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 Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AASA – THE SCHOOL SUPERINTENDENTS ASSOCIATION AND 8 OTHER EDUCATION ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

W. STUART STULLER
CAPLAN AND EARNEST, LLC
3701 IRIS AVENUE
SUITE 100
BOULDER, CO, 80301
(303) 443-8010
sstuller@celaw.com

SONJA H. TRAINOR
Counsel of Record
NATIONAL SCHOOL ATTORNEYS ASSOCIATION
2801 N. LINCOLN BOULEVARD
SUITE 220
OKLAHOMA CITY, OK 73105
(405) 528-3571
strainor@nsaa.legal

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INTEREST OF AMICI[1]

AASA, The School Superintendents Association ("AASA") represents 10,000 school district leaders across the United States. AASA advocates for equitable access for all students to the highest quality public education and develops and supports school system leaders. AASA members help shape federal, state and local policy, oversee its implementation and set the pace for academic achievement in their districts.

The Consortium of State School Boards Associations ("COSSBA") is a non-partisan, national alliance of 25 state school board associations that serve over 6,700 school boards comprised of 42,000 members who work in service to nearly 24 million students. COSSBA is dedicated to sharing resources and information to support, promote and strengthen state school boards associations as they serve their local school districts and board members.

The Council of Administrators of Special Education ("CASE") is an international nonprofit professional organization providing leadership and support to approximately 6,000 members who are dedicated to enhancement of the worth, dignity, potential, and uniqueness of students with disabilities. Its mission is to provide leadership and support to members by shaping policies and practices that impact the quality of education. The membership is

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

comprised primarily of local school district administrators of special education programs. CASE is a division of the Council for Exceptional Children, the largest professional organization representing teachers, administrators, parents, and others concerned with the education of children with disabilities.

The Council of the Great City Schools, founded in 1956 and incorporated in 1961, is a coalition of 78 of the nation's largest urban public-school systems and is the only national organization exclusively representing the needs of the largest urban public-school districts in the United States. The Council's member districts have a combined enrollment of over 7.8 million students. Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

The Minnesota Administrators for Special Education ("MASE") is a non-profit professional organization providing leadership and supports to approximately 600 members throughout Minnesota who are dedicated to enhancement of the worth, dignity, potential, and uniqueness of students with disabilities. The mission of MASE is to build strong leaders who work on behalf of students with disabilities.

The Minnesota Association of School Administrators ("MASA") is a professional organization representing more than 600 educational leaders, primarily superintendents, across the state. MASA is committed to supporting and developing

school system leaders, advocating for policies that promote equitable access to high-quality public education, and ensuring that Minnesota's school districts have the leadership and resources necessary to serve all students effectively. MASA members play a critical role in shaping education policy, overseeing its implementation, and fostering innovative practices that enhance student achievement and community engagement.

The Minnesota School Boards Association ("MSBA") is a voluntary, nonprofit organization which represents the school board members of all 331 school districts in Minnesota. MSBA's mission is to support, promote, and enhance the work of school boards and school districts throughout Minnesota. MSBA regularly represents the interests of school districts in public forums including the federal and state courts and the Minnesota Legislature.

The National School Attorneys Association ("NSAA") is a non-profit membership organization of attorneys who advocate on behalf of elementary and secondary public school districts across the United States. NSAA provides support, networking, training, and discussion opportunities to its members for the ultimate benefit of our nation's public schools and the students they serve. NSAA's approximately 900 members regularly advise public school districts on federal laws addressing how schools serve students with disabilities.

The National School Boards Association ("NSBA") is a non-profit organization founded in 1940 that represents state associations of school boards, and the Board of Education of the U.S. Virgin Islands.

NSBA ensures that school boards have the resources they need to make certain that each student everywhere has access to excellent and equitable education governed by high-performing school board leaders and supported by the community. NSBA is particularly concerned about the extreme liability many districts that are struggling financially will face if the Court lowers the standard for lawsuits filed by students with disabilities under the ADA and Section 504 for acts that were not triggered by bad faith or gross misjudgment, as such judgments will impact the limited resources schools have with which to educate students.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

More than fifty years ago, Congress prohibited schools from discriminating against "otherwise qualified" students with disabilities to ensure their full participation in the life of the school. Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794). Two years later, Congress enshrined in federal law an affirmative right of students with certain disabilities to a "free appropriate public education" ("FAPE") through special education and related services uniquely tailored to their individual needs. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (as amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, tit. I, 118 Stat. 2647, 2647–99) (codified as amended at 20 U.S.C. §§ 1400–1482) ("IDEA"). More than a decade later, Congress prohibited disability discrimination in nearly every sphere of American life, including public schools.

Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213) ("ADA"). Together, these statutes and their regulations provide important, but different, protections for students with disabilities.

Federal courts interpreting the anti-discrimination rights provided in Section 504 and ADA have attempted to distinguish between "FAPE-related discrimination claims" and pure discrimination claims. FAPE-related discrimination claims are those in which the family contends that the individualized special education services provided to their child are not sufficient to meet the child's needs and therefore fail to provide a FAPE. Pure discrimination claims allege that the child with a disability was excluded from an activity for which the child was otherwise qualified.

Petitioner contends that the bad faith or gross misjudgment standard first articulated in *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982) to address FAPE-related discrimination claims is atextual and creates two different categories of Section 504 and ADA claimants: (1) school children with disabilities and (2) all other claimants. That contention overlooks the fact that only public school children with disabilities can bring "FAPE-related discrimination claims." Thus, it is the claim, not the standard, which creates two distinct groups. Moreover, FAPE-related discrimination claims do not fit neatly, or perhaps at all, within the language and structure of Section 504 and the ADA.

This Court is asked to decide whether Section 504 and the ADA require plaintiffs alleging FAPE-related discrimination claims to meet *Monahan*'s "bad faith or

gross misjudgment" standard, or the deliberate indifference standard that is applied to otherwise-qualified discrimination claims. Under the deliberate indifference standard, a plaintiff must prove that the covered entity was deliberately indifferent to a substantial likelihood that the plaintiff would be deprived of a "federally protected right." The relevant question then is what is the federally protected right?

In Section 504 and the ADA, Congress has provided "otherwise qualified" students with disabilities the right to participate in school free from disparate treatment based on that disability when the disability has no bearing on the student's ability to participate. The allegation underlying a FAPE-related discrimination claim is much different–that a uniquely-situated student has not been treated uniquely enough—a claim that cannot be adjudicated through the "otherwise qualified" rubric under Section 504 or the ADA. The bad faith or gross misjudgment standard recognizes the distinction between FAPE-related discrimination claims and the language of Section 504 and the ADA and brings those claims into alignment with the language of these nondiscrimination statutes. Disparate treatment of unique needs is discriminatory only when the treatment is so ill-suited to the needs of the child that it amounts to intentional mistreatment.

ARGUMENT

I. THE *MONAHAN* STANDARD BRINGS FAPE-RELATED DISCRIMINATION CLAIMS WITHIN THE TEXT AND STRUCTURE OF SECTION 504 AND THE ADA.

A. FAPE-related Discrimination Claims Are Unique to the Section 504 Context and Untethered from its Text.

Petitioner contends that the bad faith and gross misjudgment standard is untethered from the text of Section 504 and the ADA and creates two categories of Section 504/ADA claimants: school children with disabilities and all other persons with disabilities. Therefore, Petitioner contends, school children bringing "education-related discrimination claims" (i.e., FAPE-related) should not be required to meet a different standard of liability than persons asserting otherwise qualified claims under Section 504 and the ADA. But FAPE-related discrimination claims can only be brought by public elementary and secondary school children with disabilities. It is the claim, not the standard, which creates two different categories of Section 504 and ADA claimants. These FAPE-related discrimination claims themselves are untethered from the text of Section 504 and the ADA.

Section 504 and the ADA provide that an otherwise qualified person with a disability shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination in the programs and activities where the disability is irrelevant to the person's ability to participate. 29

U.S.C. § 794; 42 U.S.C. § 12132.[2] Public schools are subject to both Section 504 and the ADA.

Petitioner did not contend that she was denied admission to a school for which she alleged she was otherwise qualified; *e.g., Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1270 (10th Cir. 2007) (student brought Section 504 and ADA claims alleging that she was denied admission to specialized school); or that she was denied admission to a class for which she was otherwise qualified. *E.g., C.O. v. Portland Publ. Schs.*, 679 F.3d 1162, 1169 (9th Cir. 2012) (student not "otherwise qualified" to participate in program that required students to read at grade level above the student's ability). Nor did Petitioner allege that school officials refused her physical access to a classroom. *E.g., D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1145 (C.D. Cal. 2010) (school refused to give elevator key to mobility-impaired student). These claims fit squarely within the statutory text of Section 504 and

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[2] Section 504 provides: "No otherwise qualified individual with a disability . . . shall be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance." 29 U.S.C. § 794.

The ADA provides: "[N]o qualified individual with a disability, shall by reason of such disability, be excluded from participation in, be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A qualified individual with a disability "means an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

the ADA and are sometimes called "pure discrimination" claims. *Ellensberg*, 478 F.3d at 1280-81.

Petitioner's complaint is that an educational program that was designed exclusively for her and her disability-related needs – an "individualized education program" – did not meet a certain standard of educational care or appropriateness or, as Petitioner might phrase it, educational equality. *See* Petitioner's Op. br., p. 35 ("The legislative history of both statutes confirms Congress's desire to promote equal treatment of all Americans with disabilities, across the board."); p. 37 ("The ADA and Rehabilitation Act were meant to ensure equality, and their guarantees apply equally.") Petitioner could not have asserted her claim against a covered entity that was not an elementary or secondary school such as a public library. *Fry v. Napolean Comm. Schs.*, 580 U.S. 154, 171 (2017). Nor could an adult assert such a claim against a school. *Id*. Congress's prohibition on discrimination by public schools in Section 504 and the ADA does not distinguish FAPE-related from pure discrimination claims. Congress did not modify the noun "discrimination" with the adjective "education-related." The sort of discrimination that is prohibited by Section 504 and the ADA must be found in the language and structure of those statutes.

1. Federal statutes provide positive and negative rights for students with disabilities.

In purely literal terms, the word "discriminate" means "to mark or perceive the distinguishing or peculiar features." WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 647 (1986). Marking the difference between distinguishing features is an integral part of decision-making. A grocery store cashier discriminates among nickels, dimes, and quarters to come up with the correct change. The law does not prohibit literal "discrimination"; it forbids discrimination – marking the difference – when the feature being marked is irrelevant to the decision being made. A customer is entitled to the correct change regardless of the color of the customer's jacket. In contrast to Section 504 and the ADA, under IDEA, the provision of FAPE *requires* marking the difference and programming for it.

This Court has explained that the Equal Protection Clause does not prevent state and local government in every instance from making choices based upon distinguishing features. U.S. CONST. amend. XIV. The Clause is activated when similarly situated persons are treated differently because of a particular distinguishing feature. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). The government's use of a distinguishing feature to treat similarly situated persons differently must satisfy a certain level of scrutiny depending on the feature that is used to differentiate. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (race – strict scrutiny)*; F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)

(non-suspect classes – rational basis review). This is true even when the features being marked reflect certain vulnerabilities, including relative wealth or disability. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-443 (1985) (disability); *San Antonio Indep., Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973).

This Court has recognized that some forms of state action by their nature involve "discretionary decision-making based on a vast array of subjective, individualized assessments." *Enquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008). When the state is providing individualized services involving significant discretion, "treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id*. The government's choice based on subjective and individualized features does not implicate the Equal Protection Clause when a protected category such as race is not at issue, even when the choice is irrational or arbitrary. *Id*. at 604. Thus, if a Veterans Administration physician misreads a patient's symptoms and prescribes the wrong course of treatment, the physician might be exposed to a medical malpractice claim, but not an Equal Protection claim, despite the fact that the physician's medical discrimination fell below the standard of care.

Public education is rife with "disparate treatment", or "discrimination" based on subjective, individualized assessments. Teachers assign grades. Students are separated into remedial, grade-level, and

advanced-placement classes. Students are seated alphabetically. Some students make the volleyball team. Others are cut.

When educators make decisions like these based on subjective, individual assessments, the law usually has little to say. But the law may prohibit consideration of characteristics that have nothing to do with the activity. In Title VI of the Civil Rights Act of 1964, Congress said: "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The presumption underlying Title VI is that race, color, and national origin are irrelevant to a student's ability to participate in an educational program or activity. Thus, Title VI prohibits covered entities from subjecting similarly situated persons to disparate treatment on the basis of race, color, and national origin, a so-called negative right *forbidding* the government from taking proscribed actions, as opposed to a positive right requiring the government to take prescribed actions. *Toledo Area AFL-CIO Council v. Pizza*, 154 F. 3d 307, 319 (6th Cir. 1998) (discussing negative and positive rights).

The obvious difference between Congress's words in Section 504 and Title VI is that a person with a disability is eligible for the protection of the Act only if the person is "otherwise qualified" to participate in the program or activity. An "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his [disability]." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

The "otherwise qualified" limitation brings the prohibition of Section 504 into alignment with the similarly-situated rubric of Title VI; a person with a disability who is otherwise qualified to participate in a program or activity cannot be excluded from the program or activity because of a feature that is irrelevant to the person's ability to participate. In *Davis*, this Court held that a person who relied on lip-reading to communicate was not otherwise qualified to participate in a nurse training program that included a mandatory rotation in the operating room where everyone is wearing a surgical mask, making lip-reading impossible. *Davis*, 442 U.S. at 413. To be sure, *Davis* emphasized that an entity's unreasonable refusal to modify an insubstantial program requirement might violate the Act. *Davis*, 442 U.S. at 414. Nonetheless, the Court explained that "[t]he language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." *Davis*, 442 U.S. 410. When Congress sought to expand legal protections for individuals with disabilities to nearly every corner of American life, it adopted Section 504's understanding of disability discrimination into the text of Title II of the ADA.

Two years after Section 504 was adopted, Congress enacted the Education of All Handicapped Children Act (EAHCA), now the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1400 *et seq*. If discrimination is "mark[ing] or perceive[ing] . . . distinguishing or peculiar features," WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 647 (1986), the

IDEA is, by design, highly and intentionally discriminatory, requiring local educational agencies – generally school districts – to locate, evaluate, and identify children with disabilities. 20 U.S.C. § 1412(a)(1) & (3). A child with a disability is a child with one or more disabilities who needs special education and related services because of the disability. 20 U.S.C. § 1401(3). Special education is "specially designed instruction . . . to meet the unique needs of [the] child." 20 U.S.C. § 1401(29). Related services are support services needed to assist the child to benefit from the specially designed instruction. 20 U.S.C. § 1401(29).

Schools conducting IDEA evaluations use a variety of assessment tools, strategies, and instruments administered by trained personnel to gather relevant functional, developmental, and academic data about a child. 20 U.S.C. § 1414(b)(2) & (3). The child's parents receive a copy of the evaluation report and meet with a team of qualified professionals to determine whether the child has a disability and, if so, whether the child needs specially designed instruction because of the disability.[3] 20 U.S.C. § 1414(b)(4). If so, the parents meet with another (often overlapping) team to develop an "individualized education program" (IEP) for the child. The child's IEP is updated at least annually and (1) describes the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's progress in

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[3] Thus, an academically gifted student with autism who does not need special education services would be eligible for the protections of Section 504 and the ADA, but not eligible for IDEA services.

the general education curriculum, (2) sets annual goals, and (3) describes how progress will be measured, and the special education and related services to be provided to the child. 20 U.S.C. § 1414(d)(1)(A) & (B).

The IEP is the bedrock of the central requirement of the IDEA--a "free appropriate public education." 20 U.S.C. § 1401(9); 20 U.S.C. § 1412(a)(1). Unlike Title VI, Section 504, and the ADA, which confer a negative right prohibiting schools from treating similarly situated students differently because of irrelevant criteria, the IDEA confers a positive right, requiring schools to provide specialized instruction and services to uniquely situated students. The IDEA thus requires intentional, highly calibrated discrimination and disparate treatment.

Parents who are dissatisfied with "any matter" related to the provision of a FAPE may initiate a contested hearing before an administrative hearing officer. 20 U.S.C. § 1415(b)(6)(7); (f) & (i). Any party aggrieved by the hearing officer's findings can file an action in state or federal court for review. 20 U.S.C. § 1415(i)(2)(A). In addition to injunctive relief ordering schools to provide contested instruction and services, IDEA remedies include requiring school districts to reimburse parents for the cost of private schooling or other services, *Jefferson Cnty. Sch. Dist. v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012), and requiring school districts to provide compensatory education services, *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1124 (10th Cir. 2008), which can include multiple extra years of specialized interventions. E.g., *B.H. v. West Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 700-02 (S.D. Ohio 2011) (affirming award of two years of

applied behavior analysis, remedial speech, and occupational therapies). IDEA remedies, however, do not include monetary damages.

2. FAPE-related discrimination claims under Section 504 closely parallel IDEA claims.

Given the individualized nature of the IDEA process, an IEP effectively makes each IDEA-eligible child what Equal Protection jurisprudence would term a "class of one." As a result, this Court dismissed the notion that IDEA disputes concerning the sufficiency of services provided to a child can be resolved using an "equal educational opportunity" standard. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.

Id. When the Court revisited *Rowley* thirty-five years later, the Petitioner proposed an equality-based standard. Brief for Petitioner, *Endrew F. v. Douglas County Sch. Dist*., 478 U.S. 386 (2017) (No. 15-827), 2016 WL 6769009 at 40 ("substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society"). The Court again declined to adopt one. *Endrew F.*, 580 U.S. at

393 (free appropriate public education is too complex to be captured by the word "equal").

The adequacy of a child's IEP cannot be measured by comparing its effectiveness to the effectiveness of a general education curriculum that produces high academic achievers who pursue college, students who focus on trades to enter the workforce, average students, students who drop out, and everything in between. Instead, the "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Endrew F. v. Douglas County Sch. Dist.*, 580 U.S. 386, 404 (2017). An IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 403.

In 1977 and before EAHCA (now IDEA) became effective in 1978,[4] the Department of Health, Education, and Welfare promulgated regulations under Section 504 requiring elementary and secondary schools to provide a "free appropriate public education" to qualified handicapped children. 34 C.F.R. § 104.33(a). These regulations define an "appropriate education" to be "regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons *as adequately as the needs of nonhandicapped persons are met*,"[5] essentially the equal educational

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[4] *See* Christopher J. Walker, Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School, 58 STAN L. REV. 1563,1588 (2006) (discussing adoption of Section 504 regulations).

[5] 34 C.F.R. § 104.33(a) & (b) (emphasis added).

opportunities standard that *Rowley*, and, more recently, *Endrew F.*, dismissed as requiring impossible measurements and comparisons. *Endrew F.*, 580 U.S. at 393; *Rowley*, 458 U.S. at 198.

The Section 504 FAPE regulations provide that one way of meeting the "as adequately as the needs of nonhandicapped persons are met" standard is to implement an IDEA-compliant individualized education program. 34 C.F.R. § 104.33(b)(2). As a result, historically, many FAPE-related discrimination claims brought under Section 504 and the ADA never make it past the administrative hearing process required by the IDEA to determine whether FAPE was provided.[6]

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[6] This Court has cast doubt on the validity of the Section 504 FAPE regulations. The applicant in *Davis* contended that regulations adopted under Section 504 required more substantial changes to the nursing program that would have allowed the applicant to qualify. *Davis*, 442 U.S. at 408-09. This Court rejected the argument, expressing doubt that the regulations required the sort of changes that would have been necessary to accommodate the applicant, adding: "If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute." *Id.* at 410; *see also University of Texas v. Camenisch,* 451 U.S. 390, 399 (1981) (Burger, C.J., concurring) ("The trial court must, among other things, decide whether the federal regulations at issue, which go beyond the carefully worded *nondiscrimination* provision of § 504, exceed the powers of the Secretary under § 504.") (emphasis in original). Across four decades, this Court has held that "the IDEA guarantees individually tailored educational services, while Title II [of the ADA] and § 504 promise non-discriminatory access to public institutions." *Fry*, 580 U.S. at 170-71; *see also Smith v. Robinson*,

When FAPE-related discrimination claims under Section 504 and the ADA do make it past the IDEA adjudicative process, courts deciding such claims agree that a violation of the IDEA is not necessarily a violation of Section 504 and the ADA. *Miller v. Bd. of Educ.*, 565 F.3d 1232, 1238, 1245-46 (10th Cir. 2009) ("The mere fact that complying with the IDEA is sufficient to disprove educational discrimination does not necessarily mean that every violation of the IDEA necessarily *proves* a discrimination claim."); *Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir. 998); *D.A. v. Houston Sch. Dist.*, 629 F.3d 450, 454 (5th Cir. 2010); *Monahan v. State of Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982).

When a public school student who has been served under the IDEA through an IEP brings a case in federal court asserting that the school district has not provided FAPE *under Section 504*, this FAPE-related discrimination claim closely parallels the claims that are explicitly recognized under the IDEA--that is, "a complaint with respect to any matter relating to the identification, evaluation or placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6); see generally *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 832 (2nd Cir. 2014) (Section 504 and ADA claims based on failure to identify student as child with a disability); *B.M. v. South Calllaway R-II Sch. Dist.*, 732 F.3d 882 (8th Cir. 2013) (Section 504 and ADA claims based on

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468 U.S. 992, 1016 (1984) ("Section 504 and the EHA are different substantive statutes. While the EHA guarantees a right to a free appropriate public education, § 504 simply prevents discrimination on the basis of handicap.")

alleged failure to address student's behavioral issues); *G.C. v. Owensboro Publ. Schs*., 711 F.3d 623, 634-35 (6th Cir. 2013) (section 504 and ADA claims based on alleged failure to identify child per Section 504 regulations); *D.A. v. Houston Indep. Sch. Dist*., 629 F.3d 450, 451 (5th Cir. 2010) (Section 504 and ADA claims based on alleged failure to evaluate student); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010) (Section 504 and ADA claims based on Section 504 FAPE regulations); *Birmingham v. Omaha Sch. Dist*., 220 F.3d 850 (8th Cir. 2000) (Section 504 and ADA claims based on claim school district graduated student early); *Heidemann v. Rother*, 84 F.3d 1021, 1025-26 (8th Cir. 1996) (Section 504 and ADA claims based on allegedly ill-advised behavioral strategy). In IDEA, Congress explicitly recognizes the right of students with disabilities to bring Section 504 and ADA claims,[7] but FAPE-related claims do not fit neatly, or perhaps at all, within the nondiscrimination language of Section 504 and the ADA.

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[7] 20 U.S.C. §1415(l):

> 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, title V of the Rehabilitation Act of 1973, 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.

B. The Bad Faith/Gross Misjudgment Standard for FAPE-Related Discrimination Claims Reflects the Discretionary Decision-making Educators Are Legally Required to Undergo.

Petitioner's proposal to rely on the deliberate indifference standard employed in "pure discrimination" cases to assess liability in FAPE-related cases avoids a crucial question that Petitioner does not address: what is the federally protected right at issue? Courts applying the deliberate indifference standard require a plaintiff to show both: (1) *knowledge* that a **federally protected right** is substantially likely to be violated and (2) *failure to act* despite that knowledge." *D.E. v. Central Dauphin Sch. Dist.*, 765 F.3d 260, 269 (3d Cir. 2014) (italicized emphases in original, bolded emphasis added).

The right distilled from the language of Section 504 and the ADA is the right of a person with a disability who, with or without reasonable accommodation, is otherwise qualified to participate in a program or activity but is excluded from, or denied the benefits of, the program or activity because of a disability. Thus, a deliberate indifference inquiry would require a court to find that (1) the covered entity knew the plaintiff was otherwise qualified to participate in the program or activity with or without a reasonable accommodation; (2) knew there was a substantial likelihood the plaintiff would be excluded from, or denied the benefits of, the program or activity; and (3) failed to prevent the exclusion or denial.

A FAPE-related discrimination claim does not fit within this rubric because the right asserted in such a claim is the right to specialized instruction and services designed to address the unique learning needs created by the child's disability. Even if Section 504 and the ADA are construed to require the provision of specialized instruction and services to meet the unique needs created by a child's disability, this Court is asked to articulate the federally protected right at stake that, if not met, allows a plaintiff to recover money damages. In other words, what level of services satisfy Section 504 and the ADA's antidiscrimination provisions?

One possible source for determining what level of specially designed services would be satisfactory under Section 504 and the ADA could be Section 504's FAPE regulations,[8] a source that implicitly admits that the standard is not found in the statutory language of Section 504 or the ADA. The relevant deliberate indifference standard might then read: "School officials knew that there was a substantial likelihood that the specialized instruction and services provided to the

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[8] The Section 504 regulations require federal funding recipients that operate an elementary or secondary school to provide "free appropriate public education," in order to meet the requirements of Section 504. FAPE is defined as "[t]he provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 C.F.R. § 104.33

plaintiff were not sufficient to meet the educational needs of the plaintiff as adequately as the needs of students without disabilities are met but failed to provide such services." 34 C.F.R. § 104.33. This proposal amounts to an effort to relitigate the "equal educational opportunity standard" that was rejected in *Rowley* and *Endrew F.* as "unworkable," requiring "impossible measurements and comparisons." *Endrew F.*, 580 U.S. at 393; Rowley, 458 U.S. at 198.[9]

Setting aside the issue of whether the Section 504 FAPE regulations are a valid exercise of regulatory authority, *Fry*, 580 U.S. at 170-71 ("[T]he IDEA guarantees individually tailored educational services, while Title II [of the ADA] and § 504 promise non-discriminatory access to public institutions."); *Camenisch*, 451 U.S. at 399 (Burger, C.J., concurring) ("The Secretary has no authority to rewrite the statutory scheme by means of regulations."), reciting an unworkable standard in a regulation does not make "impossible measurements and comparisons" possible. The equal educational opportunity standard does not present an evidence-based inquiry. For example, in this case, the comparison was between six hours of

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[9] The regulations provide a list of prohibited discriminatory actions, then explain "For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."

34 C.F.R. § 104.4(b)(2)

instruction provided to general education students versus four and one-quarter hours of instruction provided to Petitioner. Even on the surface, that is not a straightforward comparison. But the question becomes even less straightforward when further fleshed out. The question is whether six hours of one-size-fits-all classroom instruction is equivalent to four and one-quarter hours of specialized instruction and services that are designed to meet a particular child's unique learning needs and are delivered in a small group, if not individualized, setting. All things being equal, many, if not most, parents might prefer that their child receive the four and one-quarter hours of intensive specially designed instruction over six hours of general classroom instruction.

If the right at stake turns on the adequacy of the school's response to the challenges faced by the child, the only workable comparison is between the student's needs and the services provided to meet those needs. A deliberate indifference standard reflecting that reality might read: "School officials knew there was a substantial likelihood the specialized instruction and services provided to the plaintiff were not reasonably calculated to enable the plaintiff to make progress appropriate in light of the child's circumstances but failed to provide sufficient services." This standard, of course, reflects the dispositive question in IDEA litigation. *Endrew F.* 580 U.S. at 403.

The *Endrew F.* standard is derived from the language of the IDEA which "guarantees individually tailored educational services," not from Section 504 and the ADA which only "promise non-discriminatory access to public institutions." *Fry*, 580 U.S. at 170-71.

Thus, any standard that paraphrases the *Endrew F.* standard would be based on the text of the IDEA, not the text of Section 504 and the ADA. Moreover, adopting such a standard would convert Section 504 and ADA claims into surrogates for IDEA claims, surrogates that come with a damages remedy. Given this Court's recent decision in *Perez v. Sturgis Public Schools*, 598 U.S. 142 (2023) that Section 504 and ADA claims seeking damages need not be processed through the IDEA's administrative hearing system, *Id.* at 150, the surrogate claims almost certainly would leave the IDEA's administrative hearing process, its education-oriented remedies, and perhaps the IDEA itself, as nothing more than off-ramps that a litigant could bypass on the road to monetary damages, as well as the compensatory remedies available under the IDEA. And, as noted above, a violation of the IDEA is not necessarily a violation of Section 504 and the ADA. *Miller*, 565 F.3d at 1246 (10th Cir. 2009); *Sellers*, 141 F.3d at 529; *D.A.*, 629 F.3d at 454; *Monahan*, 687 F.2d at 1170.

Given the unique nature of an education-related "discrimination" claim under Section 504, the overlapping "FAPE" requirements set out in the Section 504 regulations, and the parallel rights provided in IDEA, it is not surprising that when the Eighth Circuit was confronted with an education-related discrimination claim, it held: "We do not read § 504 as creating general tort liability for educational malpractice, especially since the Supreme Court, in interpreting the EAHCA itself, has warned against a court's substitution of its own judgment for educational decisions made by state officials." *Monahan*, 687 F.2d at 1170-71. Other

circuits have come to the same conclusion. *D.A.*, 629 F.3d at 454 (Section 504 and the ADA do not create "general tort liability for educational malpractice"; *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764, 769 (8th Cir. 1999) (Section 504 and the ADA do not create "general tort liability for educational malpractice"); *Sellers*, 141 F.3d at 529 (Section 504 "did 'not create a private cause of action for damages for educational malpractice.'") *quoting Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 633 n. 3 (4th Cir.1985); *see also Lunceford v. District of Columbia*, 745 F.2d 1577, 1580 (D.C. Cir. 1984) (no Section 504 claim where student allegedly was negligently discharged from educational placement); *see also Torrence v. District of Columbia*, 669 F. Supp. 2d 68, 71-72 (D.D.C. 2009) (educational malpractice not actionable under Section 504; *Ms. H. v. Montgomery Bd. of Educ.*, 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011); *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 152-53 (N.D.N.Y. 1997); *A.W. v. Marlborough Co.*, 25 F. Supp. 2d 27, 31-32 (D. Conn. 1998).

In addition, even outside the special education setting, the majority of courts refuse to recognize a common law claim for educational malpractice because of a lack of a workable standard of care, difficulties assigning causation, and the danger of embroiling courts in overseeing instruction. James A. Rapp, EDUCATION LAW, vol. 5, § 12.05[3] (2023 Supp.) Nonetheless, there may be instances when more than simple negligence is afoot and the failure to respond to the unique challenges posed by a child's disability was so deficient as to violate both the IDEA's positive right to individualized instruction *and* Section 504 and the ADA's negative prohibition against discrimination.

Five circuits draw the line by asking whether the affirmative efforts that were taken in response to the challenges created by the disability were so deficient as to be a product of bad faith or gross misjudgment. *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 841 (2d Cir. 2014); *G.C. v. Owensboro Publ. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013); *D.A.*, 629 F.3d at 454 (5th Cir.); *Sellers*, 141 F.3d at 529 (4th Cir.); *see also Reid-Witt ex rel. C.W. v. Dist. of Columbia.*, 486 F. Supp. 3d 1, 7 (D.D.C. 2020) (district courts in the circuit for the District of Columbia uniformly use the bad faith or gross misjudgment standard).

Monahan's bad faith or gross misjudgment standard exists in harmony with Congress's direction that "Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], [Section 504] or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(l). The bad faith or gross misjudgment standard ensures that FAPE-related discrimination claims go no farther than the nondiscrimination prohibition of Section 504 and the ADA, not because the IDEA requires individualized instruction and services, but because Section 504 and the ADA do not.

II. IF THIS COURTS ADOPTS A DAMAGES STANDARD FOR FAPE-RELATED CLAIMS UNDER SECTION 504 THAT DOES NOT RECOGNIZE THE EXPERTISE AND DISCRETION OF SCHOOL PERSONNEL, SCHOOLS WILL FACE POTENTIAL LIABILITY UNFORESEEN BY CONGRESS.

More than forty years ago, this Court noted the confusion caused by FAPE-related claims under Section 504: "[C]ourts construing § 504 as applied to the educational needs of handicapped children have expressed confusion about the extent to which § 504 requires special services necessary to make public education accessible to handicapped children." *Davis*, 468 U.S. at 1018. "We need not decide the extent of the guarantee of a free appropriate public education Congress intended to impose under § 504." *Id*.

As this Court considers the extent of that guarantee now, *Amici* urge the Court to consider the effect of its decision on public schools. While FAPE-related Section 504 suits existed long before *Perez*, they are now more common and will surely increase if something less than bad faith or gross misjudgment is the standard for FAPE-related liability. *E.g., D.H.H. v. Kirbyville Consolidated Indep. Sch. Dist.*, No. 20-40315, 2021 WL 4948918 (5th Cir. 2021) (unpublished) (failure to find student eligible under IDEA); *A.G. v. Paradise Valley Unif. Sch. Dist.*, 815 F.3d 1195 (9th Cir. 2016) (failure to provide BIP and full-time aide for student to stay in particular placement desired by parents); *A.L. v. Special Sch. Dist. of St. Louis*, No. 4:24CV179 HEA, 2024 WL 4564210 (E.D. Mo. 2024) (failure to timely evaluate a

student for special education services); *P.W. v. Leander Indep. Sch. Dist.*, No. 1:21-CV-00722-DAE, 2022 WL 19003381 (W.D. Tex. 2023) (failure to timely evaluate for special education services); *J.G. v. Los Angeles Unif. Sch. Dist.*, LACV 20-01593 JGB, 2023 WL 8125847 (C.D. Cal. 2023) (failure to place student in the least restrictive environment); *Piotrowski v. Rocky Point Union Free Sch. Dist.*, 18-CV-6262, 2023 WL 2710341 (E.D. N.Y. 2023) (failure to conduct a proper manifestation determination review); *B.D. v. Fairfax Co. Sch. Bd.*, 1:18-cv-1425 , 2019 WL 692804 (E.D. Va. 2019) (failure to properly implement student's IEP); *J.S. III v. Houston Co. Bd. of Educ.*, 120 F.Supp.3d 1287(M.D. Ala. 2015) (removal from general education setting). Litigation drains resources, creates adversarial rather than collaborative relationships, and draws educators and families away from the task at hand: educating children with disabilities. With this caveat in mind, *Amici* urge this Court to proceed with caution in deciding this important case.

Amici urge the Court to clarify that Section 504 and the ADA confer only the right to be free from disability discrimination, not an affirmative right to specialized services to address the challenges created by a child's disability. The Court has invoked such a distinction across four decades and should continue to do so. *Fry*, 580 U.S. at 170-71 ("[T]he IDEA guarantees individually tailored educational services, while Title II [of the ADA] and § 504 promise non-discriminatory access to public institutions."); *Davis*, 442 U.S. at 410 ("[t]he language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and

affirmative efforts to overcome the disabilities caused by handicaps.") Across those same decades, Congress has not changed the language of Section 504 or the ADA.

Confirming that Section 504 and the ADA provide protection against the sort of actions giving rise to pure discrimination claims will not diminish the affirmative obligation of public school systems to provide children with disabilities with specialized instruction and services to meet the unique learning needs arising from their disabilities, nor limit families' access to the legal system when they believe school districts are being unresponsive to the educational needs of their children. These obligations and opportunities are a product of the IDEA and will continue to exist regardless of what the Court decides in this case.

Confirming that Section 504 and the ADA embrace only pure discrimination claims will not diminish the ability of students with disabilities to invoke the nondiscrimination protections of Section 504 and the ADA to the same extent as all other persons who are protected by the statutes. Public school systems will be subject to the same restrictions imposed on all entities covered by Section 504 and the ADA and will remain subject to the affirmative obligations of the IDEA. And public school staff will continue to apply their considerable discretion and expertise to provide appropriate educational programs for all students with disabilities.

CONCLUSION

Consistent with all of the above, *Amici* urge the Court to hold that the bad faith or gross misjudgment standard should be used to determine when a school district's failure to provide FAPE is so egregious as to violate both eh affirmative obligations of the IDEA and the nondiscrimination limits of Section 504 and the ADA. Significant pains could be inflicted on the interested parties by a different decision. *Amici* urge the Court to consider the education community as a whole – students, parents, teachers, school boards, administrators, community members, and taxpayers – all of whom desire to see educational resources devoted to education. Litigation distorts the allocation of educational resources. Uncertainty breeds litigation. *Amici* urge the Court to strive for continuity and certainty.

Respectfully submitted,

SONJA H. TRAINOR
Counsel of Record
NATIONAL SCHOOL
ATTORNEYS ASSOCIATION
2801 N. LINCOLN BOULEVARD
SUITE 220
OKLAHOMA CITY, OK 73105
(405) 528-3571
strainor@nsaa.legal

W. STUART STULLER
CAPLAN AND EARNEST, LLC
3701 IRIS AVENUE
SUITE 100
BOULDER, CO, 80301
(303) 443-8010
sstuller@celaw.com