No. 23-

IN THE

Supreme Court of the United States

ANISHA H. ITUAH, BY HER GUARDIAN
ANGELA MCCKAY,

Petitioner,

v.

AUSTIN STATE HOSPITAL, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May an intellectually disabled woman who complained of rape and sexual assault while involuntarily committed to a State Hospital, but was disbelieved and ignored because of her disability, bring claims under the Americans with Disabilities Act, 42 U.S.C. § 12132, or the Rehabilitation Act, 29 U.S.C. § 794(a), for disparate treatment and deliberate indifference by reason of her disability?

PARTIES AND RELATED PROCEEDINGS

Parties

- Petitioner, Anisha H. Ituah, was the Appellant below and plaintiff in the district court.

- Respondent, Austin State Hospital ("ASH"), was an Appellee below and a defendant in the district court.

- Respondent, Catherine Nottebart, was an Appellee below and a defendant in the district court.

- Respondent, Stacey Thompson, was an Appellee below and a defendant in the district court.

Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Ituah ex rel. McKay v. Austin State Hosp., et al.*, No. 22-50305, U.S. Court of Appeals for the Fifth Circuit. Judgment entered May 3, 2023.

- *Ituah ex rel. McKay v. Austin State Hosp., et al.*, No. A-18-CV-11-RP, U.S. District Court for the Western District of Texas. The district court entered Judgment on March 22, 2022, and by order adopted the report and recommendation of the magistrate judge that had issued on November 18, 2021.

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The United States District Court's unpublished order adopting the report and recommendation of the magistrate judge, *Ituah ex rel. McKay v. Austin State Hosp.,* 2022 WL 17732330 (W.D. Tex. Mar. 21, 2022), is attached to this Petition as Appendix B, at 5a-7a.

The unpublished report and recommendation of the magistrate judge recommending grant of the defendants' motion for summary judgment, *Ituah ex rel. McKay v. Austin State Hosp.*, 2021 WL 9816615 (W.D. Tex. Nov. 18, 2021), is attached as Appendix C at 8a-41a.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

The unpublished Opinion of the United States Court of Appeals for the Fifth Circuit was entered on May 3, 2023.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Amendment

XIV, section 1, provides: "…nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, sec. 1.

29 U.S.C. § 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, 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. 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.

STATEMENT OF THE CASE[1]

The Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA") are federal laws providing for private civil causes of action, where a qualified individual with disability alleges discrimination by reason of that disability, from a public entity receiving federal funds. The pervasive influence and ubiquity of federal funds to state and local programs across the country grant outsized importance to this provision of law.

Because so many educational, medical, health, and employment related institutions receive federal funds, individuals with disabilities can, in many and varied contexts, invoke these federal laws to redress perceived discrimination and maltreatment on account of their disabilities. Accordingly, it is important to maintain correct and consistent interpretation of those laws across the United States. The leadership of these varied institutions will benefit from clear and consistent guidance

1. For a more detailed recitation of the facts in this case, please refer to the Court of Appeals Opinion and the District Court Report and Recommendation, attached in the Appendix.

to prevent future violations of the federal discrimination laws and comport their activities and policies to maximize accommodation of the disabled.

The special case of the disabled person involuntarily committed to institutions raises particular concern. The nature of the commitment or confinement necessarily deprives the disabled person of agency, while it places a higher duty on the institution to protect that individual.

The different courts of appeals across the country have confronted the issue of the intent on the part of the institution that sustains a successful claim under these laws. At minimum, direct and purposeful discrimination against the disabled is covered, but the circuits have varied, whether any other standard makes a defendant liable. Petitioner argued to the courts below, that a deliberate indifference standard, as the Court applied in *Davis v. Monroe Cnty. Bd. of Educ.*, in the educational context of severe student-on-student sexual harassment, should equally apply to a state hospital's obligation to protect an involuntarily committed patient from sexual assault by another patient. The deliberate indifference standard meets the intent elements of the two federal statutes and holds the responsible public entity accountable for the circumstances to which it may subject a vulnerable, disabled plaintiff.

The Fifth Circuit rejected the deliberate indifference standard, and thereby opposed itself to a majority of other circuits. While the First Circuit aligns with the Fifth on this issue, nearly all other circuits that have considered and addressed the issue have adopted the deliberate indifference standard. Only the Fourth Circuit appears

to have acknowledged the issue but avoided deciding; as of the date of filing, counsel has not found an opinion on the issue from the District of Columbia Circuit.

Accordingly, in Ms. Ituah's case, the Court may now take the opportunity to resolve the circuit split and establish uniform accountability for institutions caring for the mentally and intellectually disabled. The case cleanly presents the sole legal issue between two parties, the individual, disabled plaintiff and a sole state hospital. Thereafter, disabled patients might enjoy significant legal protections, no matter where in the Unted States they may geographically be committed for their care.

Further review is warranted not only to correct manifest error, but to resolve a conflict and provide guidance to the lower courts.

A. Factual Background

Petitioner, Anisha H. Ituah, is an intellectually disabled adult woman who was involuntarily committed at Austin State Hospital ("ASH") in January 2016. App. 2a, 9a-10a. At some point between the evening of January 7 and the morning of January 8, 2016, a male patient entered her room and climbed into her bed. App. 2a, 10a. Ms. Ituah claims she was assaulted and raped. App. 11a.

No physical evidence of the assault and rape was preserved: No sexual assault examination was performed; no video of the relevant ward was preserved; and Ms. Ituah's bed sheets and clothing were washed, rather than kept intact as evidence. App. 16a, 38a.

Ms. Ituah contended in her suit that ASH's deliberate indifference to her claim of rape directly caused this lack of evidence and deficient investigation. By not believing, or taking seriously, her claim of rape, because she is mentally disabled, ASH discriminated against Ituah by reason of that disability, thereby not following sound investigative practices or ASH's own internal procedures for preserving evidence in rape investigations.

Ms. Ituah testified that the assailant raped her in her room. She consistently testified, not only to her family and ASH staff in the immediate aftermath, but also in her interview with the Austin Police Department and in her deposition, that she was "raped" and "brutally raped." Ms. Ituah also consistently stated since the incident, that she "screamed" and was "yelling," but "[n]o staff came."

Ms. Ituah's mother, Angela McKay, testified that she spoke with ASH staff that night and insisted they perform a "rape kit" examination, but the ASH staff refused. Ms. Ituah herself testified that she asked for a baggy in which to preserve her clothes and bed sheets, but she was rebuffed. The staff instructed Ms. Ituah to put her clothes in a hamper, and they were then washed. No sexual assault examination was performed on Ms. Ituah.

Staff instructed Ms. Ituah to take a shower after her outcry. No one consulted the security video of the hallway outside Ms. Ituah's door; instead, ASH destroyed the video 30 days after the incident, in accordance with ASH practices for disposing of video when no incidents are reported.

The allegation below was that ASH not only was deliberately indifferent to the victim's and her family's direct requests for an investigation, but that ASH was deliberately indifferent to its own policies for investigating and preserving evidence after an allegation of sexual assault. ASH policy required notification of the police on request of the patient-victim or upon any allegation of crime (significantly, including even **attempted** sexual assaults), but ASH did not contact the Austin Police Department. The nurse who took Ms. Ituah's report of the assailant entering her room and noted that "he got on top of her and was making 'grinding motions'" nonetheless checked the box on her report that the allegation was **not** of "serious physical abuse or sexual abuse."

ASH failed to interview key witnesses at the time. The individual staff members who, according to ASH's own records, were first on the scene or played key roles in interviewing Ms. Ituah and her assailant, now claim absolutely no recollection of the incident. Yet despite the minimization of the assault in ASH's records, those records still indicate an attempted assault, for which ASH's own policies mandated evidence preservation. ASH notes record Ms. Ituah's description of the assailant "grinding on top of her," and that the assailant admitted that he "tried to have sex with her."

ASH contends it did not collect evidence because it did not know or realize a rape was alleged until months later. Based on Ms. Ituah's answers to questions, ASH alleges that it was never notified until months later that Ms. Ituah alleged rape. ASH further noted that, even as it did not take steps to collect or preserve evidence, ASH did refer the allegation to the Texas Health and Human Services Commission Inspector General for an investigation.

Corroborating Ms. Ituah's claims of her incident are the prior existing pattern of frequent sexual assault allegations at ASH in the years prior to Ms. Ituah's arrival. In the six years before her assault, there were 393 allegations of sexual assault at ASH. Only five of those allegations were "confirmed" after an investigation. Some ASH patients have a history of sexually predatory conduct. The ASH corporate representative called to testify on the subject was unaware of any specific instance in which a complaining witness had been referred to Austin Police or had a sexual assault examination -- yet these are each steps of ASH official policies for any report of assault or attempted sexual assault. Nor was she aware of any case in which video or physical evidence had been preserved.

ASH's corporate representative also confirmed that ASH had not taken any steps to prevent the sexual assaults that were reported by its patients at a rate of more than one per week: There were no security cameras on patient bedrooms; there are no panic button or call buttons within reach of patients' beds; and the patients' bedrooms are close to one another. After referring allegations of patient-perpetrated sexual abuse to the Department of Family Protective Services, ASH does not receive reports tracking whether the allegations have been confirmed.

ASH's deliberate indifference to the high incidence of sexual assault at the hospital effectively deprived Petitioner Ituah of access to the health care and other benefits provided by ASH and contributed to the unsafe conditions that resulted in the sexual assault in the night of January 7-8, 2016.

B. Proceedings Below

Ms. Ituah filed suit, by and through her guardian Angela McKay, against ASH in January 2018. The district court had jurisdiction under 28 U.S.C. § 1331 (Federal question) and 28 U.S.C. § 1343 (Civil rights). The Second Amended Complaint asserted individual and putative class claims against ASH as well as against the then-current superintendent of ASH, in his official capacity, and against the woman who had been superintendent of ASH at the time of the 2016 assault, for violations of Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act" or "RA"), 29 U.S.C. § 794; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; 42 U.S.C. § 1983; 42 U.S.C. § 1985, and various Texas constitutional and tort law claims. The District Court dismissed the claims under 42 U.S.C. § 1985 and the Texas law claims in July 2019. The District Court denied the motion for class certification in January 2020.

In April 2021, both ASH and the individual defendants moved for summary judgment on all remaining claims in the case. The Magistrate Judge filed a Report and Recommendation, recommending grant of summary judgment to ASH, in November 2021. Petitioner, Ituah, timely objected to the Report and Recommendation. App. 6a. On March 21, 2022, the District Court adopted the Report and Recommendation and granted Defendants' motions for summary judgment. App. 5a. The District Court entered final judgment dismissing the case on March 22, 2022. App. 7a.

Petitioner, Ituah, filed a timely Notice of Appeal to the Court of Appeals for the Fifth Circuit. App. 2a. She

appealed only the District Court's grant of summary judgment as to her claims against the institution, ASH, under the Rehabilitation Act and the ADA. App. 2a. On May 3, 2023, the Court of Appeals by unpublished, per curiam opinion, affirmed the judgment of the District Court. App. 1a.

REASONS FOR GRANTING THE PETITION

A. The case presents an important and recurring issue of federal law.

As the Court has previously explained, "when the State takes a person into its custody and holds [her] there against [her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [her] safety and general well-being." *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.,* 489 U.S. 189, 199-200 (1989). In this regard, "persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo,* 457 U.S. 307, 321-22 (1982).

Persons involuntarily committed yet who are also disabled, qualify for relief under the Rehabilitation Act and the Americans with Disabilities Act. Minor students in schools, prisoners in custody, and involuntarily committed patients in hospitals all are vulnerable to discrimination in fact and practice that can deny them access to, or deprive them of, the benefits of the institution, whenever the individual has a qualifying disability. *See*, *e.g.*, *Pennsylvania Dept. of Corr. v. Yeskey,* 524 U.S. 206, 211, 213 (1998) (Title II of ADA applies to prisoners and others "who are being held against their will").

Federal antidiscrimination law extends to a wide range of institutions that receive federal funds. Acting under authority granted in Section 5 of the Fourteenth Amendment, Congress explicitly authorized suits under Section 504 of RA and Title II of ADA against the States and their agencies, in abrogation of the Eleventh Amendment grant of state sovereign immunity. *Tennessee v. Lane,* 541 U.S. 509 (2004); *United States v. Georgia*, 546 U.S. 151 (2008).

In the case of plaintiffs with disabilities, the intent necessary to make out discrimination under the ADA can also be supplied by proof of deliberate indifference by an institution toward the qualified disabled individual. *See City & Cnty. of San Francisco, Cal. v. Sheehan,* 575 U.S. at 610 (recognizing but declining yet to decide if "an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees" because parties failed to brief the issue).

In *Davis v. Monroe Cnty. Bd. of Educ.,* 826 U.S. 629 (1999), the Court reviewed a Title IX sex discrimination claim to decide that "where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities," a lawsuit lies for misconduct between students "that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633. While the recipient of the federal funds can be responsible only for its own misconduct, its deliberate indifference in allowing known harm to take place can be that misconduct. *Id.* at 644-45. Analogous reasoning supports the claim in this case.

In the context of an institutionalized individual with disabilities, the acts or omissions of the institution, like ASH, can display deliberate indifference. The task for lower courts has been to determine what level of indifference and what material conditions or policies can be intentional discrimination in violation of the RA and ADA.

The issue can make the difference to relief of injured and vulnerable disabled persons in many public settings. The Court's decision on this Petition can decide and shape the outcome for many disabled victims across the country for years to come.

B. The decision of the courts below is wrong.

It was undisputed below that Petitioner, Anisha Ituah, is a qualified individual with a disability under the law. App. 9a-10a. Undisputed as well is the status of ASH as a public entity receiving federal funds. Although ASH is a State institution, Congress, in enacting ADA and RA, explicitly waived sovereign immunity and permitted State entities to be sued under the ADA. *United States v. Georgia,* 546 U.S. 151 (2008); *Tennessee v. Lane,* 541 U.S. 509 (2004).

The services and benefits offered by ASH to its patients included a safe and medically supportive environment for people with intellectual disabilities or mental illness severe enough to require commitment. By allowing conditions leading to sexual assault, and in the ineffective and deficient manner that ASH conducted (or did not conduct) investigation of that assault, ASH denied Ms. Ituah access to those services and deprived her of the benefits of her commitment to ASH.

The culpable intent of ASH in this matter is shown by the pattern of deliberate indifference exhibited by ASH and shown in the evidence introduced in the courts below. Petitioner argued below that deliberate indifference sustains a claim of discrimination against persons with disabilities in the same manner that this Court found deliberate indifference underpinned claims for discrimination under Title IX, in the case of *Davis v. Monroe County*, 526 U.S. 629.

The appellate panel chose not to apply the standard of deliberate indifference, but instead focused entirely on whether any of the complained conduct resulted from intentional targeting of, or invidious animus toward, Ms. Ituah's specific disability. Ms. Ituah was "not claiming that she was assaulted *because* she has a disability." *Ituah*, 2023 WL 3222848 at *1 (emphasis original); App. 3a. The failure of ASH to investigate according to hospital procedures may be "evidence of negligence, but it is not evidence of discrimination based on Ituah's disability." *Id.* And the court found no failure to accommodate Ituah's known disability, because it found no genuine dispute over the suggested measures that might have been taken. *Id.* at *2; App. 4a.

The court confused the alleged wrongdoer in this case – in dismissing the claims against ASH, it evaluated the motives instead of the assailant-patient. App. 3a. In so doing, the lower court avoided entirely the need to evaluate ASH and its policies and procedures in this instance according to the standard of deliberate indifference. App. 3a ("a discrimination claim under the ADA/RA requires showing discrimination **based on** the plaintiff's disability") (emphasis added).

In so doing, the court of appeals showed less willingness than the magistrate judge to consider and weigh the deliberate indifference argument. While acknowledging the concept as applied in *Davis v. Monroe County,* holding public entities liable for intentional discrimination under RA and ADA when they are deliberately indifferent to the safety of their disabled wards and charges, the Report and Recommendation (and the district court on its adoption) missed the point, by myopically focusing on the assailant-patient and his motives. *Ituah*, 2021 WL 981665 at *11; App. 37a-38a. Accordingly, the lower courts erred in dismissing the claim, stating "there is no evidence that Ituah was assaulted based on her disability." *Id.*

This Court has refused to view the ADA basis of intent so narrowly. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999) ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."). In recognizing the purposes of enacting both RA and ADA, this Court has observed, "[d]iscrimination against the handicapped was perceived by Congress 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 (1985). The true discriminatory conduct was the deliberate indifference of ASH to preventing, to crediting her report of, and then to investigating and responding to, the assault upon Ms. Ituah.

The Report and Recommendation and the courts below, however, denied this theory of culpable intent. Absent direct proof that ASH intentionally worked to harm or neglect Ms. Ituah precisely because of and on account of her disability, those courts refused to see

the offending conduct – the conduct of ASH, not of the assailant-patient — as violating the RA and ADA.

In taking this position toward the application of the RA and ADA, the Fifth Circuit stands in conflict with other circuits. The Fifth Circuit's position is in the minority, and it is contrary to the law.

C. Circuits are split as to this issue of federal law.

The Court of Appeals ruling continues the Fifth Circuit's stated position that, "[t]here is no 'deliberate indifference' standard applicable to public entities for purposes of the ADA or the RA." *Delano-Pyle v. Victoria Cnty., Tex.,* 302 F.3d 567, 575 (5th Cir. 2002).

Only one other Circuit agrees with the Fifth Circuit, that deliberate indifference cannot provide requisite intent to violate the RA and ADA in discriminating against qualified individuals with a disability. The First Circuit has ruled in the case of *Nieves-Marquez v. Puerto Rico,* 353 F.3d 108 (1st Cir. 2003), that claims under RA and ADA cannot succeed absent "evidence of economic harm or animus toward the disabled." *Id.* at 126-27.

All other circuits that have considered this issue take the approach that Petitioner, Ituah, advocates. *E.g.*, *Loeffler v. Staten Island Univ. Hosp.,* 582 F.2d 268, 275-76 (2d Cir. 2009); *S.H. ex rel. Durell v. Lower Merion Sch. Dist.,* 729 F.3d 248, 263 (3d Cir. 2013); *Lacy v. Cook Cnty., Ill.,* 897 F.3d 847, 863 & n.33 (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); *Liese v. Indian Riv. Cnty. Hosp. Dist.*, 701 F.3d 334, 344-45 (11th Cir. 2012). *See also Koon v. N. Carolina,* 50 F.4th 398, 404 (4th Cir. 2022) (describing circuit split but refraining from choice of standard).

The import of the deliberate indifference standard becomes clear on examining the other circuits' opinions, to assess how Ms. Ituah might have fared had she sued in those locations. In *Beck v. Wilson*, 377 F.3d 884 (8th Cir. 2004), the Eighth Circuit applied the deliberate indifference standard to the fact pattern of an involuntarily committed woman sexually assaulted by a fellow male patient. 377 F.3d at 890.[2] Deliberate indifference of a hospital violated the ADA and RA in both the Second Circuit, *Loeffler*, 582 F.2d 586, and the Eleventh Circuit, *Liese*, 701 F.3d 334. The Tenth Circuit has found that failure to provide a safe environment for a disabled student at a technical school also can constitute deliberate indifference in violation of these federal civil rights statutes. *Powers*, 184 F.3d 1147.

Significant divergence of opinion, after a critical mass of opinions has issued from numerous circuits, calls for the Court to now settle the issue of deliberate indifference providing intent under RA and ADA. It should not have mattered that Ms. Ituah found herself in Texas and the Fifth Circuit, to determine the outcome of her lawsuit. The Court should grant the Petition and decide the circuit split.

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2. In *Beck*, however, the plaintiff did not invoke either RA or ADA as basis for the suit, and the Eighth Circuit applied a higher "shocks the conscience" standard to find no violation of substantive due process. 377 F.3d at 890-91.

D. This case is an excellent vehicle to decide the question presented.

This case comes to the Court in the posture of a grant of summary judgment. As such, the issues have been winnowed to clarify facts not in dispute and resulted in a lower court ruling narrowly focused on one element of the applicable law.

The Question Presented is one of legal interpretation. App. 33a ("The primary issue for the court is a legal one – does the ADA/RA extend to a claim where a qualified individual is assaulted while in a defendant's care."). The parties remaining are one public entity defendant, and one plaintiff individual with a qualifying disability who has made a claim under the RA and ADA in all respects, except the element of the defendant's intent – and the issue is the acceptability of the defendant's demonstrated deliberate indifference as the necessary intent to find the defendant liable.

The Fifth Circuit has ruled, in opposition to nearly all other circuits, that deliberate indifference cannot supply the intent to complete sufficient proof of violation of the RA and ADA. This Court should now take up this case to lay that dispute to rest.

CONCLUSION

In consideration of the foregoing Petition, Anisha H. Ituah, urges the Court to grant certiorari review to resolve these important questions of federal law. Petitioner respectfully requests that the Petition for Writ of Certiorari should be granted, the judgment of the Court of Appeals for the Fifth Circuit be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 3, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50305

ANISHA H. ITUAH, BY HER GUARDIAN, ANGELA MCKAY, ON BEHALF OF HERSELF AND THOSE SIMILARLY SITUATED,

Plaintiff—Appellant,

versus

AUSTIN STATE HOSPITAL; CATHERINE NOTTEBART; STACEY THOMPSON,

Defendants—Appellees.

May 3, 2023, Filed

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-11

Before GRAVES, HO, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Appendix A

Anish Ituah, an intellectually disabled woman, claimed she was sexually assaulted by a geriatric male patient, A.M., in the late evening or early morning of January 7-8, 2016, while in her room at the Austin State Hospital ("ASH"), where she was involuntarily committed. A report by the Texas Department of Family and Protective Services concluded A.M. mistakenly entered Ituah's room in his wheelchair—believing the room to be his and mistaking Ituah for his wife—climbed onto the bed, sat on Ituah's legs while remaining clothed, but then left when Ituah cried out. Ituah sued ASH and two hospital superintendents in federal court under various legal theories, including 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA"), and also sought class certification. *See* 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

Following extensive pretrial litigation and discovery, the district court denied class certification, leaving only two categories of claims: (1) Ituah's ADA/RA claims against ASH, and (2) Ituah's § 1983 claims against the superintendents. After summary judgment motions were filed by all defendants, the district court adopted the magistrate judge's recommendation to dismiss all of Ituah's claims with prejudice. Ituah now appeals only the summary judgment dismissal of her ADA/RA claims, which we review *de novo. See James v. Cleveland Sch. Dist.*, 45 F.4th 860, 864 (5th Cir. 2022); FED. R. CIV. P. 56(a).

Appendix A

Ituah presses three ADA/RA[1] theories on appeal. First, she argues ASH is liable for harassment by a fellow patient under our court's decision in *Estate of Lance v. Lewisville Independent School District*, 743 F.3d 982 (5th Cir. 2014). Among other things, *Lance* explained that a plaintiff must show she was harassed based on her disability. *Id.* at 996. Here, the district court concluded Ituah failed to show this element, and her appellate brief states that she "is not claiming that she was assaulted *because* she has a disability." Ituah reiterated this concession at oral argument. Accordingly, we affirm the summary judgment on this ground.

Second, Ituah claims ASH discriminated against her by failing to follow the hospital's internal policies concerning sexual assault claims. But a discrimination claim under the ADA/RA requires showing discrimination based on the plaintiff's disability. *See, e.g., Cadena v. El Paso Cnty.*, 946 F.3d 717, 723 (5th Cir. 2020) (requiring "that such exclusion, denial of benefits, or discrimination is by reason of [plaintiff's] disability" (quoting *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671-72 (5th Cir. 2004))). Ituah points to no such evidence. Even viewed most favorably to her, Ituah's evidence shows that hospital staff neglected to follow all relevant policies, such as by failing to order a "rape kit." Perhaps this is evidence of negligence, but it is not evidence of discrimination based on Ituah's disability. We therefore affirm the summary judgment on this ground as well.

1. Cases interpreting the ADA are generally applicable to the RA, and vice versa. *See, e.g., Cadena v. El Paso Cnty.*, 946 F.3d 717, 723 (5th Cir. 2020).

Finally, Ituah presses a failure-to-accommodate claim. That requires showing, *inter alia*, that ASH "failed to make 'reasonable accommodations'" for Ituah's known disability. *Amedee v. Shell Chem., L.P.*, 953 F.3d 831, 837 (5th Cir. 2020) (citation omitted). Ituah did not raise a genuine dispute on this issue, however. For example, her expert opined that poor "sightlines" prevented nurses from observing the door to Ituah's room. But unrebutted evidence showed "sightlines" played no role in patient monitoring; instead, ASH staff is trained to personally and directly monitor patient areas at regular intervals. Ituah's expert also suggested patient doors should have been lockable from the inside. But no evidence suggested this would have been a reasonable measure. To the contrary, ASH's unrebutted evidence detailed its policies and procedures designed to protect patients and also explained why internal door locks would have been "unwise and unsafe" for psychiatric patients. Accordingly, we affirm the summary judgment on this ground as well.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED MARCH 21, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:18-CV-11-RP

ANISHA H. ITUAH, BY HER GUARDIAN, ANGELA MCKAY,

Plaintiff,

v.

AUSTIN STATE HOSPITAL, ALAN R. NOTTEBART, CATHERINE NOTTEBART, AND JOHN DOES 1-5, EMPLOYEES OF AUSTIN STATE HOSPITAL,

Defendants.

March 21, 2022, Decided;
March 21, 2022, Filed

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Mark Lane concerning Defendants Catherine Nottebart and Stacey Thompson's

Motion for Summary Judgment, (Dkt. 146), and Defendant Austin State Hospital's Motion for Summary Judgment, (Dkt. 147). (R. & R., Dkt. 162). In his report and recommendation, Judge Lane recommends that the Court grant the motions. (*Id.* at 24). Plaintiff Anisha Ituah ("Ituah") timely filed objections to the report and recommendation. (Objs., Dkt. 166).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because Ituah timely objected to the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules Ituah's objections and adopts the report and recommendation as its own order. The Court does so despite Defendants' ill-advised attempts to minimize Ituah's allegation of rape. (*See* Resp. Objs., Dkt. 168, at 1-2) ("At best, Plaintiff's evidence shows that one patient sexually assaulted another patient on one occasion almost six years ago.").

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Mark Lane, (Dkt. 162), is **ADOPTED**. Catherine Nottebart and Stacey Thompson's Motion for Summary Judgment, (Dkt. 146), and Defendant Austin State Hospital's Motion for Summary Judgment, (Dkt. 147), are **GRANTED**.

IT IS FURTHER ORDERED that Ituah's claims are **DISMISSED WITH PREJUDICE**.

SIGNED on March 21, 2022.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES
DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, DATED NOVEMBER 18, 2021

A-18-CV-11-RP

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS, AUSTIN DIVISION

ANISHA H. ITUAH, BY HER GUARDIAN,
ANGELA MCKAY,

Plaintiff,

v.

AUSTIN STATE HOSPITAL, STACEY THOMPSON,
CATHERINE NOTTEBART, AND JOHN DOES 1-5,
EMPLOYEES OF AUSTIN STATE HOSPITAL,

Defendants.

November 18, 2021, Decided;
November 18, 2021, Filed

Appendix C

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

Before the court are Defendants Catherine Nottebart and Stacey Thompson's[1] Motion for Summary Judgment (Dkt. #146), Defendant Austin State Hospital's Motion for Summary Judgment (Dkt. #147), and all related briefing.[2] Having considered the parties' briefing and applicable law, and finding that oral arguments are not necessary, the undersigned submits the following Report and Recommendation to the District Court.

I. Background

A. Factual Background

The undisputed facts in this case are few: Plaintiff Anisha Ituah is an intellectually disabled adult woman

1. Stacey Thompson is the current Superintendent at Austin State Hospital. She was not originally named as a defendant but is automatically substituted for her predecessor, Alan R. Isaacson, pursuant to Federal Rule of Civil Procedure 25(d). Catherine Nottebart was the ASH Superintendent when the incident at issue occurred. Collectively, they are the "Superintendent Defendants."

2. The motions and related briefing were referred to the undersigned for a Report and Recommendation by United States District Judge, Robert Pitman, pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

who was involuntarily committed at Austin State Hospital ("ASH") in January 2016. During the late evening of January 7, 2016 or early morning of January 8, 2016, a male patient known as A.M. entered her room in his wheelchair and climbed onto her bed.

Defendants[3]—ASH, Nottebart, and Thompson—contend A.M. entered Ituah's room, mistakenly believing the room was his and the woman in the bed was his wife; sat on Ituah's legs as she had a sheet over her and he remained fully clothed; realized Ituah was not his wife when she yelled; returned to his wheelchair; and left the room. *See* Defs. Exh. A (DFPS Abuse and Neglect Investigative Report).[4] Under this version of events, no sexual assault occurred and thus there was no evidence of an assault that needed to be preserved. Defendants argue that "[m]onths later, Ituah began telling a different story." Dkt. #146 at 3; Dkt. #147 at 2.

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3. Because Defendants are generally aligned and ASH adopts the Superintendent Defendants' arguments, *see* Dkt. # 147 at 12 n.3, the court will collectively refer to them as Defendants except when necessary.

4. Defendants submitted the same exhibits to support both motions. Accordingly, the court will refer to them simply as Defendants' Exhibits. Similarly, the exhibits attached to Ituah's responses are nearly identical. Her response to the Superintendent Defendants' motion contains one additional exhibit—Nottebart's deposition excerpts. *See* Dkt. #152 at Exh. D. Accordingly, for convenience, the court will reference Ituah's exhibits as they are labeled at Dkt. #152, with the understanding that Exh. D was not submitted in response to ASH's motion.

Ituah concedes the DFPS Investigative Report includes her statement that she did not know "if he penetrated me," but argues A.M. admitted he "tried to have sex with her" and she has consistently reported a sexual assault. *See* Ituah Exh. G at D-00008, D-00009. She cites Progress Notes from a nurse that state Ituah reported a male patient "got on top of her and was making 'grinding motions.'" Ituah Exh. I at D-00575. Ituah contends that immediately after A.M. left her room, she called her sister and told her that she was raped. Ituah Exh. A (Ituah Depo.) at 23:18-23. She also contends she told ASH staff that she was raped, but they told her to go back to bed. *Id.* at 23:24-24:4. Ituah also reported the rape to her mother that night, and her mother contacted ASH and requested that a rape kit be done. Ituah. Exh. B (McKay Depo.) at 33:18-22, 125:11-15. Ituah also contends she requested a bag to store her bloody underwear but was told to put the underwear in a hamper to be washed and to take a shower, which she did. Ituah Exh. A (Ituah Depo.) at 55:20-56:8, 48:13-17; 52:23-25; 59:18-60:3.

Defendants contends the only remaining live claims are: (1) Ituah's claims against ASH under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, and (2) Ituah's § 1983 Equal Protection claim against Nottebart, in her individual capacity as the ASH's Interim Superintendent during January 2016, and Thompson, in her official capacity as ASH's current Superintendent.[5] Dkt. #146 at 3; Dkt. #147 at 3.

5. Ituah does not assert there are any other lives claims in the case. Ituah also named "John Does #1-5, Employees of Austin State Hospital" as additional Defendants in Plaintiff's Second Amended

Defendants have moved for summary judgment on these issues.

Relying on her expert's opinion, Ituah contends ASH's policies, procedures, and actions with respect to the prevention and investigation of Ituah's sexual assault failed to meet the standard of care typical of a state institution for patients with intellectual disabilities in numerous respects, including among others that:

- ASH failed to meet the standard of care for providing medical and psychological attention to Ituah after her sexual assault allegation;

- ASH's preliminary investigation created a de facto restrictive screening process that resulted in the failure to preserve evidence;

- The Memorandum of Understanding (MOU) for investigating sexual assaults fails to adequately cover situations in which a fellow patient is the alleged perpetrator;

- ASH staff failed to follow the procedures set forth in ASH's own Operations Manual;

Class Action Complaint, filed on September 13, 2018. *See* Dkt. #57. Ituah has never identified or served these purported "John Doe" individuals. Accordingly, Ituah's claims against any "John Doe" Defendants should be dismissed. *See* FED. R. CIV. P. 4(m) ("If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.").

• ASH failed to follow its own policies with regard to monitoring the whereabouts of patients;

• The investigator failed to assure adequacy of the safety plan and determine if it was being implemented;

• The Investigation was not conducted in a timely manner;

• The Investigation was insufficiently thorough because, among other reasons, a proper site visit and necessary interviews were not conducted, the investigators' document and record review were inadequate, and physical and video evidence was not preserved;

• Inadequate investigations at ASH increased the risk of assaults;

• Inadequate sightlines preventing the visual observation of Ms. Ituah's door from the nursing station violate the accepted standard of care;

• Patient rooms should be lockable by the patient from the inside, so long as staff has a key to open the door;

• ASH's policy of mixing individuals with intellectual and developmental disabilities (I/DD) with those with severe illness and failing to screen for vulnerability increased the risk;

> • Staff failure to follow ASH's own policies indicates a lack of adequate training about the signs and symptoms of assault, neglect, and exploitation; and
>
> • ASH failed to provide adequate information to patients about its sexual assault policies and how to report an assault.

Dkt. #152 at 11-12; Dkt. #153 at 12-13.

II. Summary Judgment Standard

Summary judgment is appropriate only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). The parties may satisfy their respective burdens by tendering depositions,

affidavits, and other competent evidence. *Estate of Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004). It is not the court's responsibility to hunt through the summary judgment record to determine if a party's arguments are supported by the record. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003) ("When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court."); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.").

The court will view the summary judgment evidence in the light most favorable to the non-movant. *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 221 (5th Cir. 2011). The non-movant must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Id.*

III. Adverse Inference

Ituah requests the court make an adverse inference against Defendants with respect to both motions. She argues:

> Defendants' failure to preserve critical evidence related to the sexual assault of Plaintiff has deeply prejudiced her ability to enforce her rights in this litigation and to seek justice for her assault. Plaintiff thus requests that this Court draw an adverse inference against the spoliator and find a fact issue on Defendants' failure to prevent or properly investigate the assault of Plaintiff.

Dkt. #152 at 20-21, #153 at 23. As all disputed fact issues are viewed in the light most favorable to the non-moving party, a finding of bad faith and an adverse inference is unnecessary and inappropriate at this stage of the litigation.

IV. Superintendent Defendants' Motion

Ituah asserts an Equal Protection claim against the Superintendent Defendants. Nottebart argues she is entitled to qualified immunity because Ituah cannot show the violation of a constitutional right or that such constitutional right was clearly established. Thompson similarly argues the claim against her fails because Ituah cannot show the violation of a constitutional right.

A. Supervisory Liability

"A supervisory official may be held liable . . . only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the

constitutional injury." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011) (citing *Gates v. Texas Dep't of Prot. & Reg. Servs.*, 537 F.3d 404, 435 (5th Cir. 2008)). A supervisor may also be liable for failure to supervise or train if: "'(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.'" *Id.* (quoting *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 446-47 (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). To establish that a state actor disregarded a known or obvious consequence of his actions, there must be "actual or constructive notice" that a policy causes constitutional violations and the actor nevertheless chooses to implement the policy. *See id.* at 447.

B. Qualified Immunity

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In reviewing a motion for summary judgment based on qualified immunity, courts engage in a two-pronged inquiry. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014). First, courts ask whether the facts, taken in the light most favorable to the plaintiff, show the official's

conduct violated a federal constitutional or statutory right. *Id.* Second, courts ask whether the right in question was "clearly established" at the time of the violation. *Id.* at 656. A court has discretion to decide which prong to consider first. *Id.*; *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lytle v. Bexar County*, 560 F.3d 404, 410 (5th Cir. 2009) (quotations omitted). "When considering a defendant's entitlement to qualified immunity, [a court] must ask whether the law so clearly and unambiguously prohibited his conduct that 'every reasonable official would understand that what he is doing violates [the law].'" *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)). Courts should define the "clearly established" right at issue on the basis of the "specific context of the case," but at the same time "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan*, 572 U.S. at 657. A plaintiff has the burden of overcoming the qualified immunity defense. *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989).

C. Analysis

1. Constitutional Right at Issue

Before addressing Defendants' more specific arguments that no constitutional right was violated, the court will first address their argument that Ituah has failed to state an Equal Protection violation at all. Defendants argue Ituah chose not to assert a Due Process claim and instead has brought her claim as one for Equal Protection, but she cannot show that any ASH policies or procedures discriminate against women. Despite previously moving to dismiss Ituah's claims, this is the first time Defendants have contended the claim is improperly brought as an Equal Protection claim rather than a Due Process claim.[6] *See* Dkt. #60, #66, #68.

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6. Defendants hinted at this distinction in their objections to the Report and Recommendation recommending denial of their motion to dismiss the claim:

> First, *Youngberg* involved a due process claim, not an equal protection claim. The magistrate made no effort to explain how or why *Youngberg* establishes an equal protection violation in this case. Plaintiff's allegations do not include any gender-based distinction in the services rendered by ASH to patients who make claims of assault, except to say that the Plaintiff is female. Plaintiff's gender, however, does not speak to whether ASH offers more or fewer services to male patients at ASH—a matter of some importance when trying to show unequal treatment. The magistrate erred in finding that Plaintiff established an Equal Protection Clause claim sufficient to overcome Isaacson's and Nottebart's entitlement to qualified immunity.

Defendants now more pointedly argue Itauh cannot satisfy any of the requirements of an Equal Protection claim. To sustain a gender-based Equal Protection challenge premised on personal safety, a plaintiff must show "(1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating fact; and (3) that the plaintiff was injured by the policy, custom or practice." *Beltran v. City of El Paso*, 367 F.3d 299, 304-05 (5th Cir. 2004); *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 886 (W.D. Tex. 2019) (Pitman, J.). To show that discrimination was a "motivating factor," a plaintiff must show that the policy is "the product of invidious discrimination." *Beltran*, 367 F.3d at 304-05; *Lozano*, 408 F. Supp. 3d at 886. Defendants argue Ituah cannot satisfy any of these requirements.

In response, Ituah argues that she can assert her claim as an Equal Protection, rather than Due Process violation,[7] and distinguishes the cases cited by Defendants because Ituah was involuntarily under Defendants' care. Dkt. #152 at 14-15. However, Ituah cites to no case that excuses an Equal Protection plaintiff from satisfying the *Beltran* elements. Additionally, Ituah cites the court to no evidence that Defendants provided less protection

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Dkt. #96 at 8-9. The District Judge overruled Defendants' objections. Dkt. #100.

7. The Supreme Court has recognized that "a state may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189, 193 n.3 (1989).

to victims of sexual assault than to victims of other assaults or that discrimination against women was the motivating factor. Accordingly, Ituah has not raised an issue of material fact that her Equal Protection rights were violated.

However, both Ituah and Defendants have argued this case under a substantive Due Process framework. *See* Dkt. #146 at 17 ("Plaintiff cannot show a constitutional violation under any theory, much less an Equal Protection theory."). Under a Due Process framework, when persons are involuntarily committed to a mental institution and thus completely dependent on the state, the state has a duty to provide such patients with certain services and care as are necessary for their "reasonable safety" from themselves and others. *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (citing *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982)). "[T]he state creates a 'special relationship' with a person only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state; otherwise, the state has no duty arising under the Constitution to protect its citizens against harm by private actors." *Id.* at 1304 (describing the Court's holding in *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189, 196 (1989)). Courts applying the "special relationship" rule have generally required plaintiffs to demonstrate that the state official acted with at least deliberate indifference toward the plaintiff. *Pena v. Givens*, 637 F. App'x 775, 783-84 (5th Cir. 2015) (citing *McClendon*, 305 F.3d at 326). As both parties have argued whether the Superintendent Defendants satisfied their Due Process responsibility to provide Ituah with

"reasonable safety," the court will analyze Ituah's claim under a Due Process framework.[8]

2. Violation of a Constitutional Right

Ituah makes no allegation that then-Superintendent Nottebart was involved in any capacity in her assault. Accordingly, the Superintendent Defendants can only be responsible if they acted with deliberate indifference in implementing unconstitutional policies that causally resulted in the assault or failing to supervise or train ASH employees, which causally resulted in the assault. *See Porter*, 659 F.3d at 446. A supervisory official cannot be held liable simply because another employee violated the plaintiff's rights. *See id.*

Neither side argues there is a specific legal standard for defining what is and is not "reasonably safe" in the context of evaluating a psychiatric hospital's specific policies and procedures regarding sexual assault. Defendants contend Ituah's allegations fall into two basic categories: first, that ASH's policies and procedures failed to adequately prevent the risk of sexual assault to female patients, and second, that ASH's policies and

8. Often, plaintiffs will attempt to assert an Equal Protection claim in an effort to avoid the "special relationship" requirement of a Due Process claim. *McKee v. City of Rockwell, Tex.*, 877 F.2d 409, 413 (5th Cir. 1989) ("Footnote three [of *DeShaney*] does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised their discretion to act in one incident but not in another.").

procedures failed to adequately respond to allegations of sexual assault. Defendants argue there is no constitutional deficiency in ASH's policies and procedures and some of the safety measures recommended by Ituah's expert are either infeasible or would leave patients less safe.

Ituah did not specifically respond to ASH's arguments but relies on her expert's report and her version of events to argue a reasonable jury could find ASH's policies failed to provide for her reasonable safety. Ituah argues that a jury "could believe [Ituah's expert] that a combination of lack of training, failure to follow their own procedures, inadequate patient monitoring and sightlines, and a history of failing to investigate or take seriously allegations of sexual assault among patients contributed to an increased risk of sexual assault at ASH. And that Ms. Ituah's rape was the tragic result." Dkt. #152 at 17.

Ituah's response to the Superintendent Defendants' motion is a "let's throw everything at the wall and see what sticks" approach. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas*, 136 F.3d at 458; *cf. U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Nonetheless, the court will do its best to determine whether Ituah's expert has raised a triable issue of material fact. Although Ituah did not follow Defendants' argument structure, the undersigned finds it helpful to address Ituah's allegations in the categories of preventative policies, investigative policies, and training sufficiency.

Appendix C

a) Policies that Minimize Risk

Defendants contend ASH trains and deploys its staff to monitor patient areas personally and directly by being present in day rooms and hallways and by checking on each patient at 30-minute intervals during sleeping hours. Defs. Exh. G at ¶¶ 2-3. They contend several of the policies suggested by Ituah's expert are not viable or reasonable in a psychiatric hospital. Specifically, they contend internal door locks would create a safety issue; security cameras in patient rooms and tracking devices on patients would violate patient privacy; and panic buttons are not reasonable in a psychiatric hospital.

Ituah did not respond to these specific concerns in her brief, nor did her expert explain why Defendants' concerns are unwarranted. Nor did Ituah or her expert explain why Defendants' policy of monitoring patients and checking on each one in 30-minute intervals is insufficient. Ituah does argue that a computer monitor at the nurses' station blocked the view down her hall and that displays of security cameras were located behind the staff at the nurses' station. Dkt. #152 at 10. Notably, Ituah's expert did not specifically opine that the sightline to Ituah's room was deficient. *See* Ituah Exh. R at 33.

Ituah's expert also opines that other contributory factors increase the risk of assault, including "mixing of individuals with intellectual disabilities and those with severe mental illness," failing to screen for vulnerabilities to or propensities to commit sexual assault, and failing to use "gender segregated units." *See* Ituah Exh. R

at 34, 36. However, Ituah's expert does not tie these recommendations to her specific case—she does not explain how any of these measures could have prevented Ituah's assault. Notably, Defendants point out that Ituah's alleged assailant had no history of sexual assault. Dkt. #158-8 at D-00010.

Accordingly, Ituah has failed to raise a question of material fact that ASH's policies and procedures to minimize risk for assault were inadequate and adopted with deliberate indifference.

b) Investigative Policies

Ituah contends that some of her harm arose from the failure of ASH employees to follow ASH's policies:

> Despite ASH's policy requiring the police to be notified if the patient requests it or if there is any evidence of a crime (specifically including even ***attempted*** sexual assaults), ASH did not contact the Austin Police Department. The nurse who documented that A.M. entered Ituah's room and "got on top of her and was making 'grinding motions'" nonetheless checked the box that the allegation was not of "serious physical abuse or sexual abuse." Despite ASH's own policies calling for the preservation of physical evidence (e.g. clothing and bedsheets) and video evidence, no such evidence was preserved in this case, and to the knowledge of ASH's corporate representative, the video evidence

> of the corridor outside of Ms. Ituah's door was neither preserved nor even viewed by anyone at ASH before being destroyed.

Dkt. #152 at 8-9 (internal citations omitted). As noted above, the Superintendent Defendants can only be liable for ASH's policies and training and not for an employee's failure to follow those policies and procedures.

Ituah cites her expert's report to allege ASH's preliminary investigation created a *de facto* restrictive screening process that resulted in the failure to preserve evidence. *Id.* at 11 (citing Ituah Exh. R at 9-11). Notably, the most relevant documents Ituah's expert relies on for this point are not part of the summary judgment record. *See* Ituah Exh. R at 9-11 (citing D-00807, D-31615-31620, D-00786). Ituah's expert also opines that bias impacted the DFPS investigation because "the unit staff decided to conduct a 'mini-investigation' before making a report to intake. As a result, the report they made was already synthesized into the facts that would support that there was no sexual assault and therefore imply there was no staff neglect." *See* Ituah Exh. R at 27-28 (citing D-00161). Again, the record Ituah's expert cites does not appear to be in the summary judgment record. Similarly, Ituah's expert opines that ASH's procedures exclude patients from the scope of alleged sexual abuse perpetrators. *Id.* at 6 (citing State Hospitals Section Operating Procedures: Abuse, Neglect and Exploitation Risk Management (B) - D-00734). This document also does not appear to be in the record. Regardless of whether these documents are in the record, and assuming they say what Ituah's expert

contends they say, Ituah's assertion that there is a *de facto* screening process before assault allegations are reported to DFPS is speculative. Ituah offers no evidence that such policies or procedures exist in contravention to the official policies.

To the extent Ituah challenges the investigative procedures that were performed by DFPS, she has set forth no basis to hold Defendants liable for how that third-party investigation was conducted. Ituah does not assert that sexual assault investigations should be conducted internally. *See* Ituah Exh. R at 26.

Accordingly, Ituah has failed to raise a question of material fact that ASH's investigative policies were inadequate and adopted with deliberate indifference.

c) Training Sufficiency

To support her allegation that Defendants failed to adequately train staff, Ituah relies on the deposition testimony of two employees. Dkt. #152 at 18-19. One employee testified that she only remembers receiving Basic Life Support and CPR training and did not remember if she was ever trained to log and retain evidence after an assault was reported. *Id.* (citing Ituah Exh. N. (Afenkhena Depo.) at pp. 16-23). Ituah's social worker testified she had no idea what ASH's policies were for preserving evidence if there were allegations of assault. *Id.* (citing Ituah Exh. M (Greenberger Depo.) at 39:16-18).

As Defendants point out, Ituah mischaracterizes the deposition testimony. One of the employees testified they

"did a lot of training," including on policies for what to do when patients report abuse, neglect, or exploitation. Ituah Exh. N. (Afenkhena Depo.) at 19:13-24. Similarly, when asked what ASH's policies were to prevent sexual assault, the other employee answered, "Staff had to go through training." Ituah Exh. M (Greenberger Depo.) at 34:14-16. Ituah has presented no evidence showing a systemic lack of training at ASH and certainly no evidence that inadequate training was offered with deliberate indifference. Accordingly, Ituah has failed to raise a question of material fact based on an alleged failure to train.

3. Clearly Established

Ituah's general right to "reasonable safety" while held at ASH was clearly established at the time of her alleged assault. *See Walton*, 44 F.3d at 1302 (citing *Youngberg*, 457 U.S. at 315-16). However, courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Tolan*, 572 U.S. at 657. "When considering a defendant's entitlement to qualified immunity, [a court] must ask whether the law so clearly and unambiguously prohibited his conduct that 'every reasonable official would understand that what he is doing violates [the law].'" *Morgan*, 659 F.3d at 371-72.

Ituah recognizes this aspect of qualified immunity:

> The central concept is "fair warning." If "prior decisions gave reasonable warning that the conduct then at issue violated constitutional

> rights," Defendants are deemed to have understood that their conduct was in violation of Plaintiff's rights.

Flores, 381 F.3d at 400.

Dkt. #152 at 14. However, Ituah only addresses the right at issue at the generic level of "reasonable safety." She cites no cases to demonstrate that the law was clearly established that she was entitled to more rigorous safety policies and procedures or staff training than ASH provided.

To the extent Ituah attempts to rely on previous allegations of sexual assault at ASH to demonstrate that any reasonable superintendent would know ASH's patients were entitled to greater safety measures than were in place,[9] she does not point the court to any evidence regarding the similarities of those allegations with hers.

D. Conclusion

Accordingly, Itauh has failed to raise a question of material fact that her constitutional rights were violated by ASH's policies and procedures related to the prevention or investigation of sexual assaults. Similarly, Ituah has failed to show her constitutional rights were violated by ASH's training of its employees regarding sexual assault

9. Defendants contend that since Ituah does not represent a class of plaintiffs any other sexual assault allegation is irrelevant and inflammatory.

prevention or investigation. Further, Ituah has failed to show that, even if she could show her constitutional rights were violated, that the law was clearly established that she was entitled to greater safety protections and staff training than what ASH provided.

Accordingly, former Superintendent Nottebart is entitled to summary judgment based on qualified immunity. Current Superintendent Thompson is entitled to summary judgment because Ituah has failed to show that ASH's policies, procedures, or training violated Ituah's constitutional rights.

V. ASH'S MOTION

Ituah's only remaining claims against ASH are for violations of the Americans with Disabilities Act ("ADA") and for violations of Section 504 of the Rehabilitation Act ("RA"). ASH moves for summary judgment on both claims. Like her response to the Superintendent Defendants' motion, Ituah responds with a scattershot of reasons her claims should survive.

A. ADA and Rehabilitation Act

Title II of 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." *Leeper v. Travis Cty., Tex.*, No. 1:16-CV-819-RP, 2018 WL 5892377, at *8 (W.D. Tex. Nov. 9, 2018) (quoting

42 U.S.C. § 12132). Title II of the ADA extends Section 504 of the Rehabilitation Act such that it applies to all public entities while simultaneously weakening its causation requirement. *Smith v. Harris Cty., Tex.*, 956 F.3d 311, 317 (5th Cir. 2020). The close relationship between Section 504 of the Rehabilitation Act and Title II of the ADA means that precedents interpreting either law generally apply to both. *Id.*

"To make out a prima facie case under Title II, a plaintiff must show (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability." *Id.* (quoting *Windham v. Harris Cty., Tex.*, 875 F.3d 229, 235 (5th Cir. 2017) (cleaned up)). In addition to prohibiting discrimination, the ADA and the Rehabilitation Act also impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals. *Smith*, 956 F.3d at 317. "To succeed on a failure-to-accommodate claim, a plaintiff must prove: (1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered entity; and (3) the entity failed to make reasonable accommodations." *Id.* at 317-18 (5th Cir. 2020) (quoting *Ball v. LeBlanc*, 792 F.3d 584, 596 n.9 (5th Cir. 2015)).

Neither a policymaker nor an official policy needs to be identified for ADA claims; a public entity "is liable for

the vicarious acts of any of its employees as specifically provided by the ADA." *Leeper*, 2018 WL 5892377, at *8 (quoting *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 575 (5th Cir. 2002)). A plaintiff has the burden to "specifically identify the disability and resulting limitations . . . and to request an accommodation in direct and specific terms." *Id.* (quoting *Windham*, 875 F.3d at 237 (cleaned up)); *see Smith*, 956 F.3d at 317. "When a plaintiff fails to request an accommodation in this manner, he can prevail only by showing that the disability, resulting limitation, and necessary reasonable accommodation were open, obvious, and apparent to the entity's relevant agents." *Id.* (quoting *Windham*, 875 F.3d at 237 (cleaned up)); *see Smith*, 956 F.3d at 317. To recover compensatory damages for discrimination under Title II, a plaintiff "must also show that the discrimination was intentional." *Id.* (quoting *Windham*, 875 F.3d at 235 n.5 (cleaned up)).

B. Analysis

ASH contends Ituah cannot prove the elements of an ADA/RA claim and courts have rejected previous attempts to create liability under the ADA/RA for an alleged failure to protect from sexual assault. ASH further argues that Ituah cannot prove a failure-to-accommodate claim. Finally, for the same reasons argued by the Superintendent Defendants, ASH argues its policies and procedures were reasonable. Ituah argues that ASH failed its obligations to make reasonable accommodations to protect her from sexual assault such that it amounted to a denial of the opportunity to participate in or benefit from the services provided by ASH. Ituah further argues that ASH discriminated by

acting with deliberate indifference to known acts of sexual assault in its facility such that it effectively barred her access to the benefits of ASH's services.

The primary issue for the court is a legal one—does the ADA/RA extend to a claim where a qualified individual is assaulted while in a defendant's care.[10] ASH cites several cases where similar claims were dismissed. In *Woodberry v. Dallas Area Rapid Transit*, 2017 WL 840976 (N.D. Tex. March 3, 2017), the court found on summary judgment that plaintiff could not assert a claim under the ADA/RA where she alleged she was sexually assaulted by the driver of a public shared ride service for individuals with disabilities. In *Strange v. Mansfield Independent School District*, 2018 WL 3950219 (N.D. Tex. Aug. 17, 2018), the court dismissed plaintiffs' ADA/RA claims regarding a public-school teacher's sexual abuse of autistic children while they were at school. Similarly, in *Ball v. St. Mary's Residential Training School*, 2015 WL 3448470 (W.D. La. May 28, 2015), the court dismissed plaintiff's ADA/RA claim alleging her son was physically and emotionally abused at his residential school. In all of these cases, the court found the ADA/RA was not the proper legal vehicle for plaintiffs to assert their claims. All of these plaintiffs, like Ituah, were receiving services for their disability when the assault or abuse allegedly occurred.

Ituah attempts to distinguish these cases by arguing that the courts in those cases rejected the plaintiffs' claims

10. ASH did not file a Rule 12(b)(6) or Rule 12(c) motion seeking to dismiss these claims earlier in the case. *See* Dkt. #26, #59 (moving to dismiss on other grounds).

"as attempting to shoehorn 'intentional torts' into the ADA and RA." Dkt. #153 at 21. She contends she "is not making any claims that Defendants owe duties resembling those under tort under the RA and ADA," rather she "has stated a claim under existing theories of discrimination that place affirmative duties on public entities with regard to how they treat people with disabilities." *Id.* Ituah's attempt to distinguish these cases makes little sense. She contends those plaintiffs "only pled claims of straightforward intentional discrimination under the RA and ADA," whereas she brings her claims under "existing theories of discrimination." *Id.* To the extent there is a distinction between the cases, it is a distinction without a difference.

Ituah relies on *D.B. v. CorrectHealth E. Baton Rouge, LLC*, 2020 WL 4507320 (M.D. La. Aug. 5, 2020), to argue that ASH failed to make reasonable accommodations to such a degree that she was denied the benefits of ASH. Dkt. #153 at 14-17. In *D.B.*,[11] the district court allowed the plaintiff's complaint to survive a Rule 12(b)(6) motion to dismiss. According to the complaint, D.B. was an individual with severe Asperger's Syndrome (on the autism spectrum), which is characterized by significant difficulties in social interaction. During a previous incarceration, D.B. was taken to the East Baton Rouge Parish Prison ("EBRPP"), and his prison transport record indicated he was autistic and medical staff formally indicated he was not cleared for general population/booking. Approximately five months later,

11. These facts are taken from the court's opinion, which accepted all well-pleaded facts as true since this case was the motion-to-dismiss stage.

a warrant was issued for D.B.'s arrest. D.B.'s guardian tried unsuccessfully to make arrangements with EBRPP's medical division for D.B. to bring in his medications. D.B.'s guardian requested that he see the prison physician, who could prescribe the medications while he was in custody. D.B. voluntarily reported to authorities and was placed in general population. He was not given his medication. Based on phone calls with D.B.'s guardian and their own interactions with him, medical staff noted in his records their recommendation: "Isolation — single cell (Please place in singled [sic] cell — Offender is Autistic with child like behavior. Can easily be preyed upon)." D.B. was moved out of general population and placed on the "M Line," which was used for "anybody with medical issues, disciplinary issues, behavior issues." Inmates on the M Line are not released in the yard or allowed to go outside and do not receive an equal opportunity to use the telephones, take showers, or possess personal items. The M Line is not supervised constantly and instead, one guard walks the hallway every fifteen minutes. Due to D.B.'s disability, and his unmedicated state, D.B. was identified by other predatory inmates as an easy target for manipulation and sexual abuse. D.B. was threatened and sexually assaulted. Concerned for him, his guardian alerted staff she believed there was a problem. At an in-person visit, D.B. communicated his abuse to his guardian, who specifically informed staff. The guardian was told, "This happens all the time and they are not going to do anything about it[;] you're not the first crying mama to sit in my office this week." When she finally spoke to a Captain at the prison, he told her "When [D.B.] came in we knew he was autistic and didn't know where to put him but

now we are moving him to a cell behind a wall where the deputies do their paperwork and he will be monitored by a deputy 24/7." An investigation revealed video evidence from the M Line that showed D.B. was unsupervised in the open hallway of the M Line and showed the sexual abuse. D.B. was not further abused once he was moved to the cell behind the deputies.

The court held D.B. sufficiently pleaded a failure-to-accommodate claim under the ADA/RA in alleging facts demonstrating that prison officials had at least actual knowledge that an accommodation was necessary and although they attempted to accommodate D.B. by moving him to the M Line, they knew that further accommodation was necessary to actually isolate D.B. from others who might prey upon him because of his disability. D.B.'s Complaint also stated a disparate-treatment claim in alleging that disabled inmates were treated differently when they were placed on the M Line for reason of their disability and that placement restricted their access to showers, telephone calls, and personal items.

D.B. is distinguishable from Ituah's claims. In contrast to D.B.'s failure-to-accommodate claim, Ituah fails to point to any evidence that ASH knowingly placed her in close proximity to patients with disciplinary or behavioral issues despite actually knowing she was likely to be preyed upon because of her disability. In contrast to D.B.'s disparate-treatment claim, there is no evidence that Ituah had restricted access to ASH's services relative to other ASH patients because of her disability.

Ituah also argues ASH acted with deliberate indifference to known acts of sexual assault such that it effectively barred Ituah's access to the benefits of ASH's services. Ituah argues that under *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court held public entities can be found liable for discrimination under Title IX when the entity acts with deliberate indifference to student-on-student sexual harassment that is so severe that it effectively bars the victim's access to the program's benefit. Ituah argues the Supreme Court and Fifth Circuit have extended the logic of *Davis* to the ADA/RA and held that discrimination can be shown through deliberate indifference to harassment between people under the state's control. Dkt. #153 at 18 (citing cases).

In the RA setting, *Davis* requires a plaintiff to show:

> (1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) [defendant] knew about the harassment, and (5) [defendant] was deliberately indifferent to the harassment.

Est. of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 996 (5th Cir. 2014).[12]

12. Ituah cites *Lance* for the proposition that *Davis* has been applied in the RA context but relies on a Second Circuit case applying *Davis* in the context of a housing discrimination claim. *See* Dkt. #153 at 18 (citing *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67,

ASH concedes that "Plaintiff is correct to note that the Fifth Circuit has extended the reasoning of *Davis* (a Title IX case) to Title II of the ADA and the RA," but argues Ituah "fails to mention the explicit direction from the Fifth Circuit that this deliberate indifference theory from *Davis* requires a Plaintiff to show that she 'was harassed based on [her] disability.'" Dkt. #157 at 6. ASH argues there is no evidence that Ituah was assaulted based on her disability and she cannot show ASH "knew about the harassment" and "was deliberately indifferent to the harassment." *Id.*

Although Ituah's expert opines Ituah was more vulnerable to assault based on her disability, Ituah offers no evidence she was harassed or assaulted based on her disability. Nor can Ituah show ASH's response was deliberately indifferent. In this context, the Supreme Court has limited the deliberate-indifference standard to a response that is "clearly unreasonable." *Lance*, 743 F.3d at 996-97. Itauh contends "no rape kit was taken, law enforcement was not notified, and no serious steps were taken to prevent future assaults." Dkt. #153 at 19. But the deliberate indifference standard does not mean the institution "can avoid liability *only by purging their [institution] of actionable peer harassment* or that administrators must engage in particular disciplinary action." *Lance*, 743 F.3d at 996 (quoting *Davis*, 526 U.S. at 648). In this case, ASH reported the assault to DFPS for an investigation. Although Ituah criticizes ASH's

93 (2d Cir. 2021)). The Second Circuit standard applying *Davis* in the housing discrimination context, unsurprisingly, omits any element related to a disability.

response to her outcry and the investigation, she does not show ASH's response was "clearly unreasonable." Ituah also argues that ASH was deliberately indifferent in how it responded to previous "known acts of sexual assault." Dkt. #153 at 17. Although Ituah emphasizes past reports of sexual assaults at ASH, she does not compare them to her own and accordingly has not shown that ASH acted with deliberate indifference to past allegations, which made her assault more likely.

Using language from *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454-55 (5th Cir. 2005), stating that the reason an entity fails to accommodate a disability is immaterial to failure-to-accommodate claim, Ituah attempts to argue there is no causation requirement in an ADA/RA claim. Ituah cannot mix and match elements from different claims or theories to find the legal formulation most favorable to her. The Fifth Circuit was clear that in a *Davis*-type harassment ADA/RA claim, a plaintiff must show they were harassed based on their disability. *Lance*, 743 F.3d at 996.

ASH has shown it is entitled to summary judgment on Ituah's ADA/RA claim against it. Ituah has failed to raise a question of material fact that would preclude summary judgment.

VI. Conclusion

Ituah's description of what transpired is disturbing. However, based on the legal theories she advanced, Ituah has not shown that any of the Defendants are legally

responsible for either the acts of another ASH patient or ASH staff that acted inconsistently with ASH policies. Accordingly, the undersigned recommends that both motions be granted and all claims be dismissed with prejudice.

VII. Recommendations

For the reasons stated above, the court **RECOMMENDS** Defendants Catherine Nottebart and Stacey Thompson's Motion for Summary Judgment (Dkt. #146) and Defendant Austin State Hospital's Motion for Summary Judgment (Dkt. #147) be **GRANTED** and all claims be **DISMISSED WITH PREJUDICE**.

VIII. Objections

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate

review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED November 18, 2021.

/s/ Mark Lane
MARK LANE
UNITED STATES MAGISTRATE JUDGE