ii. The Correct Liability Standard is "Bad Faith or Gross Misjudgment"

Plaintiffs assert they need only prove that Plaintiffs acted with "deliberate indifference" to establish their prima facie case. However, the Eighth Circuit

> . . . held in AP v. Anoka–Hennepin Indep. School Dist. No. 11 that bad faith or gross misjudgment is an element of a disability-discrimination claim only in the context of substantive challenges to a disabled child's individualized education plan. In cases not involving challenges to educational services, a showing of deliberate indifference on the defendant's part is necessary—and sufficient—to recover the compensatory damages under the ADA or § 504 . . . .

Hough v. Shakopee Pub. Schs., 608 F. Supp. 2d 1087, 1115-16 (D. Minn. 2009) (holding that searches were not part of a student's educational program and therefore "deliberate indifference" was the correct standard) (citations omitted); I.Z.M., 863 F.3d at 973 ("We have consistently held that where alleged ADA and § 504 violations are based on educational services . . ., the plaintiff must prove that school officials acted in bad faith or with gross misjudgment.") (emphasis added) (citation omitted); see also A.K.B. v. ISD 194, No. 19-CV-2421 (SRN/KMM), 2020 WL 1470971, at *13 (D. Minn. Mar. 26, 2020) (applying deliberate indifference standard in claim for medical accommodation in school).

This case is based on Plaintiffs' dissatisfaction with AJT's educational services. Even the retaliation

claim, discussed below, is inextricably intertwined with the provision of educational services. M.P., cited by Plaintiffs is distinguishable because that case involved a school district's deliberate indifference to a mother's pleas for help for her bullied son. 326 F.3d at 982-83. The Eighth Circuit found the "alleged failure to protect M.P. from unlawful discrimination on the basis of his disability is a claim . . . wholly unrelated to the IEP process." M.P. v. ISD No. 721, 439 F.3d 865, 868 (8th Cir. 2006) [M.P. II] ("Although the Eighth Circuit applied the bad faith or gross misjudgment standard in M.P., the court only did so because the parties assumed that to be the standard and the court never discussed the deliberate indifference standard that has been applied to claims of student-on-student harassment since M.P. was decided.").

iii. The District did not Act with Bad Faith or Gross Misjudgment

> In order to establish bad faith or gross misjudgment, a plaintiff must show that the defendant's conduct departed substantially from accepted professional judgment, practice or standards so as to demonstrate that the persons responsible actually did not base the decision on such a judgment. Because the ADA and § 504 do not create general tort liability for educational malpractice, bad faith or gross misjudgment requires "something more" than mere non-compliance with the applicable federal statutes. The defendant's statutory non-compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent.

B.M., 732 F.3d at 887 (cleaned up) (citations omitted).

Plaintiffs argue that when the District ignored six years of disability discrimination complaints by AJT's parents, it violated the District's own policies and its actions were not within the scope of any professionally-acceptable choices available to the District. As evidence, Plaintiffs state, without citation, that "all" District officials testified regarding their professional obligations to know and comply with the law and to ensure that all discrimination claims are investigated and resolved "pursuant to their licenses, position descriptions, and District policies." (Doc. 38 at 4.) They also aver that while the District's Superintendent, Emmons, and § 504 Coordinator all expressed ignorance of the Plaintiffs' discrimination complaints; lack of District response; and even any knowledge of the dispute, the following evidence undermines those claims:

1) The professional licensing obligations of each official to know and comply with the IDEA, § 504, and the ADA;
2) The position descriptions of each official that requires them to know and comply with the IDEA, § 504 and the ADA and to supervise and ensure compliance by other staff, including Coordinators;
3) District policies requiring investigation, parental notice of rights, and correction of any discrimination complaint, formal or informal, written or verbal, by every District employee; and
4) The documentation of disability complaints and credible testimony of AT that he met with and communicated directly with various

> Coordinators, the Superintendent, and Emmons about complaints.

(Id. at 6-7 (emphasis in original).) Plaintiffs further assert, without support, "The testimony at [the administrative] hearing established that the District's [Special Education Site] Coordinator, Joy Fredrickson, acted for years at the direction of a source outside of the IEP Team as corroborated by all IEP Team members including AJT's teachers and Parents." (Id. at 5 (emphasis in original).)

Regarding licensing, position descriptions, and district policies, other than information related to Emmons, Plaintiffs only state,

> Each District official did testify to established professional standards, including licensing obligations and position descriptions that require knowledge of the laws that prohibit disability discrimination, and of their professional obligations to ensure compliance with District policies that require reporting, investigation, notice to parents of rights, and correction of disability discrimination complaints, written or verbal, formal or informal.

(Doc. 38 at 11-12 n.21 (emphasis in original) ("Deposition of Kate Emmons, Ex. G to Goetz Affidavit; and Tharpe Affidavit.").) The Court is unable to find support for these claims in the voluminous documents Plaintiffs cite to support them. See Gardner v. First Am. Title Ins. Co., 218 F.R.D. 216, 218 n.2 (D. Minn. 2003) ("[J]udges are not like pigs, hunting for truffles buried in [exhibits] and need not excavate masses of papers in search of revealing tidbits . . . .") (cleaned up) (citations

omitted). The Employee Handbook, which is part of Plaintiffs' Exhibit G, is not evidence of what District officials testified to actually knowing.

Regarding documentation of disability complaints, AT's affidavit states that during the October 14, 2015 IEP meeting, he told "the District" that its decision to give AJT less than a full day of school did not comply with the ADA and that this statement was documented in the meeting notes of Dan Wold, Cedar Island Elementary School Principal and Amy Stafford, Coordinator. (AT Aff. ¶ 19.) Plaintiffs' Exhibit D is a copy of meeting notes from the October 14, 2015 meeting. They are unattributed/unsigned. However, it seems clear the notes were written by someone in the District because the notes originally had AJT's name incorrect and later corrected with a pen or pencil. (Pl. Ex. D at 1.)

AT attests that he again complained that the District's refusal to provide AJT with a full day of instruction was discriminatory on October 19 or 20, 2015. (AT Aff. ¶ 21.) There is no citation to this complaint. AT further attests,

> For the next six years, in countless IEP Team meetings, Conciliation Conferences, and other school meetings with District officials, we consistently complained that our daughter was being discriminated against, regressing (or not progressing at the same rate as when she was in Kentucky), and that she deserved a full school day similar to typical students and as she received in Kentucky.

(Id. ¶ 25.) He also attests that although Emmons denied knowing anything about this dispute in her

deposition, he and GT met with Emmons more than once to complain about the District's discriminatory treatment of AJT. (Id. at 50.) AT believes that the Coordinators Emmons supervises dictated AJT's shortened day "and heard but ignored [Plaintiffs'] discrimination complaints."

> A properly supported motion for summary judgment is not defeated by self-serving affidavits. Rather, the plaintiff must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor. A plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor. Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment.

Hoeft v. Eide, No. 17-CV-2526 (MJD/LIB), 2018 WL 6991103, at *4 (D. Minn. Oct. 25, 2018) (cleaned up; citations omitted), R&R adopted, 2018 WL 6523450 (D. Minn. Dec. 12, 2018), aff'd, 784 F. App'x 967 (8th Cir. 2019).

Here, Plaintiffs paint with too broad a brush when they discuss "all" District officials or Fredrickson, their licensing and professional obligations, and who controlled their professional decision-making. The only evidence Plaintiffs cite in the record is the deposition testimony of Emmons. Plaintiffs cite generously to this document. Plaintiffs cite no other evidence relating to other officials. The only "policy" in evidence is the TSES, which, in part, details Due

Process in IDEA cases. (Pl. Ex. G at 24-25 (TSES).) The District appears to have followed this system by providing prior written notices and offering a conciliation conference, mediation, a facilitated IEP meeting, or a due process hearing. (Id.; AT Aff. ¶ 49 (AT stating that instead of offering a second IEP team meeting on July 11, 2022, Emmons offered Plaintiffs the options listed above).)

Even though Emmons was surprised by the District policy that states "[a] pupil may receive special education services in more than one alternative based on the IEP," her lack of knowledge did not rise to the level of bad faith or gross misjudgment. At most, she was negligent, which does not "clear the hurdle set by the explicit language of section 504." Bradley v. Arkansas Dep't of Educ., 301 F.3d 952, 956 (8th Cir. 2002) [Bradley I]. In addition, while the Court must accept AT's accusation that Emmons advised he and GT to hire a PCA for AJT rather than seek evening schooling, while insensitive, this remark did not rise to the level of bad faith or gross misjudgment.

In addition, despite Plaintiffs' statement that "direct, specific and repeated Parent complaints to the District that failure to provide A.J.T. a full school day is disability discrimination, documented in its own records" (Doc. 38 at 6), Plaintiffs have only provided evidence of two documented complaints. The October 14, 2015 IEP meeting notes state, "Dad asked if we will provide support in the evening. Amy shared that we don't provide both homebound and school support (modified). Dad felt that this might conflict with ADA. He wants Statute. His position is that she can handle a full day, it just can't start until Noon." (Pl. Ex. G at 14.) The ADA is mentioned again in the

November 16, 2015 PWN, which states that the IEP will remain in effect no later than January 14 when the team will re-evaluate and AT "will have the opportunity to look in a [sic] modified schedule through state, IDEA and ADA laws." (Id. at 29.) Plaintiffs include several IEPs and PWNs in Exhibit G. (Pl. Ex. G1 at 28-51.) However, Plaintiffs do not cite to them. Even if Plaintiffs had done so, none of the IEPs and PWNs appear to mention discrimination.

Likewise, the District has included 11 IEPs and PWNs in its exhibits but Plaintiffs do not cite them. (See Def. Exs. 4, 11, 16-22, 26, 31-32.) Even if Plaintiffs had cited to these exhibits, they would not support their allegations. Except for the two mentions of the ADA already discussed, none of these IEPs and PWNs state that Plaintiffs expressed concern that the District was violating the ADA or discriminating against AJT. One complaint is contained in the April 30, 2018 email AT sent to Fredrickson stating that he had sent complaints about the District to various state and federal agencies. (Def. Ex. 23.) The other complaint that mentions discrimination was apparently resolved by the appointment of Dr. Reichle to conduct an IEE. (Def. Ex. 25 (ALJ Decision) at 3-4.)

On the other hand, the District provides support for its arguments that it has "followed acceptable professional judgement and standards" as it made educational decisions. (Doc. 34 at 22.) In response to concerns from AJT's parents, the District lengthened AJT's school day past the ordinary 4:00 p.m. conclusion in elementary school and the ordinary 2:40 p.m. conclusion in middle school. The District also modified AJT's IEPs in response to Dr. Reichle's IEE.

(Def. Ex. 7 (Dr. Reichle IEE), 31 (July 1, 2019 IEP containing Dr. Reichle sticky notes), 32 (Sept. 18, 2019 IEP summarizing Dr. Reichle's IEE findings and incorporating several of his suggestions).) The District notes, however, that not even Dr. Reichle collected any data about AJT's availability for learning from 5:30 to 6:00 p.m. Emmons also testified that Fredrickson told her that AJT was making progress when she was enrolled at Cedar Island and that there were "a lot of meetings with the parents or parent." (Def. Ex. 1 (Emmons Dep.) at 98-99.)

Both Parties support their opinions regarding a reasonable number of hours for AJT's school day with Expert Reports. Both Parties also cite testimony of Dr. Breningstall. The District cites testimony stating that it would not hurt to ask if AJT's parents were willing to try instruction earlier in the day. (Def. Ex. 6 (Breningstall Dep.) at 32.) Plaintiffs cite Dr. Breningstall's administrative hearing testimony that starting school before noon would lead to "an inevitable worsening of [AJT's] problems" and that she could not see "on an experimental basis exposing [AJT] to an inevitable worsening of her problems." (Def. Ex. 5 (Breningstall Admin. Hr'g Test.) at 273-74.)

Contrary to Plaintiffs' assertion that Emmons denied ever meeting AJT's parents, she admitted meeting AT during a meeting that was also attended by Fredrickson where AT explained why he wanted services for AJT in the home and Fredrickson explained why she did not agree. (Def. Ex. 1 (Emmons Dep.) at 119-20.) Emmons also stated that she attended "a conciliation [conference]" with AT. (Id. at 124.) There is no mention of "discrimination" or "the ADA" in the August 25, 2020 Summary of

Conciliation Conference that documents this encounter. (Pl. Ex. G at 50-51 (Summ. of Conciliation Conference).) Thus, it seems that the disconnect between Emmons' statement that she knew nothing about investigations regarding Plaintiffs' complaints and AT's attestation that he and GT were in meetings with Emmons where they complained about AJT's instruction can be resolved by this fact.

Emmons admits being in two meetings with AT. These meetings were focused on AJT's IEPs. The conciliation conference was part of the District's IDEA dispute resolution process, which Emmons testified is a different process from the one used to address discrimination complaints. (Id. at 15 (TSES); Def. Ex. 1 (Emmons Dep.) at 48.) Therefore, the meetings she attended with AT likely focused on AJT's instruction and learning goals, not discrimination complaints. In addition, resolution of this issue is not material to resolution of this motion. See Amini, 643 F.3d at 1074 (explain that "a fact is material if its resolution affects the outcome of the case").

Regarding the "shifting reasons" that the District gave for why they did not provide AJT instruction both in school and in her home, in Osseo Area Schools, the Court held that the services in AJT's IEP were limited by the length of the traditional school day rather than by AJT's needs. 2022 WL 4226097, at *14. However, looking at the facts in the light most favorable to Plaintiffs, it is difficult to conclude that the District acted with bad faith or gross misjudgment.

Too many of Plaintiffs' arguments are unsupported and with all the District's attempts at conciliation, new IEPs, and inclusion of Dr. Reichel's suggestions, the Court cannot attribute "wrongful

intent" to the District. See B.M., 732 F.3d at 887 (a defendant's statutory noncompliance must reach a level of "wrongful intent" to establish § 504 or ADA liability); K.E. v. ISD No. 15, 647 F.3d 795, 805-06 (8th Cir. 2011) (under IDEA, IEP team must consider results of evaluations when developing an IEP); (see also Def. Exs. 7, 31, 32.) Importantly, the District argues that AJT's school days are not shortened due to its decisions but due to AJT's health.

Likewise, although the Court did not agree with the District that the intense 1:1 and 2:1 services AJT receives make up for the loss of instructional hours when the District made the same argument in Osseo Area Schools, 2022 WL 4226097, at *13, failure to provide AJT a FAPE under the IDEA, alone, does not mean the District discriminated against her.[3] Brantley, 936 F. Supp. at 657 (holding that a "mere violation of the IDEA" does not violate § 504).

While the District has not been perfect,

> [t]he reference in the Rehabilitation Act to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has

[3] The District's brief in this case was filed almost two months prior to the Court filing its decision in Osseo Area Schools.

> been made, and that a different placement must be required under [the IDEA], is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reason of his or her handicap. An evaluation, in other words, is not discriminatory merely because a court would have evaluated the child differently.

Monahan, 687 F.2d at 1170 (deciding case based on comparison to the Education for All Handicapped Children Act ("EAHCA"), which is now the Individuals with Disabilities Education Act ("IDEA")).

Under the circumstances presented here, the District's officials exercised professional judgment in a way that did not depart grossly from accepted standards among educational professionals by convening multiple IEP meetings, extending AJT's school day beyond the school day of her peers, implementing many of Dr. Reichle's suggestions into AJT's IEPs, and by insuring that AJT always has at least one and often two aids with her at school.

Failure to provide extended schooling at home was at most negligent based on Emmons' apparent failure to understand the TSES. The District states that AJT's day is shortened because LGS prevents her from attending school prior to noon and the District will provide morning instruction should AJT's situation change to allow her to attend school earlier in the day.[4] Thus, Plaintiffs have failed to show the

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[4] While not relevant to resolution of this motion, the Court notes that although it has appealed the decision, the District has complied with its order in Osseo Area Schools insofar as it has been providing in-home instruction from 4:30 to 6:00 p.m. See

District acted with bad faith or gross misjudgment. Plaintiffs have not only failed to state a prima facie case under § 504 or the ADA but have also failed to prove there is a question of material fact regarding whether they have stated such a prima facie case.

C. Retaliation Claims

1. Legal Standards

To establish a prima facie case of retaliation under § 504, AJT's parents must show (1) they were engaged in a protected activity, (2) the District took some adverse action, and (3) a causal connection between the activity and the District's action. Albright ex rel. Doe v. Mountain Home Sch. Dist., 926 F.3d 942, 953 (8th Cir. 2019) (citation omitted). The Eighth Circuit has not determined whether an adverse action against parents who exercised IDEA rights on behalf of their disabled child is an "adverse action" for a § 504 claim of retaliation. See Bradley ex rel. Bradley v. Arkansas Dep't of Educ., 443 F.3d 965, 976-77 (8th Cir. 2006) [hereinafter Bradley II] ("To the extent they are relying on actions taken against someone other than David, it is not clear that such actions can support a § 504 claim. The [parents] have identified no Eighth Circuit cases where action against a parent who is exercising IDEA rights on behalf of his disabled child has been determined to be 'adverse action' for a § 504 claim of retaliation," but not reaching the issue); see also Albright, 926 F.3d at 953 (summarily dispatching plaintiff's § 504 retaliation

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Pl. Ex. G5 (Jan. 3, 2022 PWN) at 26 (noting that District provides services from 4:30 to 6:00 p.m. "as a result of the ALJ order dated April 21, 2021").

claims on procedural and factual grounds, but not stating whether the claims were proper).

2. Plaintiffs' Arguments

Plaintiffs assert that the District retaliated against AJT's parents by (1) conducting "repeated, excessive, and unnecessary meetings without any good faith efforts to understand and serve AJT's individual needs, but were instead intended merely to wear her Parents down and into submission" (Amend. Compl. ¶ 60); (2) offering opinions regarding AJT's schooling and abilities that "were intended to insult, harass, intimidate, and coerce [her parents] into relinquishing AJT's right to a full school day in a manner likely to interfere with the enjoyment or exercise of ADA rights" (Id. ¶¶ 61-63); (3) suggesting that the only way AJT could have a full school day was if she could attend school on a standard school schedule, which was contrary to medical advice and was "without teacher or evaluation support" (Id. ¶ 64); (4) engaging in "glaring procedural violations" such as providing a shortened school day by "administrative fiat" without input from anyone who worked directly with AJT and based on "shifting excuses unrelated to her medical and educational needs," which were motivated by an intention to punish AJT's parents for their advocacy on behalf of their daughter, "to wear them down, and to force them to abandon their advocacy efforts in a manner likely to interfere with the enjoyment and exercise of ADA rights" (Id. ¶ 65-68); (5) refusing to implement Dr. Reichle's recommendations made after his independent educational evaluation despite not expressing disagreement with his recommendations "to spite [AJT's] parents" (Id. ¶¶ 75-76); and (6) refusing to provide AJT a full day of schooling when the District

never established that she needs a shortened day (Id. ¶¶ 77-79).

3. Analysis

The Court assumes without deciding that AJT's parents were engaged in protected activity when they advocated on behalf of AJT in the IEP process. However, the District's actions Plaintiffs assert were retaliatory were not. For support, Plaintiffs' state only, "There is strong evidence of retaliation and the connection to protected activity," with a footnote to "[AT] Aff." (Doc. 38 at 41 & n.181.) Again, a self-serving affidavit, without further evidentiary support, cannot overcome summary judgment. Hoeft, 2018 WL 6991103, at *4. Moreover, a closer look at Plaintiffs' arguments shows they do not establish a prima facie case because even if the District took negative actions against Plaintiffs, there is no evidence the actions were taken because of their advocacy.

First, as the District argues, it was obligated and/or entitled by District policy and various laws and rules to convene IEP meetings, conciliation conferences, mediations, and other informal forms of dispute resolution to attempt to craft AJT's IEPs. (Doc. 34 at 26-27 (citing Minn. R. 3525.2810 subpt. 3; Bradley II, 443 F.3d at 977; Dr. Breningstall Admin. Hr'g Test: "It doesn't hurt to ask.").) In addition, as discussed above, Plaintiffs insisted on more IEP meetings at certain times relevant to this case. See supra part II.B. Moreover, to the extent AJT's parents were upset by the early IEP proposals made by the District in spring 2018 as the Parties were preparing for AJT's transition to middle school (AT Aff. ¶¶ 27-30), the District was within its rights to propose draft IEPs "for review and discussion" as long as AT and

GT were allowed to comment on them. See Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657 (8th Cir. 1999). Therefore, reason 1 does not establish a prima facie case of retaliation. Moreover, in the course of those meetings, IEP team members certainly discussed AJT's abilities and educational goals. Thus, in the absence of any cited support for Plaintiffs' arguments regarding harassment, insults, and intimidation, reason 2 does not support a prima facie case of retaliation.

Second, contrary to Plaintiffs' assertion, the District adopted several of Dr. Reichle's recommendations into AJT's IEP. (Def. Exs. 7, 31, 32.) Therefore, reason 5 does not establish a prima facie case of retaliation.

Third, to the extent District employees were less outgoing and chatty after Plaintiffs filed their lawsuit, Plaintiffs provide no support for these statements. (AT Aff. ¶ 47.) Furthermore, it is human nature to be more circumspect when employees learn about a lawsuit involving their employer and the subject of their own work. Emmons testified that she told AJT's teacher "to ignore the legal stuff that was going on, . . . to teach AJT well and do what she believed to be the right thing for AJT." (Def. Ex. 1 (Emmons Dep.) at 104.)

Finally, as the District asserts, even if District employees stated "that the only way AJT could have a full school day was if she could attend school on a standard school schedule" and the District provided a shortened school day by "administrative fiat" without input from anyone who worked directly with AJT, there is no evidence these things were done in retaliation for AJT's parents' advocacy. Likewise, though Plaintiffs assert the District proffered

"shifting excuses unrelated to AJT's medical and educational needs," and the District refused to provide AJT a full day of schooling when it never established that she needs one, there is no evidence that the District was retaliating against AJT's parents for their advocacy on behalf of their daughter. Throughout the briefs and voluminous exhibits associated with this case, it is obvious the Parties have fundamental differences of opinion regarding what constitutes a "full day" of instruction for a student who does not start school until noon. This disconnect is based on the Parties' interpretations of the facts and the law, not on the District's desire to retaliate against AJT's parents.

Even if administrative expediency was top of mind for the District when officials made scheduling decisions—as the Court found in Osseo Area Schools—evidence does not support that the District prioritized expediency as a form of retaliation. Thus, Plaintiffs have failed to prove there is a causal connection between actions taken by the District and their advocacy. Therefore, Plaintiffs have not only failed to state a prima facie case of retaliation, Bradley II, 443 F.3d at 976, but have also failed to prove there is a question of material fact regarding whether they have stated such a case.

D. IDEA Claims

Plaintiffs have filed a claim for violations of the IDEA. (Amend. Compl. ¶¶ 113-16.) As part of that claim, they assert the District has refused to implement the ALJ's Decision. (Id. ¶ 116.) AT states that the District failed to timely secure eye-gaze technology, assigned one of AJT's home-school teachers to another student and only re-instated her

to AJT when AT told the District he felt the reassignment was "continued animus and retaliation against our family," and attempted to create a home-school record that will show little or no progress by allowing teachers to cancel or arrive late for several home-school sessions and "secretly tracking" baseline data to support that outcome. (AT Aff. ¶¶ 39-47.) Because the ALJ's Decision was not implemented, Plaintiffs filed the previously-mentioned complaint with the MDE on June 9, 2021. (Amend Compl. ¶ 109.) The MDE found the District did not violate the ALJ's Decision. (Def. Ex. 27.)

On September 13, 2022, after briefing was completed in this case, the Court affirmed the ALJ's Decision. Osseo Area Schs., 2022 WL 4226097, at *21. Among other things, the ALJ concluded that AJT established that adding "the provision of eye gaze technology . . . would result in an educational program that is responsive to her individual needs . . . ." (Def. Ex. 25 (ALJ Decision) at 20.)

Plaintiffs have already filed one Motion for an Order to Show Cause why [the District] Should Not be Found in Contempt [of the Court's Order Affirming the ALJ's Decision]. Osseo Area Schs. II, 2022 WL 17082826, at *1. Plaintiffs asserted that the District was not complying with the Court's Order affirming the ALJ's Decision regarding compensatory hours of education. Id. at *1-2. Now that the Court has affirmed the ALJ's Decision, the appropriate way to seek relief for a violation of that Order is to file another motion for an order to show cause.

Filing a new IDEA claim in this or another case was never the appropriate way to obtain relief. As the District states, Plaintiffs' IDEA claim "is a thinly veiled attempt to re-litigate the issues . . . from the

due process hearing." (Doc. 34 at 30.) Except for limited exceptions not relevant here, federal courts do not have original jurisdiction over claims brought pursuant to the IDEA. Blackmon, 198 F.3d at 655-56 (discussing exhaustion); 20 U.S.C. § 1415(i)(2)(A). In addition, the statute of limitations for filing appeals of IDEA decisions is 90 days. 20 U.S.C. § 1415(i)(2)(B). Even assuming jurisdiction is proper in this Court, this "appeal," filed 104 days after the ALJ's Decision, is untimely.

Finally, even assuming the Court had jurisdiction over this claim, to the extent Plaintiffs wished to assert the claim in this Court, they had to do so as a compulsory counterclaim because the claim clearly arises out of the same transaction or occurrence that was the subject matter of Osseo Area Schools and no additional parties are required over whom the Court cannot acquire jurisdiction. See Fed. R. Civ. Pro. 13(a)(1). A compulsory counterclaim not asserted is waived. Schinzing v. Mid–States Stainless, Inc., 415 F.3d 807, 813 (8th Cir. 2005). Accordingly, Plaintiffs' claim is barred.

IV. ORDER

Based upon the files, records, and proceedings herein**, IT IS HEREBY ORDERED:**

Defendants' Osseo Area Schools, Independent School District No. 279 and Osseo School Board's Motion for Summary Judgement **(Doc. 31)** is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 1, 2023

s/Michael J. Davis
Michael J. Davis
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1399

A.J.T., a minor child, by and through her parents, A.T. and G.T.

Appellant

v.

Osseo Area Schools, Independent School District No. 279 and Osseo School Board

Appellees

Council of Parent Attorneys and Advocates, Inc.

Amici on Behalf of Appellant(s)

Minnesota Administrators for Special Education, et al.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota
(0:21-cv-01760-MJD)

[2024 WL 2845774]

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judges Grasz, Stras and Kobes would grant the petition for rehearing en banc.

Chief Judge Colloton did not participate in the consideration or decision of this matter.

June 05, 2024

Order Entered at the Direction of the Court: Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

20 U.S.C. § 1415

§ 1415. Procedural safeguards

* * *

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

* * *

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

* * *

42 U.S.C. § 12132

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279, Plaintiff - Appellant,

v.

A.J.T., BY AND THROUGH her parents, A.T. and G.T., Defendant - Appellee

Minnesota Administrators for Special Education; Minnesota Association of School Administrators; Minnesota Association of Secondary School Principals; Minnesota School Boards Association, Amici on Behalf of Appellant(s)

The Arc of the United States; Minnesota Disability Law Center; Council of Parent Attorneys and Advocates, Inc.; The Judge David L. Bazelon Center for Mental Health Law, Amici on Behalf of Appellee(s)

No. 22-3137

Submitted: October 18, 2023

Filed: March 21, 2024

[96 F.4th 1062]

OPINION

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Because of her disability, A.J.T. cannot attend school before noon. Her parents asked Osseo Area

Schools (the District) to provide evening instruction, but believing it had no obligation to educate A.J.T. outside of regular school hours, the District refused. The district court[1] concluded that this denied A.J.T. a "free appropriate public education" (FAPE). The District appeals, and we affirm.

I

A.J.T. has a rare form of epilepsy and requires assistance with everyday tasks like walking and toileting. She has seizures throughout the day, and they are so frequent in the morning that she can't attend school before noon. But she's alert and able to learn until about 6:00 p.m.

Before moving to Minnesota in 2015, A.J.T.'s Kentucky school district provided an individualized education program (IEP), *see* 20 U.S.C. § 1414(d), that included evening instruction at home. But the District wasn't as accommodating. Year after year, it denied A.J.T.'s parents' requests for evening instruction with a series of shifting explanations. The first year, it claimed that state law does not require it. The next year, it said it needed to avoid setting unfavorable precedent for itself and other districts. And later, it said that the home environment would be too restrictive and that it needed "data to substantiate this programming change."

From 2015 to 2018, while A.J.T. was in elementary school, the District provided intensive one-on-one instruction for 4.25 hours each school day.[2] Then, in

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

[2] The District initially offered instruction from 12:00 p.m. to 4:00 p.m.—the elementary school's standard end time. But

2018, the District prepared for A.J.T. to enter middle school. The middle school's standard day ended at 2:40 p.m., so the District proposed cutting back her day to about 3 hours. Despite the even shorter day, it again rejected her parents' request for evening instruction. It also rejected their various proposals to at least maintain her 4.25-hour day, including a proposal to continue keeping her at the elementary school.

Realizing that an agreement was beyond reach, A.J.T.'s parents filed a complaint with the Minnesota Department of Education. Their complaint kept A.J.T.'s 4.25-hour school day in place under the "stay-put" provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(j); *see also Hale ex rel. Hale v. Poplar Bluff R–I Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002) (per curiam), and led to a due process hearing before an administrative law judge (ALJ), *see* 20 U.S.C. § 1415(f)(1)(A).

After a five-day evidentiary hearing, the ALJ concluded that the District had denied A.J.T. a FAPE. The ALJ found that District officials improperly made "maintain[ing] the regular hours of the school's faculty" the "prevailing and paramount consideration" over A.J.T.'s needs and ordered the District to provide 495 hours of compensatory education and add certain services to her IEP, including at-home instruction from 4:30 p.m. to 6:00 p.m. each school day.

A.J.T.'s parents picked her up at 3:30 p.m. each day because they were concerned about her safety navigating the halls while other students were being dismissed, so the District later extended her school day by 15 minutes.

The District sought judicial review, *see id.* § 1415(i)(2)(A), and after receiving the administrative record and providing an opportunity to present additional evidence, the district court agreed with the ALJ, *id.* § 1415(i)(2)(C); *see also Minnetonka Pub. Schs., Indep. Sch. Dist. No. 276 v. M.L.K. ex rel. S.K.*, 42 F.4th 847, 852 (8th Cir. 2022) (standard of review in the district court). Specifically, the court found that after moving to the District, A.J.T. made progress in several areas like her desire and intent to communicate, use of eye gaze technology, ability to feed herself, and handwashing. But her overall progress was *de minimis*, and she regressed in other areas like communicating using hand signs, initiating and returning greetings using a prerecorded button switch, and toileting. The court also found that A.J.T. would have made more progress if she had received evening instruction and that a three- or four-hour school day was insufficient to pursue many expert-recommended goals. Ultimately, the court concluded that the District did not meet its burden to show that the ALJ erred in finding that the District denied A.J.T. a FAPE. *See E.S. v. Indep. Sch. Dist., No. 196, Rosemount–Apple Valley–Eagan*, 135 F.3d 566, 569 (8th Cir. 1998) (burden of proof).

II

Under the IDEA, children with disabilities are entitled to a FAPE. 20 U.S.C. § 1412(a)(1)(A). To get there, school districts must identify and evaluate a student's need for special education services and work with a team—which typically includes teachers, school officials, and the student's parents—to create an annual IEP. *Id.* § 1414(a)–(d). The IEP must include a statement of the student's academic and functional performance, describe how her disability

affects her learning, set out measurable goals, and track her progress. *Id.* § 1414(d)(1)(A)(i)(I)–(III); *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE–1*, 580 U.S. 386, 391, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017). And to be substantively adequate, it must be "tailored to the unique needs" of the individual student and "appropriately ambitious," meaning it must be "reasonably calculated to enable a child to make progress appropriate in light of [her] circumstances" and give her a "chance to meet challenging objectives." *Endrew F.*, 580 U.S. at 401–04, 137 S.Ct. 988 (citation omitted).

Judicial review in IDEA cases "is, in reality, quite narrow." *Petersen v. Hastings Pub. Schs.*, 31 F.3d 705, 707 (8th Cir. 1994). Courts are limited to reviewing whether the school district followed the IDEA's procedures and whether the student's IEP provided a FAPE. *Id.* (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). A district court must "make an independent decision, based on a preponderance of the evidence, whether the IDEA was violated," but it "must nonetheless give due weight to the administrative proceedings." *M.L.K.*, 42 F.4th at 852 (citation omitted). On appeal, we review the district court's factual findings for clear error and its determination of whether the school provided a FAPE *de novo*. *Id.*

As an initial matter, we reject the notion that the IDEA's reach is limited to the regular hours of the school day. Neither the District nor *amici* identify anything in the IDEA implying—let alone stating—that a school district is only obligated to provide a FAPE if it can do so between the bells. So we wade

into the finer details of A.J.T.'s IEPs to determine whether she received a FAPE despite the short day.

Several things convince us that she did not: First, A.J.T. made *de minimis* progress overall. Second, she regressed in toileting, and at one point, the District even removed the toileting goal from her IEP because there was not enough time in the short school day. And third, A.J.T. would have made more progress with evening instruction. The District disputes each point, so we discuss them in turn.

A.

The District argues that the district court clearly erred in finding that A.J.T.'s overall progress was *de minimis*. It says that her progress was significant in "many" areas and that even minimal progress was "remarkable" given her disability. We are unconvinced.

The District cites only slight progress in a few areas, and even one of the District's own experts agreed that A.J.T.'s progress was minimal. According to the District's progress reports, A.J.T. met none of her annual goals in 2016 or 2017. By the end of 2018, she had met a few short-term objectives[3] but still hadn't met any annual goals. The record contains no progress reports for 2019. And in 2020, she again met only a few objectives and not a single goal. Based on this, the district court did not clearly err in finding that A.J.T.'s overall progress was *de minimis*.

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[3] A.J.T.'s progress reports consist of multiple "annual goals," each of which include several "short term objectives."

A.J.T.'s limited progress is strong evidence that the District denied her a FAPE,[4] as a student making "merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all." *Endrew F.*, 580 U.S. at 402–03, 137 S.Ct. 988 (cleaned up) (holding that the FAPE standard is "markedly more demanding").

B.

The District also quibbles with the district court's findings that A.J.T. regressed in toileting and that the District removed her toileting goal for lack of time. It questions whether A.J.T. ever had success voiding on the toilet and claims that the IEP team removed the toileting goal in 2017 because it didn't expect that she could make any progress. The record tells a different story.

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[4] The District says that we should nonetheless ignore A.J.T.'s *de minimis* progress overall and her regression in toileting because "[a]n IEP is a snapshot, not a retrospective, and we must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808 (8th Cir. 2011) (cleaned up) (citation omitted). But here, the District had more and more information about A.J.T.'s instructional needs and insufficient progress each year. This is not a case where it only became apparent that the student's IEP was inappropriate after the fact. *Cf. id.* (holding that "it would be improper for us to judge [the student's] IEPs in hindsight" because the school district had "contradictory information about whether [the student] suffered from bipolar disorder" when it drafted them). Rather, A.J.T.'s limited progress and regression was both predictable and known, so it is properly considered as an "important factor" in our analysis. *See C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 989 (8th Cir. 2011) (citations omitted).

A behavior analyst who worked with A.J.T. in Kentucky testified that she was voiding on the toilet 45% of the time by the end of their work together, and A.J.T.'s father testified that when they moved to the District, she was voiding on the toilet 50% of the time at home and was making progress voiding on the toilet at school. By 2016, District records noted that A.J.T. was having "some successes" voiding on the toilet but was not meeting her goal of a 50% success rate. Then, in 2017, District officials observed that A.J.T.'s success was "inconsistent" and decided to cut the goal "due to the time constraint of [her] shortened day." The next year, the District changed course and reinstated the goal, noting her "need for instruction in activities of daily living" and that "[w]ith fewer trips to the bathroom," she was now having "minimal success." The District's records are clear that A.J.T. regressed in toileting and that it removed her toileting goal for lack of time in the short day—not for lack of ability to improve.

A.J.T.'s toileting ability is essential for her to live a healthy and dignified life, and the District's failure to take steps to address that goal violated its obligation to provide a FAPE.

C.

Finally, the District says that the district court erred by considering expert testimony that A.J.T. would have benefitted from evening instruction because doing so amounted to requiring it to "maximize a student's potential or provide the best possible education at public expense." *Albright ex rel. Doe v. Mountain Home Sch. Dist.*, 926 F.3d 942, 950 (8th Cir. 2019) (citation omitted).

But asking whether A.J.T. would have made more progress with evening instruction isn't about maximizing her potential—it's about whether the District's purely administrative decision not to provide evening education caused her *de minimis* progress and regression. *Cf. M.L.K.*, 42 F.4th at 852–54 (reasoning that the school district did not violate the IDEA by failing to identify the student's most debilitating disabilities because its failure did not cause any lack of progress); *Indep. Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 562 (8th Cir. 1996) (holding that there is no IDEA violation when an IEP's procedural inadequacies are harmless). The expert testimony shows that the District's choice to prioritize its administrative concerns had a negative impact on A.J.T.'s learning.

Considering that A.J.T. made *de minimis* progress overall, that she regressed in toileting, and that she would have made more progress with evening instruction, we see no error in the district court's conclusion that the District denied her a FAPE. None of the District's explanations for refusing to provide evening instruction have ever been grounded in A.J.T.'s individual needs, as required by the IDEA. And it still has not offered a "cogent and responsive explanation for [its] decisions" showing that A.J.T.'s IEPs were "reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances." *Endrew F.*, 580 U.S. at 404, 137 S.Ct. 988.

III.

We affirm the district court's judgment.