No. 01-31026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS PACE,

Plaintiff-Appellant

v.

BOGALUSA SCHOOL BOARD, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

RALPH F. BOYD, JR.
Assistant Attorney General

MARK L. GROSS
TOVAH R. CALDERÓN
Attorneys
U.S. Department of Justice, CRT/APP
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4142

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INTEREST OF THE UNITED STATES

This case involves the preclusive effect of a district court's decision that a child with a disability has received meaningful educational benefits from his individualized educational program pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, on claims alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. 12010 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The United States Department of Justice judicially enforces Title II of the ADA and coordinates federal enforcement of the access requirements of Section 504. See 42 U.S.C. 12132 (Title II); 28 C.F.R. Part 41 (Section 504). The United States Department of

Education administratively enforces Title II and Section 504. The Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for promulgating accessibility guidelines for facilities subject to the ADA, which then become the basis of implementation regulations issued by the Department of Justice. 42 U.S.C. 12134, 12204. These regulations cover, among other things, accessibility of public schools. See, *e.g.*, 28 C.F.R. 35.150, 35.151. The IDEA is administered by the United States Department of Education, which is also authorized to promulgate regulations and interpretive letters. 20 U.S.C. 1406, 1416(a)(1), 1417. Because of its interest in the proper interpretation of these statutes, the United States has participated as amicus curiae in a number of cases involving the scope and application of Section 504 and the ADA, *e.g.*, *Barden* v. *City of Sacremento*, No. 01-15744 (9th Cir.); *Rendon* v. *Valleycrest Prods.*, No. 01-11197 (11th Cir.); *Kapche* v. *City of San Antonio*, No. 00-50588 (5th Cir.); *Williams* v. *Herman's Family Ltd. P'ship*, 264 F.3d 999 (10th Cir. 2001); *Duncan* v. *WMATA*, 240 F.3d 1110 (D.C. Cir. 2001), as well as the IDEA, *e.g.*, *Barnett* v. *Memphis City Schs.*, No. 01-5050 (6th Cir.); *Porter* v. *Board of Trustees*, No. 01-55032 (9th Cir.); *Asbury* v. *Missouri Dep't of Elementary & Secondary Educ.*, No. 00-2510 (8th Cir.). This brief is filed pursuant to Fed. R. App. P. 29.

STATEMENT OF THE ISSUE PRESENTED

The United States will address the following issue:

Whether a finding that a child with a disability has received meaningful educational benefits from his individualized educational program, thereby

satisfying the IDEA, necessarily precludes claims alleging violations of the ADA or Section 504 based on the school's lack of accessibility.

STATEMENT OF THE CASE

1. Plaintiff Travis Pace, born on April 22, 1979, requires special assistance because he has cerebral palsy, scoliosis, and various learning disabilities. He uses a wheelchair for mobility and needs assistance using the bathroom because of a bladder condition. Travis is a resident of Bogalusa, Louisiana. In 1982, Travis entered the Bogalusa City School System. *Pace* v. *Bogalusa City Sch. Bd.*, 137 F. Supp. 2d 711, 713 (E.D. La. 2001).

2. On July 21, 1997, Travis's mother, Olivia Burks, requested a due process hearing pursuant to the IDEA based on the lack of facilities accessible to Travis at Bogalusa High School. *Ibid.* She complained that the school has only two bathrooms designated as "accessible," neither of which are near the cafeteria, gym, auditorium, music/band room, library, or administrative/guidance offices, and that although Travis was assigned an aide to assist him with toileting, he had to page the aide and often soiled himself before the aide arrived. Burks also complained that Travis's classroom was located on the second floor of the school and that the "lift" he was required to use to get to the second floor was small, had heavy metal doors that had to be closed manually, was not always in working order, and presented a safety risk to Travis (R. Vol. 1 at 79). The "lift" was in fact a dumbwaiter which the school once used to transport books and other heavy items between floors (R. Vol. 1 at 204).

Additionally, Burks complained that: (1) there were no wheelchair ramps connecting the sidewalks at the school to the street; (2) during fire drills Travis had to either use the "lift," scoot down the stairs by himself without his wheelchair, or be carried down by another person; (3) the two school buses designated as being "handicapped equipped" could not safely transport Travis; (4) Travis's special education classroom was smaller than regular education classrooms and his movement was significantly restricted; (5) the school had no accessible entrances; (6) Travis was denied the opportunity to participate in physical education classes with non-disabled students; and (7) Travis was placed in special education classes with students with disciplinary problems and not given the extra time he needs to complete written tasks (R. Vol. at 79-80).

On August 21, 1997, the due process hearing began to determine whether Travis was being denied a free appropriate public education under the IDEA. Burks testified that in 1995, Travis fell in the bathroom at the school because it was not accessible. After Travis's fall, the school designated two bathrooms as "accessible" (one on the first floor and one on the second). Burks also testified about Travis soiling himself when the aide was not available, injuries he sustained when using the "lift," and the lack of ramps at the school. Burks also complained that Travis's proposed "individualized education program" (IEP) did not provide

for his enrollment in a GED program and computer class (R. Vol. 1 at 79-80).[1]

The hearing officer found that Travis had not been denied a free appropriate public education. The hearing officer specifically found that the evidence did not prove that Burks's concerns with the school's facilities prevented Travis from getting to his classes and receiving meaningful educational benefit (R. Vol. 1 at 89-93).

3. Travis appealed the hearing officer's decision to the Louisiana State Level Review Panel (SLRP), which affirmed the prior holding. The panel noted that, while not required, the school should provide a full-time aide to Travis to assist him with his bathroom needs. Also, the SLRP noted its concern with Travis's transition plan and encouraged the school to complete it as soon as possible (R. Vol. 1 at 64-65).

4. On September 18, 1997, attorneys representing Travis filed complaints with the Department of Justice, the Office for Civil Rights (OCR) of the Department of Education, and the Architectural and Transportation Barriers Compliance Board (Access Board) on his behalf and on behalf of other students with mobility impairments of the Bogalusa City School System, alleging

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[1] An IEP is a written statement for each child with a disability which sets forth, *inter alia*, the educational and other, related services to be provided to the child. See 20 U.S.C. 1414(d).

violations of Section 504 and the ADA (R. Vol. 5 at 267).[2] The complaints alleged that the school system: (1) failed to provide an appropriate education for Travis and other children with physical disabilities; (2) segregated the physical location of the classrooms designated for students with disabilities; (3) failed to ensure that students with disabilities participated with nondisabled individuals in activities to the maximum extent appropriate; (4) failed to ensure that facilities, services, and activities for individuals with disabilities were comparable to those for nondisabled students;(5) operated services, programs, or activities that were not physically accessible to or usable by individuals with disabilities; and (6) retaliated against members of their law firm for representing clients bringing these claims.

OCR investigated the complaint and issued two resolution letters. Consistent with OCR's internal case processing procedures, OCR closed Travis's allegation that the school system failed to provide a free appropriate public education for the individual students identified since that issue was the subject of the IDEA due process hearing. OCR found that there was insufficient evidence to support the remainder of the allegations, except for the allegation regarding the

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[2] Consistent with 28 C.F.R. 35.190(b)(2), the Department of Justice deferred to the Department of Education's Office for Civil Rights investigation of this matter. The Access Board concluded that it did not have jurisdiction based on its determination that no federal funds subject to the Architectural Barriers Act were used in the design, construction, alteration, or leasing of Bogalusa High School.

physical accessibility of the school's services, programs, and activities. That allegation was resolved by the signing of a voluntary, written agreement between OCR and the school system. This "Commitment to Resolve" obliged the school system to conduct a physical inspection of its facilities to identify any accessibility barriers and to ensure compliance with federal standards by developing a compliance plan, which OCR agreed to monitor (R. Vol. 5 at 267-272, 943-946).

5. Plaintiff brought suit in federal district court, seeking damages and injunctive relief, against the Bogalusa City School Board, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, alleging violations of the IDEA, the ADA, Section 504, 42 U.S.C. 1983, the Louisiana State Constitution, and various state statutes. Plaintiff's IDEA claims were both procedural and substantive in nature. He alleged that the administrative proceeding before the hearing officer and SLRP failed to comply with the IDEA's procedural requirements. In addition, Plaintiff claimed that he was denied meaningful educational benefits because his IEP was inappropriate for his specialized needs. *Pace*, 137 F. Supp. 2d at 714.

Plaintiff's ADA and Section 504 claims asserted that the defendants intentionally discriminated against Plaintiff by assigning him to classrooms on the second floor, failing to provide him with easily available reasonable accommodations, failing to properly make all of the school grounds, the cafeteria, the health center, and the bathrooms accessible to him, and failing to ensure that the "lift" was safe for him to use (R. Vol. 1 at 201-208). The complaint stated:

> The defendants have denied Travis Pace access to the auditorium; music room; agri-science classroom; cafeteria; parking; auditorium stage; auditorium bathroom; music complex bathroom; boys[’] gym bathroom; elevator; second floor; health center; water in the cafeteria; water in Building A; stadium bathroom; field house; dumbwaiter; water fountain; bathrooms; telephones; * * * entrances; cafeteria; Health Center; program services like physical education and off campus trips[;] *and other program services and accommodations which will be proven at trial.*

(R. Vol. 1 at 207-208 (emphasis added)).

6. The district court bifurcated Plaintiff’s IDEA and non-IDEA claims, and issued two separate decisions. In an order and memorandum dated March 14, 2001, the court affirmed the decision of the SLRP and dismissed Plainitff’s IDEA claims. See *Pace*, 137 F. Supp. 2d at 713. The court first reviewed Plaintiff’s procedural claims and found that the evidence did not support a finding that the administrative proceedings before the hearing officer and SLRP violated the IDEA’s procedural requirements. *Id.* at 716-718. The court next considered Plaintiff’s substantive IDEA claims and found that Plaintiff had received meaningful educational benefit. Specifically, the court held that: (1) Travis’s program was individualized on the basis of his assessment and performance, *id*. at 718; (2) Travis’s educational program was administered in the least restrictive environment appropriate to his special education and physical needs, *id.* at 719-720; (3) key “stakeholders” provided services in a coordinated and collaborative manner, *id.* at 720; and (4) Travis demonstrated positive academic and non-academic benefits from his educational program, *ibid.* In discussing whether Plaintiff was educated in the least restrictive environment, the court emphasized

that, in addition to physical assistance designated to Plaintiff in his IEP, the school had made several accommodations:

> Travis'[s] IEP facilitator testified that all his classes were moved to the first floor, two ramps were constructed onto the field, a curb extension was added to the front driveway, new handicap parking spaces were added to the front of the school and the old handicap parking area was paved, new handicap signs were installed, modifications were made to the elevator, and a new water fountain with handicap access was installed. The Court finds, therefore, that Travis has received his education in the least restrictive environment appropriate with his special education and physical needs.

Ibid. (citation omitted).

In a separate and subsequent decision, the district court granted summary judgment in favor of the defendants with regard to Plaintiff's ADA, Section 504, and other civil rights claims. *Pace* v. *Bogalusa City Sch. Bd.*, No. 99-806, 2001 WL 969103 (E.D. La. Aug. 23, 2001). The district court stated that although a plaintiff suing under the IDEA may also raise claims under other statutes, such claims cannot be maintained "when the factual basis for such a claim is indistinct from the settled or resolved IDEA claim." *Id.* at *3. The district court noted that "[t]he hearing officer, the SLRP, and this Court have all determined that Travis was not denied a free and appropriate public education because of accessibility concerns with Bogalusa High School." *Ibid.* (citing *Pace*, 137 F. Supp. 2d at 719). The court held that Plaintiff's ADA and Section 504 claims are "part and parcel of the IDEA cause of action," and therefore were precluded. *Ibid.* The court reasoned that because it "found that Travis received meaningful educational benefit from a free and appropriate educational program," it "cannot

concomitantly find that the defendants refused to provide reasonable accommodations according to the same facts." *Id.* at *4.

SUMMARY OF THE ARGUMENT

1. The ADA, Section 504, and the IDEA are designed to protect the rights of children with disabilities, but do so in very different ways. The ADA is intended to provide, *inter alia*, "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The statute is designed to address the many forms of discrimination, including the discriminatory effects of architectural barriers, in all areas of public life, including education. See 42 U.S.C. 12101(a)(3), (5). To effectuate this sweeping purpose, Title II of the ADA, along with its implementing regulations, require public entities, such as a public schools, to operate each of its services, programs, or activities so that, when viewed in their entirety, they are readily accessible to and usable by children and other individuals with disabilities. 28 C.F.R. 35.150(a). As part of this nondiscrimination obligation, public schools must comply with Title II's accessibility standards for new construction and alteration of existing facilities. See 28 C.F.R. 35.151. Section 504 operates similarly, and has program accessibility standards that are consistent with those of Title II. See 28 C.F.R. 42.520-42.522 (Department of Justice regulations); 34 C.F.R. 104.21-104.23 (Department of Education regulations).

In contrast, the IDEA has the distinct purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public

education * * * designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A). This purpose is carried out by requiring States, which receive certain federal monies, to develop and implement an "individualized education program" (IEP) for each child with a disability. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 181 (1982); see also note 1, *supra*. The IDEA does not, however, contain specific accessibility standards for school facilities. So long as a child with a disability receives meaningful educational benefits from his or her IEP, a school has met its educational obligation under the IDEA for that child. *Id.* at 206-207. Thus, Congress specifically provided in the IDEA that children with disabilities have available to them the rights, procedures, and remedies of the ADA, Section 504, and other federal laws, in addition to those of the IDEA. See 20 U.S.C. 1415(l).

2. The district court's preclusion of Plaintiff's ADA and Section 504 claims based on its earlier dismissal of his IDEA claims was improper because compliance with Section 504 and the ADA in this case should have been judged by an altogether different legal standard than compliance with the IDEA. See, *e.g., Copeland* v. *Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (explaining that issue preclusion is only appropriate where both the facts and the legal standard used to assess them are the same in both proceedings). The district court's holding that Plaintiff received meaningful educational benefits from his IEP under the IDEA does not address whether the school complied with the accessibility standards under Section 504 and the ADA. For example, the court's

finding that Plaintiff was educated in the least restrictive environment, thereby satisfying one requirement of the IDEA, does not demonstrate that the accommodations made at the school complied with the accessibility standards for new construction or alterations to existing facilities.

Moreover, the district court, in holding that Plaintiff's ADA claims were precluded, failed to properly apply the law of this Court, which has held that in order to establish a violation of Section 504 or the ADA, a plaintiff need only show that "a school district has *refused* to provide reasonable accommodations." *Marvin H.* v. *Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983) (emphasis in original); see also *Jonathan G.* v. *Caddo Parish Sch. Bd.*, 875 F. Supp. 352, 363 (W.D. La. 1994) (plaintiff entitled to declaratory relief under Section 504 for claim challenging school's disciplinary procedures although it failed to state a cause of action under IDEA). Instead, the district court improperly relied on cases adhering to, and, in some instances, misinterpreting, the Eighth Circuit's "bad faith/gross misjudgment" standard to preclude a litigant's redundant non-IDEA claims where no violation of the IDEA has been found. The cases cited by the court are inapposite to this case because Plaintiff's Section 504 and ADA claims, which do not solely involve damages, are legally distinct from his IDEA claims.

ARGUMENT

FAILURE TO ESTABLISH A VIOLATION OF THE IDEA DOES NOT NECESSARILY PRECLUDE A PLAINTIFF'S RELATED CLAIMS UNDER THE ADA AND SECTION 504

A. *The Legal Standards Applicable To ADA And Section 504 Claims Differ From The Legal Standards Used To Assess IDEA Claims*

While the ADA and Section 504 on one hand, and the IDEA on the other, all protect the rights of children with disabilities, they do so in very different ways. As explained herein, the ADA is a broad and comprehensive statute which prohibits discrimination based on disability. Regulations implementing Title II of the statute, which are similar to the regulations implementing Section 504, set forth specific accessibility standards for public entities. The IDEA, however, focuses more narrowly on the provision of educational services to children with disabilities based on each child's particular disability and individual educational needs. So long as a child receives meaningful educational benefits from his individualized education program, the substantive requirements of the IDEA have been satisfied. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 206-207 (1982) Accordingly, the legal standards for the accessibility of schools to children with disabilities differ significantly under each statute.

1. The ADA is broadly intended to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "clear, strong, consistent, enforceable standards [to] address[] [such] discrimination." 42 U.S.C. 12101(b)(1)-(2). The 1990 passage of the ADA

was Congress's response to the "serious and pervasive social problem" of discrimination which persists against individuals with disabilities in all critical areas of society, including education. 42 U.S.C. 12101(a)(2)-(3). Congress enacted the ADA to address the various forms of discrimination which such individuals continually encounter, including:

> outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). To effectuate its sweeping purpose, the ADA forbids discrimination against individuals with disabilities in major areas of public life, among them employment (Title I), public services (Title II), and public accommodations (Title III). Title II of the ADA, applicable to public entities including public schools, states that "no qualified individual with a disability shall, by reason of such disability, * * * 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.

Title II and its implementing regulations require both program and facility accessibility. See 28 C.F.R. 35.149-35.151. The regulations state that "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). The regulations further

provide a list of suggested methods, such as "redesign of equipment, reassignment of services to accessible buildings, assignment of aides * * *, alteration of existing facilities and construction of new facilities, * * * or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(b)(1). In choosing among these available methods, a public entity "shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate." *Ibid.* When a public entity undertakes new construction or an alteration to an existing facility, the regulations require that the facility be constructed or altered "in such manner that [it] is readily accessible to and usable by individuals with disabilities * * *." 28 C.F.R. 35.151(a)-(b). Conformance with the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) generally satisfies this requirement. 28 C.F.R. 35.151(c).

Section 504 also prohibits discrimination on the basis of disability, but its obligations are tied to the receipt of federal financial assistance. 29 U.S.C. 794(a). The Title II regulations discussed above mirror Section 504's implementing regulations governing program accessibility. See 28 C.F.R. 42.520-42.522 (Department of Justice regulations); 34 C.F.R. 104.21-104.23 (Department of Education regulations). Therefore when, as here, a claim is made under Section 504 and there is federal financial assistance, Section 504 creates accessibility

obligations similar to those of the ADA.[3]

2. The IDEA has a different and more specific focus. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A). To meet this purpose, federal funds are made available to assist States, localities, and educational service agencies to provide educational services to all eligible children with disabilities. To qualify for such funds, a State must have in effect policies and procedures to ensure that a free appropriate public education is available to all children with disabilities. 20 U.S.C. 1412(a)(1)(A). An appropriate education must be tailored to the needs of a particular child by means of an "individualized education program" (IEP). *Rowley*, 458 U.S. at 181 (1982); see also note 1, *supra*.

The IDEA also requires States to establish mechanisms for resolving disputes between parties in identifying or evaluating a child or in developing and implementing a child's IEP. For instance, when a dispute arises between the parents of a child with disabilities and the school system, either party has a right to seek to resolve the matter through a state administrative proceeding known as an

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[3] In addition to the general program accessibility standards, the Department of Education has also promulgated Section 504 regulations related to the education of children with disabilities. See 34 C.F.R. 104.33-104.37. The standards contained therein are similar, but not identical, to the standards of the IDEA. Compare 34 C.F.R. 300.305-300.309.

"impartial due process hearing." 20 U.S.C. 1415(f). In Louisiana, due process hearings are held before a hearing officer and then a review panel. See generally La. Rev. Stat. Ann. § 17:1952. Should the parties be unable to resolve their disputes through "due process" proceedings, any party has the right to bring a civil action in any state court of competent jurisdiction or in federal district court for *de novo* review. 20 U.S.C. 1415(i)(2)(A).

To determine whether the child received a free appropriate public education pursuant to the IDEA, the court, on review, must answer two questions. "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-207. If these two questions can be answered affirmatively, then the State has fulfilled its obligations under the law. *Ibid.*

3. In 1986, Congress amended the IDEA to clarify its intent that the IDEA not be construed as the exclusive statute available under which such individuals may seek relief. See *Fontenot* v. *Louisiana Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986). That amendment now contains a specific reference to Section 504 and the ADA. It states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the

> procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. 1415(l).

This provision is necessary to provide children with disabilities the full protection which Congress intended. Plaintiff's case is illustrative. Because the only issue before the district court regarding Plaintiff's substantive IDEA claims was whether he received meaningful educational benefits from his IEP, the only recourse he had for challenging the accessibility of Bogalusa High School was to file suit under the ADA and Section 504. As explained above, the ADA requires public schools, *inter alia*, to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a); see also 28 C.F.R. 42.520(a), 34 C.F.R. 104.22(a) (parallel Section 504 regulations). This program accessibility requirement applies even where, as here, a child with a disability may have benefitted from his IEP. Moreover, the ADA's accessibility standards apply to new construction and alteration of existing facilities, see 28 C.F.R. 35.151(a)-(b), standards which have no counterpart in the IDEA. Accordingly, the legal standards governing Plaintiff's ADA and Section 504 claims differ significantly from the legal standards used to assess his IDEA claims.

B. *The District Court Improperly Precluded Plaintiff's ADA Claims*

The district court improperly granted summary judgment in favor of the defendants with respect to Plaintiff's ADA claims. The court incorrectly held that

Plaintiff's ADA claims were precluded by the court's earlier holding that Travis "was not denied a free and appropriate public education because of accessibility concerns with Bogalusa High School." *Pace*, 2001 WL 969103, at *3.

The rule of issue preclusion (collateral estoppel), bars relitigation by a party in a previous action of issues that were actually litigated and decided in that previous action. See *Restatement (Second) of Judgments*, Introductory Note to ch. 1 (1982). Issue preclusion is appropriate only if: "(1) the issue at stake is identical to the one involved in the prior action, (2) the issue was actually litigated, and (3) the issue was necessary to support judgment in the prior action." *Swate* v. *Hartwell*, 99 F.3d 1282, 1289 (5th Cir. 1996). "Collateral estoppel does not preclude litigation of an issue unless both the facts and the legal standard used to assess them are the same in both proceedings." *Copeland* v. *Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995). In *Society of Separationists, Inc.* v. *Herman*, 939 F.2d 1207, 1210 (5th Cir. 1991), aff'd on reh'g en banc, 959 F.2d 1283 (1992), for example, the plaintiff sued a local judge after she was held in contempt for refusing to take an oath or affirmation as a precondition to serving on a jury. The plaintiff alleged that her constitutional right to "separation of church and state" was violated when she was excluded from the jury simply because she refused to take the oath. The court dismissed her claim, holding that the jury oath did not violate the Establishment Clause. *Id.* at 1211. The plaintiff then filed a separate lawsuit, alleging that her constitutional rights under the Free Exercise Clause were violated when she was imprisoned for refusing to take the oath. *Id.* at

1210-1211. The district court granted summary judgment to the defendants, holding, *inter alia*, that the plaintiff was barred from relitigating claims based on the same facts. This Court reversed on the ground that the plaintiff's Establishment Clause case and Free Exercise case called for very distinct inquiries, and were "governed by altogether different legal standards." *Id.* 1212-1213.

This case is analogous. Like the plaintiff in *Herman*, Plaintiff here has asserted separate causes of action based on distinct legal theories. In evaluating Plaintiff's substantive IDEA claims, the district court appropriately focused on whether Plaintiff received meaningful educational benefits from his IEP, and found that he had.[4] See *Pace*, 137 F. Supp. 2d at 718. However, this finding does not address whether other areas of the school were accessible to and usable by Plaintiff. The ADA requires that public schools "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a) (emphasis added). Indeed, Plaintiff alleged in his complaint that he was denied access to, *inter alia*, the auditorium, the music room, the cafeteria, the health center, bathrooms, telephones, entrances, and other program services (R.

[4] The United States takes no position on the correctness of the district court's conclusion that Plaintiff's IEP satisfied the IDEA.

Vol. 1 at 207-208).[5]

Moreover, among the factors the court considered in deciding whether Plaintiff benefitted from his IEP was whether Plaintiff's educational instruction was administered in the "least restrictive environment appropriate with his special educational and physical needs." *Pace,* 137 F. Supp. 2d at 719-720. The court held that the various kinds of assistance and accommodations that the school provided Plaintiff, such as the relocation of Plaintiff's classes to the first floor and the designation and installation of certain "accessible" facilities, satisfied this IDEA requirement. *Id.* at 720. The court, however, never considered whether the school's designation and installation of certain "accessible" facilities satisfied the standards set forth in the ADA and its implementing regulations for new construction and alteration to existing facilities. Compliance with those standards is generally achieved by conformance with the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG). 28 C.F.R. 35.151(c).

Indeed, Plaintiff was prepared to prove his ADA claims by offering, *inter alia*, the testimony of an expert architectural witness. In his deposition taken by counsel for the defendants, the architect, who surveyed Bogalusa High School in

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[5] As explained above, OCR did not find the physical facilities at Bogalusa High School to be in compliance with Section 504 or the ADA. Instead, it continues to monitor implementation of the school's voluntary "Commitment to Resolve." See pp. 6-7, *supra.*

November of 1999, testified that the newly-constructed ramps, for example, did not conform with the ADAAG because they lacked the proper edge protection (R. Vol. 5 at 1247). He pointed out similar deficiencies in the "accessible" parking spaces (R. Vol. 5 at 1247), bathrooms (R. Vol. 5 at 1250-1251), "lift" (R. Vol. 5 at 1248), and various entrances (R. Vol. 5 at 1251-1255). Thus, the district court's finding that Plaintiff received meaningful educational benefits from his IEP under the IDEA once the school constructed ramps and designated other facilities as "accessible" does not address whether those alterations complied with federal accessibility standards promulgated under the ADA (or Section 504). Plaintiff's ADA claims, therefore, are legally distinct from his IDEA claims because they allege that the school denied him program accessibility *beyond* meaningful educational benefits. Because the issues of ADA and IDEA compliance are significantly different in this case, the district court's conclusion, 2001 WL 969103, at *4, that because "[t]he Court found that Travis received meaningful educational benefit from a free and appropriate educational program, * * * [it] cannot concomitantly find that the defendants refused to provide reasonable accommodations according to the same facts" is incorrect. The court clearly assessed Plaintiff's ADA (and Section 504) claims under an improper legal standard.

In holding that Travis's ADA and Section 504 claims were precluded, the district court failed to properly apply the law of this Court. Instead, the court relied on a number of cases from the Eighth Circuit adhering to a heightened "bad

faith/gross misjudgment" standard to preclude Section 504 and ADA claims for damages where no IDEA violation had been established. Although it is unclear whether the court actually applied this heightened standard to Plaintiff's claims here, the court's reliance on those cases for the proposition that "[P]laintiff cannot maintain claims of discrimination [under the ADA and Section 504] based on the same factual allegations as the IDEA cause of action after the Court has already resolved [P]laintiff's IDEA claim in favor of defendants," 2001 WL 969103, at *3, was nonetheless improper.

First, this Court has held that ADA and Section 504 claimants need only show that "a school district has *refused* to provide reasonable accommodations" to state a cause of action. *Marvin H.* v. *Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983) (emphasis in original). Proof of intent is therefore not required to prove a violation; rather, it is only necessary to recover damages. *Id.* at 1356-1357. In his complaint, Plaintiff pled facts of intentional conduct in support of his ADA and Section 504 claims and, more importantly, requested injunctive relief in addition to damages. Reversal of the district court's preclusion of Plaintiff's ADA and Section 504 claims is therefore warranted with respect to his request for injunctive relief; to the extent that Plaintiff may be entitled to damages, the district court must, on remand, make findings as to the level of intent with which the defendants act.

At least one court within this jurisdiction has pointed out that "[t]he Fifth Circuit has not gone so far as to hold that in order to state a cause of action under

Section 504 [or the ADA], it must be shown that the defendant acted in bad faith." *Jonathan G.* v. *Caddo Parish Sch. Bd.*, 875 F. Supp. 352, 363 (W.D. La. 1994). In *Jonathan G.*, the court held that the plaintiff failed to state a cause of action under the IDEA, but was nevertheless entitled to declaratory relief under Section 504 for his claim that the school's disciplinary procedures discriminated against him on the basis of his disability. *Id.* at 364. Although the plaintiff's claim in *Jonathan G.* was not related to the accessibility of the school, the court's approach is instructive because it demonstrates how claims brought under more than one statute designed to protect the rights of children with disabilities can and should be analyzed under each statute's distinct legal standard. The district court in this case did not undertake such analyses and, as a result, improperly precluded Travis's ADA claims.

Second, even if the district court applied the Eighth Circuit's "bad faith/gross misjudgment standard" to Plaintiff's claims, application of that standard here was improper because, as explained above, Plaintiff's ADA and Section 504 claims are legally distinct from his IDEA claims. Moreover, Plaintiff's claims are not strictly claims for damages. The Eighth Circuit first articulated its standard in *Monahan* v. *Nebraska*, 687 F.2d 1164 (1982), cert. denied, 460 U.S. 1012 (1983), a case which predates the 1986 amendment to the IDEA clarifying Congress's intent to make the rights and remedies of Section 504, the ADA, and other federal statutes available to IDEA litigants. See 20 U.S.C. 1415(l); see also *Howell* v. *Waterford Pub. Schs.,* 731 F. Supp. 1314, 1318-1319

(E.D. Mich. 1990) (rejecting *Monahan* as bad law in light of the 1986 amendment). The gravaman of the plaintiffs' complaint in *Monahan* was that the State "failed to provide for an impartial, 'due process' hearing at which parents may contest education placements, in violation of [the IDEA]." 687 F.2d at 1169. Based on these facts, they alleged claims for damages under the IDEA, Section 504, and various state laws. *Ibid.* After careful and thorough review of the pleadings, the court found that the plaintiffs' Section 504 claims "rest[ed] on the same procedural theories that [were] unsuccessfully urged under [the IDEA]." *Id.* at 1170. Accordingly, the court concluded that Section 504's prohibition of "discrimination" must require "something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist." *Ibid.* The court held that before liability can be imposed, "either bad faith or gross misjudgment should be shown before a [Section] 504 violation can be made out, at least in the context of education of handicapped children." *Id.* at 1171.

The district court, in precluding Travis's ADA and Section 504 claims, cited to a number of cases adhering to the "bad faith/gross misjudgment" standard in *Monahan*. See *Pace*, 2001 WL 969103, at *3-*4, and citations contained therein. While some of these cases properly applied the *Monahan* standard to redundant IDEA and non-IDEA claims, others summarily, and thus, improperly, applied it to preclude Section 504 and ADA claims accompanying unsuccessful IDEA claims, regardless of the claims' factual and legal differences. Compare *Birmingham* v. *Omaha Sch. Dist.*, 220 F.3d 850, 856 (8th Cir. 2000) (*Monahan* standard applied

to redundant non-IDEA and IDEA claims), and *Moubry* v. *Independent Sch. Dist.*, 9 F. Supp. 2d 1086 (D. Minn. 1998) (plaintiff's Section 504 and ADA claims challenging school's educational services were not factually or legally distinct from plaintiff's IDEA claims), with *Hoekstra* v. *Independent Sch. Dist.*, 103 F.3d 624, 627 (8th Cir. 1996) (plaintiff alleged violation of the ADA based on school's inaccessible elevator), cert. denied, 520 U.S. 1244 (1997), and *Robert H.* v. *Nixa R-2 Sch. Dist.*, 26 I.D.E.L.R. 564 (W.D. Mo. 1997) (plaintiff alleged violation of Section 504 based on school's policy of excluding him from school activities such as field trips and lunch). The summary application of the "bad faith/gross misjudgment" standard to preclude an IDEA litigant's non-IDEA claims is inconsistent with the approach taken by the *Monahan* Court, which "read and reread the[] pleadings" before concluding that the plaintiffs' Section 504 claims were indistinct from their IDEA claims. *Monahan*, 687 F.2d at 1170. Because Plaintiff's Section 504 and ADA claims in this case are legally distinct from his IDEA claims, the cases cited by the district court in precluding Plaintiff's non-IDEA claims are inapposite.[6]

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[6] In addition to cases from the Eighth Circuit, the district court cited two other cases which are markedly different from this one. In *D.F.* v. *Western School Corp.*, 921 F. Supp. 559 (S.D. Ind. 1996), and *Urban* v. *Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996), the plaintiffs asserted Section 504 and ADA claims contesting the adequacy of the school district's educational services. *Urban*, 89 F.3d at 728; *D.F.*, 921 F. Supp. at 574. Because those claims were factually and legally indistinct from their IDEA claims, the plaintiffs could not

(continued...)

CONCLUSION

For the foregoing reasons, the district court's judgment regarding the preclusive effect of its IDEA decision on Plaintiff's ADA and Section 504 claims should be reversed and the case remanded to permit Plaintiff to put on evidence regarding whether Bogalusa High School satisfies the ADA and Section 504.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

_____
MARK L. GROSS
TOVAH R. CALDERÓN
Attorneys
U.S. Department of Justice, CRT/APP
950 Pennsylvania Avenue, NW
Washington, DC 20530

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[6](...continued)
prevail under Section 504 or the ADA once they failed to prove a violation of the IDEA. *Urban*, 89 F.3d at 728; *D.F.*, 921 F. Supp. at 574.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the United States as Amicus Curiae in Support of Appellant was served electronically and also by first class mail on this 9th day of January, 2002, to the following counsel of record:

Anne Arata Spell, Esq.
Spell & Spell
943 Ellis Street
Franklinton, LA 70438

Ernest L. O'Bannon, Esq.
Bienvenu, Foster, Ryan & O'Bannon
1010 Common Street, Suite 2200
New Orleans, LA 70130

B. Ralph Bailey, Esq.
Law Office of B. Ralph Bailey
800 Mariner's Plaza
Mandeville, LA 70448

Charles K. Reasonover, Esq.
Lamothe & Hamilton
601 Poydras Street, Suite 2750
New Orleans, LA 70130

_____
TOVAH R. CALDERÓN
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 6,714 words.
2. The brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

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TOVAH R. CALDERÓN
Attorney