Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?

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In a recently published nuanced analysis, Professor Mark Weber argued against applying an intent requirement for non-employment § 504 and Americans with Disabilities Act (ADA) claims against governmental entities.[1] Professor Weber made clear that his argument applies "particularly" but not exclusively to claims for "monetary relief,"[2] extending to "any intent requirement either for liability or monetary relief."[3]

The purpose of this brief article is to provide a comprehensive yet concise canvassing of the case law specific to student § 504 and ADA claims against school districts to determine whether courts require a heightened, intent standard.[4] The purpose, in contrast to Professor Weber's stimulating analysis, is descriptive rather than prescriptive. Moreover, in light of the school district context and systematic outcomes focus of this analysis, the treatment of § 504 and the ADA is

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1. Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination*, 56 B.C. L. REV. 1417 (2015). Although nominally limiting his position to "reasonable accommodation" claims, his ultimate reliance on *Alexander v. Choate*, 469 U.S. 287 (1985) to replace the "misguided" analogy to Title VI and Title IX cuts more broadly. *E.g.*, *id.* at 1419, 1436, 1440. Moreover, "reasonable accommodation" is not a particularly clear delimiter, especially because it often fuses with the "otherwise qualified" element of the general prima facie case and, in any event as his cited cases show, extends to various cases that are subject to other broad liability categories in the K–12 context.

2. *Id*. at 1464.

3. *Id*. at 1419. His reference to "liability" in this context is understood to extend beyond money damages to the "full range of remedies," including "injunctive remedies" and "declaratory relief." *Id.* at 1419, 1430, 1440.

4. As made clear *infra* note 14 and accompanying text, the cited case law is limited to the K–12 public school context, and as illustrated *infra* note 7, the "intent standard" refers in the context to more than one heightened variation.

on a joint basis,[5] with the Individuals with Disabilities Education Act (IDEA) serving as a relatively remote backdrop.[6]

The first part of this article provides an overview of the various elements of such claims, including the heightening hurdle of the various forms of what Professor Weber referred to as an intent requirement.[7] The second part provides the scope, including exclusions, of the analysis. The third and primary part presents a circuit-by-circuit chart of the current case law. The final part provides a brief discussion of the results, including recommendations for follow-up analyses.

I. OVERVIEW OF THE BASIC ELEMENTS OF STUDENT SECTION 504 AND ADA CLAIMS

Within the aforementioned[8] context and beyond the threshold hurdles,[9] courts generally agree that the prima facie case consists primarily of the following elements: (1) student meets definition of disability and is otherwise qualified; (2) exclusion, benefit denial, or other discrimination; and (3) causal link between disability and discrimination.[10] Although not necessarily applied in a flowchart-type

5. For the basically indistinct substantive standards of § 504 and the ADA within this bounded context, see, *e.g.*, Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 275 (3d Cir. 2014) (repeating that "the substantive standards for determining liability under the Rehabilitation Act and the ADA are the same"); B.M. *ex rel.* Miller v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 887 (8th Cir. 2013) (commenting that the rights and remedies are the same under Title II of the ADA and § 504); Miller *ex rel.* S.M. v. Bd. of Educ., 565 F.3d 1232, 1245 (10th Cir. 2009) ("Because [they] involve the same substantive standards, we analyze them together."); S.S. v. E. Ky. Univ., 532 F.3d 445, 453–54 (6th Cir. 2008) ("We will . . . analyze [the student's] ADA and § 504 claims together [because the limited differences are not relevant here].").

6. For a systematic analysis of the specific differences among these three statutory frameworks in the K–12 student context, see Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886 (2017).

7. Using the criminal law concept of "mens rea" by way of analogy, Professor Weber listed "discriminatory animus" and "deliberate indifference" as examples of what he more generally refers to as intent. Weber, *supra* note 1, at 1422–23). He separately but similarly rejected the alternative "bad faith-gross misjudgment" standard. Weber, *supra* note 1, at 1421, 1456.

8. *See supra* text accompanying note 4.

9. "Hurdles" in this context serves to show the practical effect of such prerequisites on plaintiff students. The major example is the exhaustion doctrine. Fry v. Napoleon Cmty. Schs., 137 S.Ct. 743 (2017). A less frequent but occasionally fatal hurdle is the statute of limitations. Bd. of Educ. v. C.M., 70 IDELR ¶ 68 (S.D.N.Y. 2017).

10. B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 158 (2d Cir. 2016); Gohl v. Livonia Pub. Schs. Sch. Dist., 836 F.3d 672, 683 (6th Cir. 2016); J.C. *ex rel.* W.P. v. Cambrian Sch. Dist., 648 F. App'x 652, 654 (9th Cir. 2016); A.G. v. Paradise Valley Unified Sch. Dist., 815 F.3d 1195,

sequence, the first element[11] or the third element[12] has been fatal in various court decisions, whereas the focus here is on the ultimate application of the second element.[13]

II. SCOPE OF THE ANALYSIS

Within the K–12 public school student context,[14] the boundaries for this circuit-by-circuit analysis are (1) broadly FAPE-related, peer

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1207 (9th Cir. 2016); Nevills v. Mart Indep. Sch. Dist., 608 F. App'x 217, 222 (5th Cir. 2015); G.C. v. Owensboro Pub. Schs., 711 F.3d 623, 635 (6th Cir. 2013); Weidow v. Scranton Sch. Dist., 460 F. App'x 181, 186 (3d Cir. 2012); M.Y. *ex rel.* J.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885, 888 (8th Cir. 2008). The specific wording of the second element varies, with "other" (or "otherwise") not uniformly part of the judicial formulation. This ambivalence is reflected in the ADA definitional section, which does not use this qualifier before the reference to discrimination and yet is within the overall definition of discrimination. 42 U.S.C. § 12132 (2012). Section 504's earlier and less specific formulation refers alternatively to participation exclusion, benefit denial, and discrimination, yet clearly is a statute specific to nondiscrimination. 29 U.S.C. § 794(a) (2012). In any event, the focus of this article is the ultimate application in terms of the intent issue regardless of the initial inclusion or omission of such a qualifier.

11. Although it is generally understood that the definition of disability under § 504 and the ADA is broader than that under the IDEA, qualifying under the IDEA does not automatically mean that the student meets the § 504/ADA definition of disability. *E.g.*, B.C. v. Mount Vernon Sch. Dist.*,* 837 F.3d 152, 159–60 (2d Cir. 2016); Ellenburg v. N.M. Mil. Inst., 572 F.3d 815, 822 (10th Cir. 2009). Moreover, beyond the scope of the IDEA definition of disability, the substantial-limitation part of the § 504/ADA definition of eligibility has defeated some student claims at the first element of the prima facie claim. *E.g.*, Mann v. La. High Sch. Athletic Ass'n, 535 F. App'x 405, 411–12 (5th Cir. 2013); Weidow v. Scranton Sch. Dist., 460 F. App'x 181, 184–85 (3d Cir. 2012).

12. Doe v. Columbia-Brazoria Indep. Sch. Dist., 855 F.3d 681, 690 (5th Cir. 2017); *J*.C. v. Cambrian Sch. Dist., 648 F. App'x 652, 654 (9th Cir. 2016); C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist., 641 F. App'x 423, 426–27 (5th Cir. 2016); Dutkevitch v. Pa. Cyber Charter Sch., 439 F. App'x 177, 179 (3d Cir. 2011), *vacatur denied*, 439 F. App'x 177 (3d Cir. 2012).

13. Although only a secondary matter here, part of the second element is the sometimes different judicial treatment of free appropriate public education (FAPE) under § 504/ADA as compared with the IDEA. *E.g*., Miller v. Bd. of Educ. of Albuquerque Pub. Sch., 565 F.3d 1232, 1246 (10th Cir. 2009) (ruling that denial of FAPE under the IDEA is not necessarily sufficient for a § 504/ADA denial of FAPE); Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008) ("The most important differences are that, unlike FAPE under the IDEA, FAPE under § 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the 'design' of a child's educational program").

14. This contextual boundary excludes case law under Titles I (employment) and III (places of public accommodation, such as private schools) of the ADA. *E.g.,* U.S. v. Nobel Learning Communities, Inc., 676 F. Supp. 2d 379 (E.D. Pa. 2009). It also excludes the limited § 504-ADA difference in the effective communication regulation of Title II of the ADA. *E.g.,* K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013).

harassment, and staff abuse cases,[15] and within this relatively broad subject matter, (2) the various theories except the one definitionally obverse to intent—disparate impact.[16] The time period is the most recent fifteen years. Moreover, although the coverage within these boundaries is relatively comprehensive, the focus of the citations is on fairly recent federal appeals court decisions, with older appellate decisions and recent lower court decisions only included in the absence of such authority. Finally, although most student suits under § 504/ADA seek monetary damages, which generally are not available under the IDEA,[17] the coverage here is not limited to this form of relief.

III. TABULAR ANALYSIS OF THE CASE LAW

Table 1 synthesizes the applicable case law within the stated scope of analysis. The entries for each circuit are in response to the focal question—do courts require a heightened, intent standard for student § 504/ADA claims? The columns for each jurisdictional row represent an approximate typology of relief: (1) money damages where the plaintiff clearly sought this form of relief and the court seemed to limit its answer to this remedy; (2) unclear form of relief or its limitation was not readily discernable; and (3) where the court addressed one or more of

15. In contrast, because they have rather specialized statutory or regulatory bases, the exclusions are student § 504/ADA suits premised on (1) facilities accessibility, *e.g.*, Estrada v. San Antonio Indep. Sch. Dist., 575 F. App'x 541 (5th Cir. 2014) (requiring intent); Greer v. Richardson Indep. Sch. Dist., 472 F. App'x 287 (5th Cir. 2012); Celeste v. E. Meadow Union Free Sch. Dist., 373 F. App'x 85 (2d Cir. 2010), or (2) although seemingly requiring animus at the final, pretext step, for retaliation, *e.g.*, Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303, 783 F.3d 634 (7th Cir. 2015); A.C. v. Shelby Cty. Bd. of Educ., 711 F.3d 687 (6th Cir. 2013); D.B. v. Esposito, 675 F.3d 26 (1st Cir. 2012).

16. However, the scope of this theory is rather restricted and theoretical. *E.g.*, Mark H. v. Lemahieu, 513 F.3d at 936-37 (attempting to plumb the limits of the disparate impacts that Seciton 504/ADA prohibits under *Sandoval* and *Choate*). As a result, the case law that has applied this theory within the boundaries of our focus is very limited in both frequency and success. *E.g.*, B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 158–59 (2d Cir. 2016) (upholding summary judgment for district on students' disparate impact claim regarding use of noncredit courses based on failure to establish first prima facie element); Smith v. Henderson, 982 F. Supp. 2d 32, 46–47 (D.D.C. 2013) (rejecting for failure to show something more, such as intent); C.D. v. N.Y.C. Dep't of Educ., 52 IDELR ¶ 8 (S.D.N.Y. 2009) (denying dismissal of two students' disparate impact claim based on unavailability of free meals at district's private placements).

17. *E.g.,* C.O. v. Portland Pub. Sch., 679 F.3d 1162 (9th Cir. 2012); Chambers v. Sch. Dist. of Phila., 587 F.3d 176 (3d Cir. 2009); Diaz-Fonseca v. P.R., 451 F.3d 13 (1st Cir. 2006); Ortega v. Bibb Cty. Sch. Dist., 397 F.3d 1321 (11th Cir. 2005).

the equitable remedies that not only are often associated with the IDEA[18] but also are within the broad range of relief available under § 504/ADA,[19] such as tuition reimbursement or compensatory education. Finally, the footnoted citations include parentheticals that identify the variation, or proxy, for intent to the extent that the court required such a heightened standard.

18. *See*, Perry A. Zirkel, *Compensatory Education: Another Annotated Update of the Law*, 336 EDUC. L. REP. 654 (2016); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012). The various other equitable remedies include various injunctions, such as orders for evaluation, placement, or training. Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011).

19. Mark H. v. Lemahieu, 513 F. 3d 922, 938–39 (9th Cir. 2008) (Plaintiffs suing under § 504 may "seek 'the full panoply of remedies, including equitable relief and [compensatory] damages.'") (citing Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F. 2d 1103, 1107 (9th Cir. 1987)).

TABLE 1. CIRCUIT-BY-CIRCUIT CANVASSING OF INTENT REQUIREMENT FOR § 504/ADA STUDENT CASES

	Money Damages?	Unclear Relief?	Other Relief?
1st Cir.	Yes[a]	Yes, with a limited exception[b]	
2d Cir.	Yes[c]	Yes[d]	
3d Cir.	Yes[e]		No[f]
4th Cir.	Yes[g]		Yes[h]
5th Cir.	Yes[i]		
6th Cir.	Yes[j]	Yes[k]	Probably[l]
7th Cir.	Yes, with limited exceptions[m]		
8th Cir.		Yes[n]	
9th Cir.	Yes[o]		No?[p]
10th Cir.	Yes, with limited exceptions[q]	Yes[r]	
11th Cir.	Yes[s]	Probably[t]	
D.C. Cir.		Yes[u]	

[a]Lebron v. P.R., 770 F.3d 25, 31 (1st Cir. 2014) (requiring intent).

[b]S.S. v. City of Springfield, 146 F. Supp. 3d 414, 425 (D. Mass. 2015) (denying dismissal of ADA integration claim without intent being part of the prima facie case).

[c]Frank v. Sachem Sch. Dist., 633 F. App'x 14, 15 (2d Cir. 2016) (deliberate indifference).

[d]C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 841 (2d Cir. 2014) (bad faith-gross misjudgment).

[e]D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 269–70 (3d Cir. 2014; S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 263–64 (3d Cir. 2013) (deliberate indifference).

[f]Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280–82 (3d Cir. 2012); *see also* S.P. v. Fairview Sch. Dist., 64 IDELR ¶ 99 (W.D. Pa. 2014); Chelsea D. v. Avon Grove Sch. Dist., 61 ¶ 161 (E.D. Pa. 2013) (citing *M.R.* and *Ridgewood*); Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012; Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa. 2003). *But cf.* Sch. Dist. of Phila. v. Kirsch, __ F. App'x __ (3d Cir. 2018);T.F. v. Fox Chapel Area Sch. Dist., 589 F. App'x 594, 601 (3d Cir. 2014).

[g]S.B. v. Bd. of Educ. of Harford Cty., 819 F.3d 69, 76 (4th Cir. 2016) (deliberate indifference for peer harassment); Sellers v. Sch. Bd. of City of Manassas, 141 F.3d 524, 529 (4th Cir. 1998) (bad faith-gross misjudgment for denial of FAPE).

[h]K.D. v. Starr, 55 F. Supp. 3d 782, 789–90 (D. Md. 2014) (interpreting *Sellers* broadly, rejecting money damages boundary for bad faith-gross misjudgment).

[i]Nevills v. Mart Indep. Sch. Dist., 608 F. App'x 217, 222 (5th Cir. 2015); Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 1000 (5th Cir. 2014) (deliberate indifference for peer harassment); D.A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 455 (5th Cir. 2010) (bad faith-gross misjudgment for denial of FAPE).

[j]S.S. v. E. Ky. Univ., 532 F.3d 445, 453–54 (6th Cir. 2008) (deliberate indifference for peer harassment).

[k]G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 635 (6th Cir. 2013) (bad faith-gross misjudgment); *see also* N.L. v. Knox Cty. Sch., 315 F.3d 688, 605 (6th Cir. 2003).

[l]Campbell v. Bd. of Educ. of Centerline Sch. Dist., 58 F. App'x 162, 167 (6th Cir. 2003). *But see* I.L. v. Knox Cty. Bd. of Educ., 257 F. Supp. 3d 946, 967 (M.D. Tenn. 2017) (ruling that "because [the plaintiff] seeks only injunctive relief on her Title II and § 504 claim, she need not prove deliberate indifference."). Citing Weber, *supra* note 1, the court came to this conclusion only for non-damages claims. Moreover, this claim was against the state education department, not the school district, and it failed to survive the department's motion for summary judgment due to the failure to meet the prima facie elements. *See id.*

[m]In addition to disparate impact, see *supra* note 16 and accompanying text, courts have offered the non-intent alternative of failure to provide reasonable accommodations, although it was not successful upon its applications in a number of cases. *See also* A.H. v. Ill. High Sch. Ass'n, __ F.3d __ (7th Cir. 2018); *e.g.,* CTL v. Ashland Sch. Dist., 743 F.3d 524, 528–29 (7th Cir. 2014); Thurmon v. Mount Carmel High Sch., 191 F. Supp. 3d 894, 898–99 (N.D. Ill. 2016); *cf.* Zandi v. Fort Wayne Cmty. Sch., 59 IDELR ¶ 283 (N.D. Ill. 2016); *cf.* Zandi v. Fort Wayne Cmty. Sch., 59 IDELR ¶ 283 (N.D. Ind. 2012) (explaining that plaintiff mied in intent requirement. For the residual alternative in the Seventh Circuit, deliberate indifference is required. *E.g*., Zachary M. v. Bd. of Educ., 829 F. Supp. 2d 650, (N.D. Ill. 2011)

[n]I.Z.M. v. Rosemount-Apple Valley-Eagan Sch. Dist., 863 F.3d 966, 973 (8th Cir. 2017); B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 887 (8th Cir. 2013); M.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885, 889–90 (8th Cir. 2008); M.P. v. Indep. Sch. Dist. *721*, 326 F.3d 975, 981–82 (8th Cir. 2003) (bad faith-gross misjudgment).

[o]A.G. v. Paradise Valley Unified Sch. Dist., 815 F.3d 1195, 1207–08 (9th Cir. 2016); T.B. v. San Diego Unified Sch. Dist., 806 F.3d 451, 472 (9th Cir. 2015); Mark H. v. Lemahieu, 513 F.3d 922, 938–39 (9th Cir. 2008) (deliberate indifference).

[p]P.P. v. Compton Unified Sch. Dist.,135 F. Supp. 3d 1098 (C.D. Cal. 2015) (denying motion to dismiss failure-to-accommodate claim).

[q]Miller v. Bd. of Educ. of Albuquerque Pub. Sch., 565 F.3d 1232, 1246 (10th Cir. 2009) (undefined but unproven discrimination element). For subsequent lower court decisions that specified this element as deliberate indifference, see, *e.g.,* Dorsey v. Pueblo Sch. Dist. 60, 215 F. Supp. 3d 1082, 1087–88 (D. Colo. 2016); Sutherlin v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254, 1267 (N.D. Okla. 2013) (citing the Sixth Circuit's decision in *S.S.*).

[r]In a recent decision, the Tenth Circuit recognized a failure-to-train claim under not only an "intentional discrimination (disparate treatment)" theory but also the alternatives of disparate impact and reasonable accommodation. J.V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1297 (10th Cir. 2016). However, the outcome was in favor of the district for all three alternatives.

[s]J.S. v. Houston Cty. Bd. of Educ., 877 F.3d 979 (11th Cir. 2017),Long v. Murray Cty. Sch. Dist., 522 F. App'x 576, 577 (11th Cir. 2013) (deliberate indifference); T.W. v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 604 (11th Cir. 2010) (undefined intentionality requirement).

[t]*Compare* Alboniga v. Sch. Bd. of Broward Cty., 87 F. Supp. 3d 1319, 1338 (S.D. Fla. 2015) (failure to provide reasonable accommodation without more), *with* D.F. v. Leon Cty. Sch. Bd., 65 IDELR ¶ 134 (N.D. Fla. 2014) (bad faith-gross misjudgment).

[u]Alston v. District of Columbia., 770 F. Supp. 3d 289, 298 (D.D.C. 2015); B.D. v. District of Columbia, 66 F. Supp. 3d 75, 80 (D.D.C. 2014); T.M. v. District of Columbia, 961 F. Supp. 2d 169, 176 (D.D.C. 2013); Jackson v. District of Columbia, 826 F. Supp. 2d 109, 115 (D.D.C. 2011); Torrence v. District of Columbia, 669 F. Supp. 2d 68, 72 (D.D.C. 2009); Douglass v. District of Columbia, 605 F. Supp. 2d 156, 168 (D.D.C. 2009); Robinson v. D.C., 535 F. Supp. 2d 38, 41–42 (D.D.C. 2008) (bad faith-gross misjudgment).

A review of the entries in the table reveals that the circuits are almost entirely agreed that student § 504/ADA claims against school districts require some variant of intent. The exceptions are quite limited in terms of jurisdictions, theories, and type of relief. More specifically, when the relief is limited to money damages or is unclear, the exceptions are limited to a lower court decision in the First Circuit,[20] decisions with alternative theories largely arising in the Seventh Circuit,[21] and one of two lower court decisions in the Eleventh Circuit.[22] In the much less frequent instances of claims for equitable relief, such as compensatory education or tuition reimbursement, the answers are limited to a split between (1) the Third Circuit[23] and the Fourth Circuit[24] and (2) the presently minority view of a lower court ruling in the Sixth Circuit.[25]

Discussion of the Findings

The primary conclusion is that as a matter of objective analysis, in contrast with academic advocacy, the courts have erected a rather wide and mostly solid wall of authority in support of a heightened, intent standard for student § 504/ADA claims against school districts. The gaps in the wall are relatively small and largely limited to equitable relief, which is not the remedy most often sought via these claims in contrast with those under the IDEA.[26]

Moreover, the likelihood of the limited exceptions swallowing the rule, based on the nuanced analysis that Professor Weber has advanced, is low for several, overlapping reasons. First, the net movement during the period that he surveyed has been in the opposite direction, which he largely understated. For example, various federal appellate decisions cited in the chart[27] subsequently superseded the relatively few district

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20. *See* case cited *supra* note "b" under Table 1.
21. *See* cases cited *supra* note "m" under Table 1.
22. *See* cases cited *supra* note "t" under Table 1.
23. *See* cases cited *supra* note "f" under Table 1.
24. *See* cases cited *supra* note "h" under Table 1.
25. *See* cases cited *supra* note "l".
26. The wide and ever-lengthening line of § 504/ADA rulings based on the IDEA exhaustion doctrine is a less direct indication of the primacy of this remedy. In its recent relevant decision, the Supreme Court acknowledged that the parents sought compensatory damages but left for another day its effect on the exhaustion issue. *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 752 n.4 (2017).
27. *See* cases cited *supra* notes "c–f" under Table 1.

court decisions for § 504/ADA money damages in the K–12 context,[28] which Professor Weber had characterized as avoiding the intent "trap."[29] Indeed, an examination of the cited case law in the Third Circuit[30] reveals that the notable exception for "other relief" represents a whittling down of its 1999 decision in *Ridgewood Board of Education v. N.E. ex rel. M.E.*[31] rather than an expanding reversal of the primary category of relief.[32]

Second, in the year or two after his article, the Second, Fourth, Eighth, and Ninth Circuits,[33] as well as various lower courts,[34] have issued decisions that continued the opposite direction. The only decision that followed his analysis was that of a district court[35] in the Sixth Circuit, which appears to have solidifying opposite authority.[36] This decision, which reportedly is not likely to be appealed,[37] only adopted Professor Weber's view to the extent of money damages and was ultimately unsuccessful due to the plaintiff's failure to establish the prima facie case without intent.

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28. *E.g.*, Doe v. Darien Bd. of Educ., 59 IDELR ¶ 257 (D. Conn. 2012); M.S. v. Marple Newtown Sch. Dist., 59 IDELR ¶ 186 (E.D. Pa. 2012); J.L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257, 274–75 (W.D. Pa. 2008); Indiana Sch. Dist. v. H.H., 428 F. Supp. 2d 361, 364 (W.D. Pa. 2006).

29. Weber, *supra* note 1, at 1455.

30. *See* cases cited *supra* notes "e" and "f" under Table 1.

31. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999).

32. *See* cases cited *supra* note "e" under Table 1.

33. *See* cases cited *supra* notes "c, g, n," and "o" under Table 1.

34. *E.g.*, Peters v. St. Charles Parish Sch. Dist., 69 IDELR ¶ 242 (E.D. La. 2017); B.A. v. Manchester Sch. Dist., 70 IDELR ¶ 132 (D.N.H. 2017); R__S. *ex rel.* Ruth B. v. Highland Park Indep. Sch. Dist., IDELR ¶ 67 (N.D. Tex. 2017); Z.F. v. Ripon Unified Sch. Dist., 70 IDELR ¶ 19 (E.D. Cal. 2017); Luong v. E. Side Union High Sch. Dist., (N.D. Cal. 2017); Dorsey v. Pueblo Sch. Dist. 60, 215 F. Supp. 3d 1082, 1087–88 (D. Colo. 2016); Conklin v. Jefferson Cty. Bd. of Educ., 205 F. Supp. 3d 797, 815–16 (N.D. W. Va. 2016); RM v. Charlotte-Mecklenburg Cty. Bd. of Educ., 70 IDELR ¶ 6 (W.D.N.C. 2017); A.C. v. Scranton Sch. Dist., 191 F. Supp. 3d 375, 389 (E.D. Pa. 2016); Beam v. W. Wayne Sch. Dist., 165 F. Supp. 3d 200, 209 (M.D. Pa. 2016); Miller v. Monroe Sch. Dist., 159 F. Supp. 3d 1238, 1249 (W.D. Wash. 2016); D.N. v. Louisa Cty. Pub. Sch., 156 F. Supp. 3d 767, 776 (W.D. Va. 2016); Sparman v. Blount Cty. Bd. of Educ., 68 IDELR ¶ 202 (N.D. Ala. 2016); W.H. v. Tenn. Dep't of Educ., 67 IDELR ¶ 6 (M.D. Tenn. 2016). *But cf.* K.G. v. Sergeant Bluff-Luton Cmty. Sch. Dist., 244 F. Supp. 3d 904, 929 (D. Iowa 2017) (concluding that bad faith is not required for a hostile environment claim).

35. *See* cases cited *supra* note "l" under Table 1.

36. *See* cases cited *supra* notes "j–l" under Table 1.

37. E-mail from Melinda Jacobs, attorney (as school district co-counsel in I.L. v. Knox Cty. Sch. Dist.) to Perry A. Zirkel, Professor Emeritus, Lehigh University (Aug. 3, 2017, 19:53 EST) (on file with author).

Third, the doctrine of precedent, encompassing the vertical and horizontal binding dimension and the persuasive dimension,[38] is a powerful force against such a change in the well-established direction. For example, in response to the appellate briefs seeking to have the Eighth Circuit overturn its purportedly erroneous and misleading[39] bad faith-gross misjudgment standard originating in *Monahan v. Nebraska*,[40] the Court explained:

> [The plaintiff] and the Council of Parent Attorneys and Advocates as *amicus curiae* [whose brief cited Professor Weber's article] vigorously argue that *Monahan* was misguided and contrary to the purpose of these anti-discrimination statutes. However, even if we were inclined to revisit Judge Richard Arnold's opinion in *Monahan*, as a panel we are bound by this controlling precedent [citing intervening 8th Circuit decisions].[41]

Fourth, unlike Professor Weber's analysis, the relevant courts decisions, with relatively rare exception, fail to provide clear and consist differentiation based on the type of claim or the particular level of heightened standard. For example, some courts have declined altogether to define the particular variant,[42] and the few that have sought to differentiate the leading variants have disagreed as to which is higher.[43] In a less clear-cut contrast with his cross-relief position,[44] various courts, including the aforementioned[45] lower court decision within the Sixth Circuit, have drawn a line between compensatory damages and equitable relief, although the "unclear relief" category in the table suggests that the line is moving in the opposite direction to that advocated by Professor Weber and adopted by this lower court.

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38. Jeffrey C. Dobbins, *Structure and Precedent,* 108 MICH. L. REV. 1453, 1460–63 (2010).

39. Weber, *supra* note 1, at 1457, 1460.

40. Monahan v. Neb., 687 F.2d 1164, 1170 (8th Cir. 1982).

41. I.Z.M. v. Rosemount-Apple Valley-Eagan Sch. Dist., 863 F.3d 966, 973 (8th Cir. 2017). The weight of vertical precedent makes such a shift even more difficult to sustain at the district court level within such circuits. *E.g.*, R.M.M. v. Minneapolis Pub. Sch., 70 IDELR ¶ 64 (D. Minn. 2017).

42. *See* cases cited *supra* notes "a" and "q" under Table 1.

43. *Compare* Baker v. S. York Cty. Sch. Dist., 60 IDELR ¶ 106 (M.D. Pa. 2012) (bad faith-gross misjudgment is the more stringent standard, *with* Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 524–25 (5th Cir. 2013), *vacated as premature*, 599 F. App'x 534 (5th Cir. 2013) (deliberate indifference as more stringent).

44. *See supra* notes 2–3 and accompanying text.

45. *See* cases cited *supra* note "l" under Table 1.

Nevertheless, Professor Weber's identification of the alternative theories of disparate impact and reasonable accommodation merit concomitant consideration. Thus far, the disparate impact theory has been limited in both scope and success.[46] The reasonable accommodation theory as a distinct alternative to intent applications has been largely limited to the Seventh and Tenth Circuits with ultimate outcomes all in favor of the defendant districts.[47] The other jurisdictions have tended to import an intent requirement into the reasonable accommodation claims to the limited extent that they appear as a separable theory.[48]

These findings and conclusions are subject to further research, including replication and various extensions, including (1) expanding the analysis to the aforementioned[49] excluded areas; (2) moving further to expand the analysis beyond the K–12 context to square more closely with the scope of Professor Weber's article; (3) empirically examining the outcomes for each of the various requisite elements and theories; and (4) systematically comparing the frequency and outcomes of § 504/ADA claims of students and other plaintiffs, such as employees.

Unlike Mark Antony,[50] I come not to bury Professor Weber but to compliment and complement his work. For legal and educational practitioners in the K–12 context, this corollary analysis would seem to suggest that § 504 and the ADA generally pose a steep slope for student litigants at this time. In the future, however, Professor Weber's proposed approach ultimately could, based on its intellectual elegance and impassioned cogency, influence courts to conclude that their broad use of intent amounts to a "grievous fault."[51]

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46. *See supra* note 16.

47. *See* cases cited *supra* notes "m" and "r" under Table 1.

48. *E.g.*, D.A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 454 (5th Cir. 2010); G.C. v. Bd. of Educ. of Centerline Sch. Dist., 58 F. App'x 162, 167 (6th Cir. 2003); A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 683 (S.D.N.Y. 2012), *aff'd mem. sub nom.*; Moody v. N.Y.C. Dep't of Educ., 513 F. App'x 95 (2d Cir. 2013).

49. *See supra* notes 14–15.

50. William Shakespeare, Julius Caesar, act 3, sc. 2.

51. *Id.*