No. 24-249

In the Supreme Court of the United States

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

v.

OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279, ET AL.,
RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner, a student with disabilities, filed suit against respondents, her school district and school board, under the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794. Petitioner alleged that respondents discriminated against her when providing disability services respondent was required to provide under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. Consistent with every court of appeals to consider the question, the Eighth Circuit held that a plaintiff bringing such a claim is required to make a showing of discriminatory intent. The Eighth Circuit further held that petitioner had failed to make that showing on the facts of this case. The question presented is:

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

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INTRODUCTION

This case concerns two distinct but complementary statutory schemes. The Individuals with Disabilities Education Act (IDEA) guarantees appropriate educational services to students with physical or mental disabilities. The ADA and the Rehabilitation Act protect students from disability discrimination. As applied to the provision of IDEA services, the overlap between these statutes leads to a "conceptual peculiarity" that exists only in this context. *Timms v. Metro. Sch. Dist.*, 722 F.2d

1310, 1318 (7th Cir. 1983). Specifically, it is possible for a student with a disability to bring a claim under the ADA and the Rehabilitation Act alleging that a school has discriminated against her by not developing and implementing an appropriate special education program under the IDEA—a program that she is only entitled to because of the IDEA.

For more than forty years, courts of appeals considering this unique subset of ADA and Rehabilitation Act claims directly challenging IDEA educational services have widely recognized that plaintiffs must establish more than a bare violation of the IDEA. Instead, those courts have appropriately developed a "sensible remedial scheme that best comports with" the implied causes of action in the ADA and the Rehabilitation Act. *See Gebser v. Largo Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). That scheme requires plaintiffs to show that school professionals acted with discriminatory intent by demonstrating that their decisions were premised on "bad faith or gross misjudgment."

This Court should decline petitioner's request to overturn these longstanding precedents. To start, petitioner fails to show any meaningful disagreement in the circuits over the appropriate discriminatory intent standard. As to damages claims, petitioner elevates form over substance. While the circuits sometimes use different verbal formulations to describe the intent standard, they agree an intent standard exists; that it is high; and that it requires a deviation from accepted professional practices. As to injunctive relief claims, there is no disagreement at all. No opinion of any court of appeals embraces petitioner's view that plaintiffs alleging the kind of discrimination claim at issue here—*i.e.*, an educational-services discrimination claim based on

disagreement with an IEP—can succeed without proving discriminatory intent. Petitioner's contrary argument relies on cases involving entirely different kinds of discrimination claims and out-of-context snippets of dicta.

Moreover, petitioner fails to show that courts' differences in wording routinely lead them to reach different results under these two statutes. Certainly that was not the case here. As both courts below found, the District did not ignore petitioner's needs. To the contrary, the evidence demonstrates that the District reasonably responded to the disagreement over the length of petitioner's school day by making persistent efforts through the IDEA process, all while petitioner was making progress. Although petitioner's parents disagree with some decisions the District made, those disagreements do not evince discriminatory intent under any standard used in any circuit. In any event, through a separate suit petitioner has already received injunctive relief and compensation for her FAPE denial. A decision in her favor would make little difference, and this case is accordingly a very poor vehicle for addressing the question presented.

Finally, the decision below does not warrant review because it is correct. This Court has repeatedly cautioned courts against "substitut[ing] their own notions of sound educational policy for those of the school authorities." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 404 (2017). In this unique context, courts must balance the Rehabilitation Act and ADA's prohibition on disability discrimination with educators' responsibility for determining appropriate special education services, which is "often necessarily an arguable matter." *See Monahan v. Nebraska*, 687 F.2d 1164, 1170-71 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). The "bad faith or gross misjudgment" standard

properly accounts for the need for "deference" "based on the application of expertise and the exercise of judgment by school authorities," *id.*, while still reining in abuses by educators who violate professional standards, deliberately target students with disabilities, or completely ignore their needs. This is not such a case, and the court of appeals rightly affirmed judgment in favor of the District.

STATUTORY PROVISIONS INVOLVED

The IDEA, 20 U.S.C. § 1415(*l*), provides:

> 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.

The Rehabilitation Act, 29 U.S.C. § 794, provides in relevant part:

> 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 ADA, 42 U.S.C. § 12132, provides:

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.

STATEMENT

A. Legal Background

1. Originally titled the Education for All Handicapped Children Act, the IDEA requires public schools to provide students with disabilities a "free appropriate public education" (FAPE). 20 U.S.C. § 1400(d)(1)(A). That education must be tailored to meet the student's "unique needs," rather than conform to what is provided to the broader student body. *Id.* Accordingly, the IDEA requires that educators, parents, and the student collaborate annually to develop an "individualized education program" (IEP), which the school must then implement. *Id.* § 1414(d). Each IEP has different goals, services, and modifications to the student's education, because an appropriate education "turns on the unique circumstances of the child for whom it was created." *Endrew F.*, 580 U.S. at 404.

Recognizing that the prompt resolution of educational concerns is critical for positive outcomes, Congress set forth "elaborate and highly specific procedural safeguards" that must be followed when a student (or her parents) alleges that a public school is failing to provide a FAPE. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982); *see* 20 U.S.C. § 1415. These procedural safeguards provide multiple avenues for the timely resolution of IDEA claims.

A complaint from a student or her parents usually triggers a "[p]reliminary meeting," where the parties can

discuss the student's needs and come to consensus about the contents of an appropriate IEP. 20 U.S.C. § 1415(f)(1)(B)(i). Alternatively, the parties can choose formal mediation. *Id.* § 1415(e). If the school has not resolved the complaint within 30 days, the matter proceeds to a "due process hearing" before an impartial hearing officer. *Id.* § 1415(f). At the conclusion of the hearing, the hearing officer may order injunctive relief, such as the implementation of a new IEP, and equitable relief, such as monetary compensation for past educational expenses or "compensatory education" funds for future educational expenses. *See Strawn ex rel. Karl C. v. Mo. State Bd. of Educ.*, 210 F.3d 954, 957 (8th Cir. 2000).

Only after the hearing can an aggrieved party challenge the hearing officer's order in federal court, where the reviewing court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii); *see also id.* at § 1415(i)(3)(b) (attorney's fees); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985) (compensation for educational expenditures). During the pendency of the administrative hearing or federal judicial review, the student's current IEP remains in effect unless the school and parents agree otherwise. 20 U.S.C. § 1415(j).

2. The ADA and the Rehabilitation Act offer broad antidiscrimination protections for both children and adults with disabilities. The Rehabilitation Act forbids any federally funded "program or activity" from "discriminat[ing]" based "solely" on disability; the ADA applies the same prohibition to any "public entity." 29 U.S.C. § 794(a); 42 U.S.C. §§ 12131-12132. Courts agree that claims under the ADA and the Rehabilitation Act generally "live and die together, as 'the enforcement, remedies, and rights are the same under both.'"

Pet.App.2a (quoting 42 U.S.C. § 12133); *see also, e.g.*, *McDonald v. Pa. Dep't of Pub. Welfare*, 62 F.3d 92, 95 (3d Cir. 1995); *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995).

In the employment and post-secondary education contexts, both statutes require covered entities to make reasonable accommodations to prevent discrimination, such as by adjusting an employee's work schedule or allowing for service animals. *See* 28 C.F.R. § 35.130(b)(7) (ADA); *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (Rehabilitation Act); *see also Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 170 (2017). In elementary and secondary-school contexts, however, the Rehabilitation Act requires school districts to provide students with a disability a FAPE. 34 C.F.R. § 104.33. While this obligation is commonly (and incorrectly) referred to as providing "reasonable accommodations," it is, in fact, a different standard. One way that a school district can satisfy its FAPE obligation under the Rehabilitation Act is to comply with the IDEA's IEP requirements. *Id.* § 104.33(b)(2).

Unlike the IDEA, the ADA and the Rehabilitation Act do not set forth prerequisites to judicial review; plaintiffs suing under these latter statutes (outside of the educational context) generally go straight to court. And when they do, they can seek two types of relief: "compensatory damages" and an "injunction." *Barnes v. Gorman*, 536 U.S. 181, 186-87 (2002).

The educational context gives rise to a subset of ADA and Rehabilitation Act discrimination complaints that substantially overlaps with—and is often "virtually identical" to—IDEA complaints. *Fry*, 580 U.S. at 160 (citation omitted). In these complaints, students with disabilities allege that their school discriminated against them because of the "denial of an appropriate public education (much as an IDEA claim would)." *Id.* at 161.

In these cases, the students can receive compensatory damages and, theoretically, injunctive relief. Compensatory damages are not covered by the IDEA, so a student bringing such a claim need not exhaust the IDEA's administrative procedures. *See Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 151 (2023). But because injunctive relief would require the school district to develop and implement an alternative IEP, the student must first exhaust the IDEA's administrative procedures. *See* 20 U.S.C. § 1415(*l*). As this Court has explained, this IDEA-prescribed process is necessary to avoid courts "substitut[ing] their own notions of sound educational policy for those of the school authorities." *Endrew F.*, 580 U.S. at 404.

B. Factual Background

1. Petitioner A.J.T. ("Ava") has a rare form of epilepsy that causes daily seizures and impairs her cognitive and physical functioning. Pet.App.50a. Ava communicates inconsistently using limited signs and cannot independently walk, feed herself, or use the bathroom. *Id.*; Pet.App.52a. As such, she qualifies for, and undisputedly requires, individualized educational services under the IDEA.

Ava became an Osseo Area School District student as a fourth grader in 2015, when her family moved to Minnesota from Kentucky. Pet.App.50a. In accordance with the IDEA's procedural requirements, before Ava started at Cedar Island Elementary School, the District held multiple IEP team meetings with her parents to discuss Ava's academic services, consider input from her medical providers, and address potential revisions to her education program. Pet.App.9a-10a.

As part of the IEP process, the District considered and adopted many of the accommodations that Ava had

received at her previous school in Kentucky. *Id.* There, Ava's school had provided for a noon start time. *Id.* The District adopted that accommodation, which was proposed by Ava's parents and her treating neurologist. *Id.*; Pet.App.12a. The District's initial IEP also offered 240 daily minutes of direct special-education instruction, which exceeded the 215 daily minutes provided by Ava's Kentucky IEP. Pet.App.10a. At all times at her Kentucky school, where the typical school day lasted 7 hours, Ava received at most 5.75 hours of total instructional time. Resp. C.A. Br. at 7-8; *see also* Pet. C.A. App. 302-03.

Ava's daily schedule at Cedar Island initially ran from noon to 4:00 p.m. Pet.App.50a n.2. Although Ava had never received a "regular"-length school day in Kentucky, Ava's parents requested an extended school day. *See* Pet.App.8a-10a. Because of Ava's demonstrated progress while attending Cedar Island, the District denied this request. Pet. C.A. App. 332. A few months later, however, in March 2016, the District offered to adjust Ava's school day to end at 4:15 p.m.—beyond the end of the regular school day—to provide her extra time to safely navigate the halls at school dismissal. Pet.App.50a n.2. Ava's parents accepted that proposal, which extended Ava's instructional time to 4.25 hours. Pet.App.10a. The District proposed a new IEP with equivalent hours in the spring of 2017, and Ava's parents gave implied consent. *See id.*; Resp. C.A. App. 144-45; Pet. C.A. App. 242-43.

2. In 2018, the District began preparing for Ava's transition to Maple Grove Middle School, where the school day ended at 2:40 p.m. After reviewing Ava's current seizure plan and medical needs, the District proposed a revised schedule that would have ended Ava's school day at 3:00 p.m. Pet.App.10a-11a; Pet. C.A. App. 335-37. This time, Ava's parents objected to the proposal

and instead requested "[h]ours of instruction similar to those currently provided" at Ava's elementary school. Pet. C.A. App. 341. The District also offered Ava additional extended-school-year services during the summer, which Ava's parents likewise rejected. *Id.* at 246-47, 331. Because Ava's parents refused to approve the District's proposal, Ava's previous IEP remained in effect pursuant to the IDEA's "stay-put" provision. Pet.App.10a; *see* 20 U.S.C. § 1415(j) (providing that "during the pendency of any proceedings" under the IDEA, "the child shall remain in the then-current educational placement"). As a result, Ava continued receiving 4.25 hours of daily instruction, which included specialized educational services during the regular school day and direct one-to-one educational and paraprofessional services from 3:00 p.m. to 4:15 p.m. each day. Pet.App.4a; Pet. C.A. App. 94-95, 258.

Pursuant to the IDEA, the District repeatedly offered to engage in mediation, conciliation, and facilitated IEP meetings to resolve the disagreement, but Ava's parents rejected those offers. Pet. C.A. App. 97, 182-83, 338. Through her parents, Ava subsequently brought an administrative IDEA claim challenging her IEP's adequacy. Pet.App.7a. She alleged that by providing her with 4.25 hours of dedicated educational instruction instead of the 6.5 hours of school time generally available to other students, the District had deprived her of a FAPE. *See* Pet.10-11.

The ALJ ordered the District to increase Ava's daily instructional hours from 4.25 to 5.75—the same hours she had received in Kentucky—and also ordered 495 hours of compensatory education instruction. Pet.10; Pet. C.A. App. 344, 366-69. The District appealed that order, but the United States District Court for the District of Minnesota affirmed. *Osseo Area Schs. v. A.J.T.*, 2022 WL

4226097, at *21 (D. Minn. Sept. 13, 2022). The District appealed again, but the Eighth Circuit also affirmed the ALJ's order. *Osseo Area Schs. v. A.J.T.*, 96 F.4th 1062, 1064 (8th Cir. 2024). As a result, there is an ongoing injunction requiring the District to "[e]xtend[] [Ava's] instructional day until 6:00 p.m.," thereby meeting the standard for "an educational program that is sufficiently ambitious in light of her circumstances." *A.J.T.*, 2022 WL 4226097, at *21.

3. Ava separately brought a parallel claim for disability discrimination under the ADA and the Rehabilitation Act based on the same factual assertions. Pet.10. She alleged that "[t]he District's violations of the IDEA also violated [her] rights under" the ADA and the Rehabilitation Act, and sought injunctive relief and damages. Compl. ¶¶ 106, 121, *A.J.T. v. Osseo Area Schs.*, 2023 WL 2316893 (D. Minn. Feb. 1, 2023). Specifically, she sought an injunction to enforce the ALJ's order, and to require the District to "comply[] with the procedures and standards required by federal special education and anti-discrimination laws." *Id.* at 24-25. Her complaint suggested that, without an injunction, the IEP she "obtained from the IDEA administrative hearing [was] insufficient to *permanently* secure [her] rights to a full school day equal to her peers," *id.* ¶¶ 109, 124 (emphasis added), because the "IDEA permit[s] school officials to revise IEPs 'periodically,'" Pet.10 (quoting 20 U.S.C. § 1414(d)(4)). Ava additionally sought damages to reimburse her for the money she spent on disability "evaluations," "special education," and "related services," remedies also available under the IDEA. Compl. ¶¶ 117-19, 132-34; *see Sch. Comm. of Burlington*, 471 U.S. at 371.

The district court rejected Ava's discrimination claims, finding that she had failed to show that the District

had acted with "bad faith or gross misjudgment." Pet.App.30a; *see Monahan*, 687 F.2d at 1170-71.

The district court explained that Ava provided no evidence supporting her assertion that the District "expressed ignorance of [her] discrimination complaints." Pet.App.26a; *see* Pet.App.27a ("The Court is unable to find support for these claims in the voluminous documents Plaintiffs cite."); Pet.App.28a ("There is no citation to this complaint."); Pet.App.29a ("Plaintiffs cite no other evidence relating to other officials."); Pet.App.33a ("Too many of Plaintiffs' arguments are unsupported.").

The district court further concluded that the District had "followed acceptable professional judgement and standards," Pet.App.31a, and that any "[f]ailure to provide extended schooling at home was at most negligent," Pet.App.35a. Indeed, the court explained, the District "conven[ed] multiple IEP meetings," "lengthened AJT's school day" in "response to concerns from [Ava]'s parents," "modified [Ava]'s IEP in response to" Ava's doctor's educational evaluation, and "insur[ed] that [Ava] always has at least one and often two aids with her at school." Pet.App.31a-32a, 35a. In other words, while the district court agreed that petitioner's IEP was not sufficient under the IDEA, it concluded that the District's attempts to meet that standard did not evince any discriminatory animus under the ADA or the Rehabilitation Act.

4. The Eighth Circuit affirmed. The court agreed with the district court that Ava had failed to demonstrate "bad faith or gross misjudgment." Pet.App.3a. It also agreed that "the District did not ignore [Ava]'s needs or delay its efforts to address them." Pet.App.4a. In particular, the court explained, District officials "met with [Ava]'s parents," "updated" Ava's IEP each year, provided Ava with "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 offered Ava "16 three-hour sessions at home each summer." *Id.*

5. The Eighth Circuit denied rehearing en banc. *A.J.T. v. Osseo Area Schs.*, 2024 WL 2845774, at *1 (8th Cir. June 5, 2024).

REASONS FOR DENYING THE PETITION

The Court should deny the petition for multiple reasons.

To start, there is no circuit conflict worthy of the Court's review. With respect to claims for damages, only the Third and Fifth Circuits have suggested a standard other than "bad faith or gross misjudgment." But all circuits to consider the question agree that an intent standard exists for damages claims, and they all agree that standard is a demanding one. Whether the standard is phrased as requiring "deliberate indifference" or "bad faith or gross misjudgment" has little practical effect. And while petitioner suggests that she would prevail under a "deliberate indifference" standard, the record here demonstrably proves otherwise.

Petitioner's claim of a circuit split with respect to claims for injunctive relief is even weaker. No court of appeals decision has addressed the discriminatory intent standard to obtain injunctive relief. That is not surprising. Injunctive relief in this context requires IDEA exhaustion, *see supra* p.8, sparing courts the need to address the standard in ADA and Rehabilitation Act cases.

Even if there were a substantial circuit split, this case would be a poor vehicle to address it. Petitioner's claims for damages and for injunctive relief would both fail under any conceivable standard. The District repeatedly sought

to meet petitioner's needs. That petitioner's parents disagree with the decisions the District made may be the basis for a claim under the IDEA—a claim petitioner brought and won—but it is not the basis for a claim of discrimination under the Rehabilitation Act or the ADA. The "bad faith or gross misjudgment" standard applied below correctly implements this common-sense conclusion, and thereby avoids the need for judges to play the role of school administrator.

I. This Case Does Not Implicate Any Meaningful Circuit Split.

Petitioner (at 14) asserts that the circuits have split over the standard for imposing liability under the ADA and the Rehabilitation Act for educational-services claims. She (at 17) characterizes the split as courts disagreeing in two ways: the "intent required for injunctive relief," and that for "damages." But there is little daylight between the circuits' standards for damages. And no circuits have ruled on the standard for claims seeking injunctive relief in this context, so there is no circuit split at all.

A. There Is No Meaningful Circuit Split Over the Standard for ADA and Rehabilitation Act Damages Claims in Education Settings.

As petitioner (at 7) acknowledges, "every circuit requires 'a showing of intent'" for ADA and Rehabilitation Act damages claims in educational settings. And despite petitioner's assertions (at 7-8, 17-18) to the contrary, there is no material distinction between the circuits' formulations of that intent requirement.

1. The Third and Ninth Circuits apply a "deliberate indifference" standard to damages claims. *See* Pet.17. Plaintiffs in these circuits can recover only if the defendant "fail[ed] to act" after the plaintiff "alerted" the

defendant to their "need for accommodation," or where "the need for accommodation was obvious, or required by statute or regulation." *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1207 (9th Cir. 2016) (citation omitted); *see also S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263-65 (3d Cir. 2013).

The Second, Fourth, Fifth, Sixth, and Eighth Circuits apply a "bad faith or gross misjudgment" standard. *See* Pet.15. Under that standard, plaintiffs can recover damages only if the defendant acted in "bad faith" or "substantially departed" from "accepted professional judgment, practice or standards." *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887-88 (8th Cir. 2013).

While this language is different, the substance is not. Indeed, courts recognize that an educational professional's failure to act upon being alerted of a child's need *is* a substantial deviation from accepted professional judgment and practice. For example, in *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975 (8th Cir. 2003), the Eighth Circuit held that a district court could find the school district "acted in bad faith or with gross misjudgment on the basis of its failure to return [the student]'s mother's repeated phone calls" regarding her son's safety and "required modifications to his accommodation plan." *Id.* at 982; *see also D.L. v. District of Columbia*, 730 F. Supp. 2d 84, 100 (D.D.C. 2010) (holding that defendants acted with bad faith or gross misjudgment where they "knew that their actions were legally insufficient, yet failed to bring themselves into compliance").

That overlap is consistent with the rule in other contexts involving state-provided services, where "to be held liable under the deliberate indifference standard, [the provider] must make a decision that is such a

substantial departure from accepted professional judgment, practice, or standards" that the decision must have been based on something else. 60 Am. Jur. 2d Penal & Corr. Insts. § 89 (2024); *accord Pearson v. Prison Health Serv.*, 850 F.3d 526, 539 (3d Cir. 2017) (citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)); *see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997) (finding that deliberate indifference requires "proof that a municipal actor disregarded a known or obvious consequence of his action").

Petitioner insists (at 2, 3, 13, 15, 16, 22, 24, 27, 30) that the "bad faith or gross misjudgment" standard is "uniquely stringent." But "deliberate indifference" is also a "stringent standard of fault," *Bryan Cnty.*, 520 U.S. at 410, that imposes a "high bar" for plaintiffs to clear, *Csutoras v. Paradise High Sch.*, 12 F.4th 960, 966, 969 (9th Cir. 2021). Courts thus routinely dismiss deliberate indifference claims where the facts alleged are "not egregious enough" to warrant relief. *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 271 n.10 (3d Cir. 2014).

In that respect, "[d]eliberate indifference is similar to the bad faith or gross misjudgment standard." *Alex G. ex rel. Dr. Steven G. v. Bd. of Tr. of Davis Joint Unified Sch. Dist.*, 387 F. Supp. 2d 1119, 1124 (E.D. Cal. 2005). Even courts that petitioner claims acknowledge a circuit split have difficulty parsing the difference, if any, between the standards. *See, e.g.*, *Myslow v. New Milford Sch. Dist.*, 2006 WL 473735, at *9 (D. Conn. Feb. 28, 2006) (assuming that "the standards are identical"); *J.L. ex rel. J.P. v. N.Y.C. Dep't of Educ.*, 324 F. Supp. 3d 455, 468 (S.D.N.Y. 2018) ("equat[ing] gross misjudgment with deliberate or reckless indifference"). These courts again and again find that plaintiffs failed to meet either standard, or met both standards. *See, e.g.*, *A.S. v. Mamaroneck Union Free Sch. Dist.*, 2024 WL 308211, at *9 (S.D.N.Y. Jan. 26, 2024);

E.M. ex rel. Guerra v. San Benito Consol. Indep. Sch. Dist., 374 F. Supp. 3d 616, 625-26 (S.D. Tex. 2019); *Est. of A.R. v. Muzyka*, 543 F. App'x 363, 365 (5th Cir. 2013); *A. v. Hartford Bd. of Educ.*, 976 F. Supp. 2d 164, 194 (D. Conn. 2013); *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F. Supp. 2d 529, 564 (S.D.N.Y. 2010).

2. Unsurprisingly and critically, petitioner identifies no case where the difference between bad faith and deliberate indifference was outcome determinative. This case is no exception. Petitioner (at 32) claims the decision below "explicitly acknowledged" that she "had presented evidence showing deliberate indifference," so her claims "would have survived summary judgment" had the Eighth Circuit adopted the deliberate indifference standard. But the decision below did not so hold.

The Eighth Circuit explained that petitioner "*may* have established a genuine dispute" about whether the District was "negligent or even deliberately indifferent"—not that she had indeed established such a dispute. Pet.App.3a (emphasis added). Indeed, the Eighth Circuit held, "the District *did not ignore* [Ava]'s needs or delay its efforts to address them." Pet.App.4a (emphasis added). As discussed, plaintiffs can recover damages based on deliberate indifference only if the educational professional "fail[ed] to act" on a known or obvious "need for accommodation." *Paradise Valley*, 815 F.3d at 1207 (citation omitted). Because the District acknowledged and acted promptly to address the need, the District could not have acted indifferently.

As the district court held, any "[f]ailure to provide extended schooling at home was *at most negligent*," Pet.App.35a (emphasis added), because the District readily "respon[ded] to concerns from [Ava]'s parents," Pet.App.31a. The District held IEP meetings and exchanged numerous emails with Ava's parents. Pet. C.A.

App. 341. It extended offers for mediation, conciliation conferences, and facilitated IEP meetings to better understand their concerns. *Id.* at 97, 182-83, 338-39. It even proposed providing Ava with additional home instruction over the summer on top of the three daily "extended school year" hours she already received. *Id.* at 246-47, 331. Ava's parents rejected all of this. Because "deliberate indifference must be a 'deliberate choice, rather than negligence or bureaucratic inaction,'" petitioner cannot show that her damages claim would have been resolved differently in a different circuit. *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009) (citation omitted).

B. There Is No Circuit Split Over the Standard for Injunctive Relief Under the ADA and the Rehabilitation Act for Educational-Services Claims.

With respect to petitioner's request for injunctive relief, there is no circuit conflict at all. Indeed, there cannot be. As discussed below, *infra* p.24, there is no injunctive relief available in ADA and Rehabilitation Act cases that challenge an IEP because an IDEA-compliant IEP meets the Rehabilitation Act's FAPE standard. *See Paradise Valley*, 815 F.3d at 1203; 34 C.F.R. § 104.33(b)(2). None of the IEP-related ADA and Rehabilitation Act cases petitioner cites resolved an injunctive relief claim. Thus, no circuit has opined on the standard for injunctive relief in these cases.

1. The Third Circuit has not addressed the standard governing education-related ADA and Rehabilitation Act claims that seek injunctive relief. All three cases on which petitioner (at 18) relies resolve only damages claims under those Acts.

In *S.H. ex rel. Durrell v. Lower Merion School District*, 729 F.3d 248 (3d Cir. 2013), the Third Circuit

addressed only claims seeking "compensatory education and monetary damages"—not claims seeking injunctive relief—because the plaintiff "admitted that she is not disabled and never has been disabled." *Id.* at 255. In *D.E. v. Central Dauphin School District*, 765 F.3d 260 (3d Cir. 2014), the plaintiff sought "only compensatory damages," and because the plaintiff had not demonstrated a genuine issue of material fact with respect to that claim, the Third Circuit did not "belabor [its] analysis" by addressing the showing a plaintiff would need to make to establish a prima facie case under the ADA and the Rehabilitation Act. *Id.* at 269 n.9. Finally, in *School District of Philadelphia v. Kirsch*, 722 F. App'x 215 (3d Cir. 2018) (unpublished), the plaintiffs sought only "tuition reimbursement"—again, not injunctive relief. *Id.* at 227.

2. The same is true in the Seventh Circuit. In the only case petitioner (at 19) cites, the plaintiffs "had moved to a different school district [by the time the case reached the Seventh Circuit], mooting their request for an injunction." *C.T.L. ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014). As a result, "[t]he Seventh Circuit in *CTL* did not address the issue of bad faith or gross misjudgment." *C.B. v. Bd. of Educ. of City of Chi., Dist. 299*, 624 F. Supp. 3d 898, 919 (N.D. Ill. 2022).

To support her claim to the contrary, petitioner (at 19) plucks from a footnote that the Seventh Circuit "does 'not require a showing of intentional discrimination'" for education-related injunctive relief claims. But that footnote merely states that failure-to-accommodate claims "generally" do not require such a showing, citing a single case from outside of the education context. *C.T.L.*, 743 F.3d at 528 n.4. Petitioner's "discussion of *CTL*" is therefore nothing more than "a red herring." *C.B.*, 624 F. Supp. 3d at 919.

If anything, after *C.T.L.*, the Seventh Circuit appears to have *adopted* the "bad faith or gross misjudgment" standard for injunctive relief claims under the ADA and the Rehabilitation Act in education settings. In *Stanek v. St. Charles Community Unit School District No. 303*, 783 F.3d 634 (7th Cir. 2015), the Seventh Circuit held that "something more than a bare violation of IDEA is required to establish disability discrimination in an educational program," citing Fourth Circuit precedent that applied the "bad faith or gross misjudgment" standard. *Id.* at 641 (citing *Sellers v. Sch. Bd. of the City of Manassas*, 141 F.3d 524, 528-29 (4th Cir. 1998)). The Seventh Circuit went on to explain that the plaintiff in *Stanek* had "alleged enough to state a plausible claim" because "his teachers tried to push him out of their classes [and] refused to comply with his IEP" because of "his autism and the extra attention he needed"—an indication of bad faith, if not gross misjudgment. *Id.*

3. Petitioner's three Ninth Circuit cases (at 18-19) face the same problem. In *Mark H. v. Hamamoto*, the Ninth Circuit never addressed injunctive relief because the "*sole remaining question* [wa]s whether Plaintiffs [we]re entitled to money damages." *Mark H. v. Lemahieu*, 372 F. Supp. 2d 591, 593 (D. Haw. 2005) (emphasis added), *rev'd sub nom. Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010).

In *A.G. v. Paradise Valley Unified School District No. 69*, 815 F.3d 1195 (9th Cir. 2016), the court was presented with whether an IDEA settlement agreement waived all claims under the ADA and the Rehabilitation Act. *Id.* at 1205-06. In answering no, the Ninth Circuit discussed the standard for injunctive relief, but never "evaluate[d] in the first instance whether plaintiffs ha[d] a valid [injunctive] claim," because the issue was not before the court. *Id.* at 1206.

And in *R.D. ex rel. Davis v. Lake Washington School District*, 843 F. App'x 80 (9th Cir. 2021) (unpublished), the Ninth Circuit did not rule on the standard for injunctive relief because it was not raised below. *See id.* at 83. The district court noted that the "standard applicable to Section 504 claims for equitable relief" was not in question and that the deliberate indifference inquiry would not resolve all potential ADA and Rehabilitation Act claims. *R.D. ex rel. Davis v. Lake Washington Sch. Dist.*, 2019 WL 2475001, at *4 (W.D. Wash. June 13, 2019).

4. Petitioner (at 19, 20 & n.3) also relies on *district* court cases in the First, Tenth, and Eleventh Circuits. But those decisions obviously do not bind their respective circuits (or even judges in the same district), and thus cannot create the kind of conflict that would warrant this Court's review. And in any event, many of those cases do not resolve ADA and Rehabilitation Act claims that seek injunctive relief. *See*, *e.g.*, *Swenson v. Lincoln Cnty. Sch. Dist. No. 2*, 260 F. Supp. 2d 1136, 1147 (D. Wyo. 2003) (only damages because plaintiff had already "graduated [high school]"); Compl. ¶¶ 19, 23, *Miles v. Cushing Pub. Schs.*, 2008 WL 4619857 (W.D. Okla. Oct. 16, 2008) (only "physical and emotional damages").[1]

II. This Case Is A Poor Vehicle to Resolve the Question Presented.

Even were there a circuit conflict worthy of this Court's consideration, this case would be a poor vehicle to address it.

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[1] In its Statement of Interest in *Robertson v. District of Columbia*, No. 24-0656 (D.D.C. Sept. 30, 2024), ECF No. 62, the United States "[r]el[ied] on the same cases cited in Ava's petition" and adopted Ava's understanding of the circuit split. Pet. Supp. Br. at 3. For the reasons stated above, the United States is similarly mistaken.

As explained above, *supra* pp.17-18, the question of whether "deliberate indifference" differs from "bad faith or gross misjudgment" for purposes of damages claims is irrelevant here because the District would prevail under either standard.

Petitioner also fails to show that adopting a different standard would make a difference in her claim for injunctive relief. Petitioner won her IDEA claim. *See Osseo Area Schs.*, 96 F.4th at 1064. The ALJ ordered the District to revise petitioner's IEP to include, among other things, at-home instruction after the regular school day, and to provide 495 hours of compensatory education. Pet. C.A. App. 366-69. Both the district court and the Eighth Circuit affirmed. *See A.J.T.*, 2022 WL 4226097, at *1; *Osseo Area Schs.*, 96 F.4th at 1064.

As a result, there is already an ongoing injunction in place requiring the District to "extend[] [Ava's] instructional day until 6:00 p.m.," thereby affording Ava a FAPE, or "an educational program that is sufficiently ambitious in light of her circumstances." *A.J.T.*, 2022 WL 4226097, at *21. A FAPE under the IDEA satisfies the District's obligation to provide a FAPE under the Rehabilitation Act as well. *See* 34 C.F.R. § 104.33(b)(2).

In her ADA and Rehabilitation Act claims, petitioner asks for an injunction to enforce the ALJ's order, and to require the District to "comply[] with the procedures and standards required by federal special education and anti-discrimination laws." Compl. at 25. The way petitioner structured these claims "shows that what she is really seeking is a FAPE." *Cooper v. Sch. City of Hammond*, 2023 WL 5898438, at *14 (N.D. Ind. Sept. 8, 2023). There is no additional injunctive relief available to her under the ADA or the Rehabilitation Act that she has not already obtained through her IDEA claim. *See Paradise Valley*, 815 F.3d at 1203 (holding that an IDEA-compliant IEP

meets the Rehabilitation Act's FAPE standard); 34 C.F.R. § 104.33(b)(2).

Petitioner (at 10) suggests that because the IDEA permits periodic revisions of IEPs, she might lose her current injunctive relief in the future. But under the IDEA's stay-put provision, once the ALJ-ordered IEP is in place, Ava "shall remain in" that IEP "unless the [District] and the parents otherwise agree." 20 U.S.C. § 1415(j). In other words, even if the District sought to alter Ava's current IEP due to changing circumstances, her parents already have veto power that allows them to preserve her current IEP. In these circumstances, a permanent injunction would add nothing to the relief Ava has already obtained.

III. The Question Presented Does Not Demand This Court's Intervention.

Petitioner (at 30) overstates the importance of the question presented and the consequences of a decision in her favor.

To start, the universe of plaintiffs with claims affected by the question presented is narrow. For educational discrimination plaintiffs not covered by the IDEA, such as college students, a "bad faith or gross misjudgment" standard does not apply (as petitioner herself points out). *See* Pet.29; *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). And for IDEA-covered plaintiffs bringing *claims* not covered by the IDEA—*i.e.*, non-FAPE discrimination claims—courts apply less-demanding standards even if they apply a "bad faith or gross misjudgment" standard to educational-services cases. *See, e.g.*, *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1177-78

(8th Cir. 2022), *vacated as moot*, 33 F.4th 1042 (8th Cir. 2022) (reasonable accommodation); *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 517 (5th Cir. 2013) (deliberate indifference); *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cnty.*, 819 F.3d 69, 76 (4th Cir. 2016) (same).

Moreover, in most cases, separate discrimination claims challenging educational services will not offer plaintiffs relief beyond what is already available under the IDEA. Plaintiffs covered by the IDEA generally must exhaust administrative avenues under that statute before suing under either the ADA or the Rehabilitation Act. *See Fry*, 580 U.S. at 157-58; 20 U.S.C. § 1415(*l*); *supra* p.8. An educational-services plaintiff awarded injunctive relief under the IDEA has no remaining injunctive relief to pursue, because the implementation of an IDEA-compliant IEP fulfills compliance with the FAPE standard under the Rehabilitation Act. *See, e.g.*, *Paradise Valley*, 815 F.3d at 1203.[2]

Although plaintiffs seeking only compensatory damages may bypass the IDEA administrative process, *see Perez*, 598 U.S. at 148, in the educational-services context, damages available under the ADA and the Rehabilitation Act will frequently mirror relief also available under the IDEA, *i.e.*, compensatory education

[2] Conversely, if an IDEA claim is unsuccessful, an ADA or Rehabilitation Act discrimination claim arising from the same facts is likely to be either wholly precluded or meritless, regardless of which standard of review is applied. *See, e.g.*, *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 863 F.3d 966, 972-73 (8th Cir. 2017) (holding that preclusion of ADA and Rehabilitation Act claims was appropriate where claims "grew out of or were intertwined with [IEP] allegations"); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 251 (3d Cir. 2013) (affirming summary judgment for school district on discrimination claims where parallel IDEA claim had been dismissed).

funds, expense reimbursement, and attorney's fees. *See Sch. Comm. of Burlington*, 471 U.S. at 371; 20 U.S.C. § 1415(i)(3)(B); *see also McDaniel v. Syed*, 115 F.4th 805, 821 n.9 (7th Cir. 2024) (precluding double recovery for the same harm). That is because neither punitive damages nor damages for emotional distress are recoverable for educational discrimination. *Barnes*, 536 U.S. at 189; *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 142 (2022), *reh'g denied*, 142 S. Ct. 2853 (2022). The damages available under the ADA or the Rehabilitation Act are, instead, compensatory: "given as a compensation, recompense, or satisfaction to the plaintiff" for actual damages incurred. *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876). In an educational-services case, actual damages relate to the denial of a FAPE—precisely the harm that the IDEA's remedies are designed to recompense. Accordingly, if a successful IDEA plaintiff brings separate discrimination claims arising from the same facts, the additional relief she stands to gain is minimal at best.

The facts of this case well illustrate the point. Petitioner does not identify any additional compensatory damages she would be entitled to receive beyond a temporal extension of the IDEA compensation she has already received. *See* Pet.10. Indeed, in almost any case, recovering compensatory damages in excess of relief available under the IDEA would be the result of an end run around the IDEA's two-year statute of limitations in order to recover over more time—here, six years. *See Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 (8th Cir. 2003).

Because the *substantive* damages available to educational-services plaintiffs are functionally the same, regardless of the statute or standard of review, there is no pressing need for the Court to take up the question of the

precise standard to apply to discrimination claims like petitioner's.

IV. The Decision Below Is Correct.

The "bad faith or gross misjudgment" standard applied by the decision below is both consistent with the ADA and the Rehabilitation Act, and appropriate in the education context.

1. The ADA and the Rehabilitation Act prohibit schools from discriminating against students with disabilities "solely by reason of [a student's] disability." 29 U.S.C. § 794; 42 U.S.C. § 12132. Although neither statute explicitly references an intent requirement, courts agree that to obtain compensatory damages, the student must make "a showing of *intentional* discrimination." *Durrell*, 729 F.3d at 262 (emphasis added) (collecting cases). That is because the ADA and the Rehabilitation Act expressly incorporate Title VI's rights and remedies, Pet.App.2a, and under Title VI, "compensatory damages" are unavailable "except for intentional discrimination," *Alexander v. Sandoval*, 532 U.S. 275, 282-83 (2001); *see also Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011).

Moreover, the private right of action petitioner seeks to enforce under Title II of the ADA and Section 504 of the Rehabilitation Act is judicially implied. *See Cummings*, 596 U.S. at 212. As a result, courts retain "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser*, 524 U.S. at 284. Exercising that latitude entails examining the "statute to ensure that [this Court] do[es] not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose." *Id.* It also requires ensuring that the private right of action does not permit federal courts to intrude too far into the "vital relations"

among states, schools, and students. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 685 (1999) (Kennedy, J., dissenting). Having "embarked on" the "endeavor" of allowing a private right of action that Congress did not create, courts are "duty bound to exercise [their] discretion with due regard for federalism and the unique role of the States in our system." *Id.*

2. The "bad faith or gross misjudgment" standard is an appropriate exercise of that discretion. Most importantly, it accounts for the unique nature of claims like petitioner's—that is, claims by students with disabilities regarding the appropriateness of their IEPs.

As courts have recognized, discrimination claims based on an IEP's adequacy are a "conceptual peculiarity" that "exists in the primary and secondary education context" because IDEA-funded schools must tailor education services to the needs of each student with a disability. *Timms*, 722 F.2d at 1318. In that context, simply alleging disparate treatment of a student with a disability is insufficient to prove discrimination because the IDEA *inherently requires* disparate treatment of each student with a disability. Instead, claims like petitioner's rest on allegations that otherwise-legitimate IEP services are not being provided in an adequate manner.

The "bad faith or gross misjudgment" standard permits courts to adjudicate these novel claims without requiring judges to "substitute their own notions of sound educational policy for those of the school authorities which they review." *Endrew F.*, 580 U.S. at 404 (citation omitted). The standard furthers this Court's directive that in cases involving IEPs, "deference" is required "based on the application of expertise and the exercise of judgment by school authorities." *Id.*; *see also Monahan*, 687 F.2d at 1171 (discussing the need for "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").

3. Petitioner's contrary rule, under which plaintiffs could obtain injunctive relief (and potentially damages) without any showing of intentional discrimination at all, would open the door for plaintiffs to end-run the statutorily prescribed IEP process and preempt school districts' facilitation of the IDEA. And it would transform every successful educational-services claim into an open-and-shut discrimination claim under the ADA and the Rehabilitation Act.

Petitioner's approach would frustrate the "federal policy embodied in the IDEA" of collaboration between educators, parents, and students and the "quick resolution of IDEA claims." *Strawn*, 210 F.3d at 957-58. Under petitioner's rule, plaintiffs could litigate discrimination claims that are effectively indistinguishable from IDEA claims, but without having to first follow the IDEA's collaborative process. And they could do so well after the expiration of the IDEA's limitations period, which was created to eliminate the "unreasonably long threat of litigation" that "raises the tension level," "breeds an attitude of distrust" between schools and parents, and inhibits the ability of schools and parents to "work[] cooperatively to find the best education placement and services for the child." H.R. Rep. No. 108-77, at 115-16 (2003).

This case is a clear example of the pitfalls of petitioner's approach. The District's alleged deliberate indifference reflects a disagreement between Ava's educators and Ava's parents over the amount of IDEA services Ava needs to make appropriate progress. That is an IDEA claim, not a discrimination claim. *Cf. Fry*, 580

U.S. at 172-73 (describing process of evaluating whether a FAPE is "really the gravamen of the plaintiff's … complaint"). And adjudicating it would require courts to "second-guess the expert administrators on matters on which they are better informed." *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) (citation omitted).

Consider petitioner's request for a "permanent" injunction. Pet.10. Petitioner essentially asks the courts to find that the provision of a school day shorter than the default provided to other students is automatically an act of discrimination—regardless of whether that decision was made as a matter of judgment pursuant to the IEP process. But there are many valid reasons why a student's IEP might require a school day that is shorter than the default, and courts have previously recognized that the ADA and the Rehabilitation Act do not categorically require schools to modify their policies to allow students with disabilities to attend school for a full, or "regular," school day. *See, e.g., DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist.*, 126 F.3d 1102 (8th Cir. 1997).

Moreover, the IEP that the ALJ devised and the district court affirmed complies with the IDEA's related "least restrictive environment" requirement. *See* 20 U.S.C. § 1412(a)(5). That provision requires institutions, where possible, to educate students with IEPs alongside other students in a typical classroom environment. *Id.* Thus, a school district is already obligated to align a student's school day to the default standard to the fullest extent possible. *Id.* Implementing a firm "instructional hours" requirement would potentially introduce confusion, supplant educators' judgment, and make school districts likely to err on the side of more instruction—even if possibly harmful to a student—in order to avoid the threat of litigation.

4. The "bad faith or gross misjudgment" standard does not yield the parade of horribles that petitioner (at 30-32) invokes. The IDEA instructs parents and schools to counsel together about adequately meeting the child's needs. *See* 20 U.S.C. § 1415. School districts cannot hide behind the IDEA to discriminate at will: They must engage in the IEP process and make decisions consistent with professional standards. But neither can parents strongarm school districts by disguising their IEP disputes as discrimination claims.

Again, the facts of this case are instructive. As the Eighth Circuit held, "the District did not ignore [Ava's] needs or delay its efforts to address them." Pet.App.4a. The District repeatedly engaged with Ava and her parents and tailored the IEP to Ava's needs. Pet.App.4a, 31a, 32a, 35a. The negotiations may give rise to a dispute about which actions were best or most appropriate, but there is no evidence of deliberate indifference.

Nor does the "bad faith or gross misjudgment" standard sanction "benign neglect," as petitioner claims. Pet.27 (quoting *Choate*, 469 U.S. at 295). In fact, *Choate* underscores that gross misjudgment, not deliberate indifference, is the appropriate standard. As the Court explained in that case, the Rehabilitation Act targeted unintentional discriminatory acts, like "architectural barriers," that were clearly not erected with the aim or intent of excluding persons with disabilities, yet had that result. *Choate*, 469 U.S. at 297. The Court thus held that conduct barred by the Rehabilitation Act need not be "fueled by a discriminatory intent." *Id.*

The "bad faith or gross misjudgment" standard takes this instruction into account by proscribing intentional conduct, bad faith, *in addition to* unintentional yet harmful conduct, gross misjudgment. By contrast, the

"deliberate indifference" standard still requires discriminatory intent, even if lower than bad faith.[3]

5. Petitioner (at 25-26) argues that Congress repudiated *Monahan*'s reasoning when it passed 20 U.S.C. § 1415(*l*). But section 1415(*l*) overruled *Smith v. Robinson*, 468 U.S. 992 (1984), not *Monahan*, and the two cases are distinct. This Court in *Smith* held that plaintiffs could not seek relief under the ADA or the Rehabilitation Act when an IDEA claim was available. *See* 468 U.S. at 1019-20. Section 1415(*l*) overruled that holding by making clear that the IDEA cannot limit the relief available under the ADA or the Rehabilitation Act: Those claims are separately available. Section 1415(*l*) does not, however, opine on the standard governing those claims. *See Fry*, 580 U.S. at 172-73 (discussing distinction between the IDEA and the Rehabilitation Act under section 1415(*l*)).

If any doubt remains, every circuit to adopt the "bad faith or gross misjudgment standard" has continued applying the standard after Congress enacted section 1415(*l*). *See* Pet.16-17. Thus, neither *Smith* nor section 1415(*l*) addressed the standard governing each cause of action—the question in *Monahan*.

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[3] Petitioner (at 28-29) asserts it is "bizarre" that the Eighth Circuit imposes a different standard of liability on elementary and secondary students than on college students. But colleges are not covered by the IDEA. *See* 34 C.F.R. § 300.2. Nor are colleges subject to the detailed FAPE requirements present for elementary and secondary students under Section 504 regulations. *Compare* 34 C.F.R. Part 104, Subpart D, *with id.* Subpart E. The "blueprints" for those regulations "come from" the IDEA. *C.T.L. ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 529 (7th Cir. 2014).

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

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