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ACCIDENTALLY ON PURPOSE: INTENT IN DISABILITY DISCRIMINATION LAW

MARK C. WEBER*

Abstract: American disability discrimination laws contain few intent requirements. Yet courts frequently demand showings of intent in disability discrimination lawsuits. Intent requirements arose almost by accident: through a false statutory analogy; by repetition of obsolete judicial language; and by doctrine developed to avoid a nonexistent conflict with another law. Demanding that section 504 and Americans with Disabilities Act (“ADA”) claimants show intent imposes a burden not found in those statutes or their interpretive regulations. This Article provides reasons not to impose intent requirements for liability or monetary relief in section 504 and ADA cases concerning reasonable accommodations. It demonstrates that no intent requirement applies to ADA employment cases, then explains that the same conclusion should apply to cases under the ADA’s state and local government provisions and section 504. It rebuts an analogy to caselaw under Title VI and Title IX of the Civil Rights Act that some courts use to impose intent requirements. It then discusses the reasoning of cases relying on the inappropriate analogy, cases resting on obsolete precedent, and cases refusing to apply remedies to avoid conflicting with federal law. This Article relies on a contextual reading of Supreme Court decisions, the history of the ADA, and policy considerations.

INTRODUCTION

American disability discrimination laws contain few intent requirements. Yet courts frequently demand showings of intent before they will remedy disability discrimination. These intent requirements have come into the law almost by accident: through a statutory analogy that appears apt but is in fact false; by continued repetition of language pulled from an obsolete judicial opinion; and by doctrine developed to avoid a conflict with another law when the conflict does not actually exist. This Article submits that many courts in disability discrimination cases involving education and other governmental services have made these interpretive errors, wrongly requiring plaintiffs to prove intent, particularly when the cases request monetary relief.

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The inapt statutory analogy is the borrowing of restrictive caselaw from Title VI of the Civil Rights Act,¹ which forbids race discrimination by federal grantees, and Title IX of the Education Amendments,² which forbids sex discrimination by federal educational grantees, to interpret section 504 of the Rehabilitation Act, which bans disability discrimination by federal grantees,³ and Title II of the Americans with Disabilities Act (“ADA”), which bans disability discrimination by state and local government.⁴ The misguided repetition of judicial language is the reliance on an assertion by one appellate court more than thirty years ago that in disability discrimination suits concerning education, plaintiffs must prove “bad faith or gross misjudgment.”⁵ The unnecessary restriction on the reach of the disability discrimination laws to avoid contradicting another law arises from a supposed conflict between section 504 and the Individuals with Disabilities Education Act⁶ (“IDEA”) that Congress resolved in 1986.⁷

Demanding that disability discrimination claimants prove intent imposes a burden found nowhere on the face of section 504 or Title II of the ADA. It is true that in *Alexander v. Choate*, the Supreme Court required a showing of intentional discrimination to establish a violation of section 504 when plaintiffs mounted an attack on an across-the-board state government resource allocation decision concerning a public welfare program.⁸ But the same opinion stated that in other kinds of cases, disparate impact—the far extreme from intent—will suffice to establish a claim,⁹ and it denied the applicability of Title VI’s requirement of intent for damages remedies.¹⁰ Analogous cases interpreting the employment provisions of the ADA and Supreme Court cases interpreting other ADA provisions do not insist on proof of intentional discrimination.¹¹ The text and legislative history of the ADA also show that intent is not required for reasonable accommodation cases.¹²

¹ 42 U.S.C. §§ 2000d to 2000d-7 (2012).

² 20 U.S.C. §§ 1681–1688 (2012).

³ 29 U.S.C. § 794 (2012).

⁴ 42 U.S.C. §§ 12131–12165 (2012) (“ADA”). In most instances, obligations imposed by Title II of the ADA and section 504 of the Rehabilitation Act are identical. *See infra* text accompanying notes 88–113.

⁵ *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982); *see infra* note 228 and accompanying text (discussing additional cases).

⁶ 20 U.S.C. §§ 1400–1482 (2012) (“IDEA”).

⁷ *Id.* § 1415(l); *see infra* text accompanying notes 229–234 (discussing issue).

⁸ 469 U.S. 287, 308 (1985) (discussed *infra* text accompanying notes 146–153).

⁹ *See id.* at 307 (contrasting Medicaid resource allocation decisions with discrimination in employment, education, and physical barriers to access).

¹⁰ *Id.* at 292–94.

¹¹ *See infra* text accompanying notes 62–70 (discussing cases under ADA Title I) and 159 (Title II).

¹² *See infra* text accompanying notes 156–158.

This Article spells out the reasons not to impose any intent requirement either for liability or for monetary relief in section 504 and ADA cases concerning reasonable accommodations. It makes the uncontroversial point that no intent requirement applies to ADA employment cases, then explains that the same conclusion ought to apply to cases under the ADA's state and local government services provisions and section 504. It debunks the analogy to caselaw under Title VI and Title IX of the Civil Rights Act that a number of courts use to support an intent requirement in monetary relief cases. It then identifies and corrects the reasoning of the cases relying on the inappropriate analogy, those that rest on an obsolete precedent, and those that refuse to apply a full range of remedies for fear of conflict with the federal special education law.

Much of the scholarship on issues of intent in discrimination law has tracked judicial developments. Thus noteworthy articles commented on the first Supreme Court decisions expounding Title VII¹³ disparate impact and disparate treatment theories.¹⁴ Significant commentary followed the Court's decision in *Washington v. Davis*,¹⁵ which held that plaintiffs had to prove intent to establish a violation of equal protection.¹⁶ There was also an uptick in writing when *Alexander v. Sandoval*¹⁷ declared in 2001 that no private right of action existed to enforce the disparate impact regulations under Title VI of the Civil Rights Act, and so intent must be shown to make out any claim for relief under Title VI.¹⁸ By contrast, much recent commentary on discriminatory intent arises not from Supreme Court developments but from social science advances,

¹³ 42 U.S.C. §§ 2000e to 2000e-16 (2012).

¹⁴ E.g., Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases*, 34 VAND. L. REV. 1205 (1981); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977). Some commentary on the disparate impact theory predated the Supreme Court's cases. See Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 290–310 (1971). A belated entry into this field is Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

¹⁵ 426 U.S. 229 (1976).

¹⁶ *Id.* at 239; see, e.g., Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Eric Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983).

¹⁷ 532 U.S. 275 (2001).

¹⁸ E.g., Sam Spital, *Restoring Brown's Promise of Equality After Alexander v. Sandoval*, 19 HARV. BLACKLETTER L.J. 93 (2003); John Arthur Laufer, Note, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613 (2002). For an illuminating discussion of the interaction of *Washington v. Davis* and *Alexander v. Sandoval*, see Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 568–69 (2006).

such as tests to discern hidden attitudes about race or other characteristics,¹⁹ and research on popular opinion about the prevalence of discrimination.²⁰

Work specifically about disability discrimination displays less attention to issues of intent, although scholars have written thoughtful discussions about disability stereotypes and other discriminatory states of mind, and discussed how these attitudes both contribute to discrimination against people with disabilities and make it difficult to persuade triers of fact that discrimination occurred.²¹ Writers have criticized the unwillingness of many courts to accept a wider range of disability discrimination claims based on disparate impact.²² Their work stresses the connection between, on the one hand, failure to accommodate, and on the other, maintaining practices with unjustified disparate impacts.²³

This Article seeks to break new ground by identifying, placing into context, and critiquing the infiltration of intent requirements into cases brought under the government services provisions of the disability discrimination laws.²⁴ In recent

¹⁹ E.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006). Challenges to the views of these scholars include Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006).

²⁰ E.g., Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012).

²¹ E.g., Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Carrie Griffin Basas, *Back Rooms, Board Rooms: Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59 (2008); Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383.

²² Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 864 (2006).

²³ *Id.* at 887–93 (collecting sources); see also Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 911 (2004) (noting common goal of disparate impact and reasonable accommodation prohibitions in eliminating barriers to inclusion and opportunity). Professor Jolls and others have noted that both accommodation requirements and more traditional prohibitions on intentional discrimination in race or sex cases may diminish an employer's profitability, the latter due to consumer preferences and other factors. Christine Jolls, *Anti-Discrimination and Accommodation*, 115 HARV. L. REV. 642, 684–97 (2001); see Bagenstos, *supra* note 21, at 837; Crossley, *supra*, at 889–97; Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodation as Antidiscrimination*, 153 U. PA. L. REV. 579, 597–636 (2004).

²⁴ Some of this author's earlier work described the phenomenon, but without any extensive evaluation. See, e.g., Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 611, 627–29 (2012) [hereinafter, Weber, *Procedures and Remedies*]. The ever-astute Professor Zirkel has also observed that courts frequently require showings of intent in claims under section 504 in educational settings. See, e.g., Perry A. Zirkel, *Public School Bullying and Suicidal Behaviors*, 42 J.L. & EDUC. 633, 634 n.19 (2013); see also Christine Florick Nishimura, Note, *Eliminating the Use of Restraint and Seclusion Against Students with Disabilities*, 16 TEX. J. C.L. & C.R. 189, 214–15 (2011) ("The party must also be able to show that the educational decisions relating to the student were inappropriate and constituted either 'bad faith' or 'gross misjudgment' to make a successful special education claim under section 504. Furthermore, if a plaintiff is seeking monetary damages, the plaintiff must show the defendants acted with deliberate indifference." (footnotes omitted)). A prescient article by Professors

work, Professor Secunda presented a strong argument that the intent standard borrowed from Title VI is inadequate when applied to claims by students bullied on account of their disabilities, and he proposed the use of a reasonable accommodation theory and the application of a gross-mismanagement standard for school district liability under section 504 and Title II of the ADA.²⁵ This Article concurs that the Title VI analogy is inadequate and further submits that it is legally unsupportable. Moreover, this Article contends that a standard of gross misjudgment also lacks support in the disability discrimination statutes, and that liability and monetary remedies should be available for the unadorned failure to provide reasonable accommodation, as section 504 and the ADA clearly provide. Professor Black has persuasively argued for a relaxed deliberate indifference standard to supplant the intent requirements that courts currently apply to cases brought under the Equal Protection Clause; he relied in part on disability discrimination precedents.²⁶ Although application of that standard to section 504

Buhai and Golden analyzed caselaw as of 2000 and argued from legislative history and selected judicial opinions that intent should not be required in Title II ADA damages cases. Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1121 (2000); see also Nina Golden, *Compounding the Error: Deliberate Indifference vs. Discriminatory Animus Under Title II of the ADA*, 23 N. ILL. U. L. REV. 227 (2003) (criticizing court of appeals decisions applying intent standards to ADA Title II). This Article builds on that work in part, though the argument here differs by relying as well on comparisons to the ADA's employment provisions, on the fundamental premises of the reasonable accommodation duty imposed by the statute, and on Supreme Court cases interpreting the governmental services provisions. The present Article also analyzes developments since 2000, including *Alexander v. Sandoval*, which might be thought to undermine the position taken by Professors Buhai and Golden. It further seeks to identify and correct the errors in common judicial approaches to intent, particularly in cases involving education. Another illuminating pre-*Sandoval* source is Leonard J. Augustine, Note, *Disabling the Relationship Between Intentional Discrimination and Compensatory Damages Under Title II of the Americans with Disabilities Act*, 66 GEO. WASH. L. REV. 592, 607–12 (1998) (criticizing intent requirement for damages in ADA Title II accommodations cases). This author's work from the pre-*Sandoval* era also discussed Title II and section 504 remedies. See Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1104–09, 1115 (1995) (canvassing legislative history and other sources). Helpful capsule discussions of *Sandoval*'s potential impact on ADA remedies include: SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 313–14 (2010); RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION* 159–60 (8th ed. 2013); see also MARK C. WEBER ET AL., *SPECIAL EDUCATION LAW: CASES AND MATERIALS* 512–13 (4th ed. 2013) (discussing *Sandoval* and section 504 remedies in education cases).

²⁵ Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. ILL. L. REV. 175, 200–09. Professor Secunda also suggests greater use of claims under state anti-bullying legislation. *Id.* at 210–15.

²⁶ Black, *supra* note 18, at 575. Professor Black's deliberate indifference test is:

an objective one with four prongs: first, whether the government was or should have been aware of the racial harm or impacts that its actions caused or the benefits/opportunities it denied; second, whether other less harmful reasonable alternatives were or became available; third, why those alternatives were not implemented; and fourth, what, if any, interests are used to justify the racial harm. The inquiry moves to

and ADA cases might produce results in some cases similar to those produced by the approach suggested here, this Article finds ample support for those results in section 504 and the ADA reasonable accommodation law without resorting to an analogy to deliberate indifference as applied to equal protection.

Part I below defines intent, as that term is used in civil rights and other cases, and describes how intent affects liability and remedies under Title VII and other anti-discrimination statutes. Part II shows how the employment provisions of the ADA make use of intent both in determining liability and in assigning remedies, and it makes the point that intent is not required for monetary relief when an employer fails to provide reasonable accommodations. Part III explores section 504 and the state and local government services provisions of the ADA, analyzing the use of intent when courts determine liability and remedies. With regard to remedies, it challenges the analogy to Title VI and Title IX caselaw, then analyzes the Supreme Court precedent that ought to control. In Part IV, the three wrong approaches to intent in Title II and section 504 cases are explained and corrected.

I. INTENT: CATEGORIES OF MENS REA IN CIVIL RIGHTS CASES

Intent is important in many areas of law. In order to clarify the use of the concept here, it is helpful to begin with the most familiar applications of intent, next to consider how courts apply intent principles to liability questions in civil rights claims other than disability discrimination suits, and then to discuss how intent affects remedies in civil rights actions.

Criminal law and tort law make responsibility hinge on categories of state of mind, or what is called—typically in the criminal law context—mens rea. These states of mind range across a spectrum of blameworthiness²⁷ from animus (acting “purposely,” in the language of the Model Penal Code),²⁸ to knowledge to a substantial certainty that the actor’s conduct will harm a victim and indifference to that consequence;²⁹ to recklessness in the sense of aware-

the third and fourth prongs only if the answers to the first two are affirmative. Under the final prongs, if the defendant cannot justify the choice to perpetrate a racial harm—in spite of available alternatives—with some governmental purpose that outweighs the racial harm, then the deliberate indifference standard would find that equal protection had been denied.

Id.

²⁷ See generally Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306 (2011) (discussing ability of decision makers to apply Model Penal Code distinctions regarding mens rea consistently).

²⁸ MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST. 1962).

²⁹ See *id.* § 2.02(2)(b); see also RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) (deeming knowledge to be equivalent to intent for tort liability: “The word ‘intent’ is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result . . .”).

ness of a high risk of harm and failing to undertake slight burdens to avoid it, thus demonstrating indifference to others' risk;³⁰ to negligence;³¹ to strict liability, which is no state of mind requirement at all.

In discrimination and other civil rights cases, excluding disability for a moment, courts apply similar mental state classifications, but with some adaptations. Again arrayed from most blameworthy to least, they are: discriminatory animus;³² other intentionality that may nonetheless lack hostility, such as patronizing and stereotyping;³³ deliberate indifference to known deprivation of rights by others under one's control;³⁴ negligence, at least in workplace harassment cases;³⁵ disparate impact without adequate justification, which will sustain a claim but is not actually a showing of intent;³⁶ then strict liability, which is also not a showing of intent, but applies when agency law dictates liability for an employer-principal on the basis of an agent's conduct, in discrimination cases where agency principles govern.³⁷

³⁰ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. LAW INST. 2010).

³¹ In tort law, negligence, like strict liability, is not a true mens rea, for it is a measure of conduct that does not take into account the actor's subjective mental state. See RESTATEMENT (SECOND) OF TORTS § 283 cmt. a (AM. LAW INST. 1965); see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 110 (1881) ("A man may have as bad a heart as he chooses, if his conduct is within the rules."); Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 280–82 (2008) (discussing objective standards for negligence liability); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 319 (2009) ("Common Law negligence is not actually a mental state; the reasonable-person standard 'is determined and applied without reference to what the actor was thinking at the moment.'") (quoting Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2075 n.24 (1994)).

³² E.g., *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 151 (2000) (discussing age-based animus). Courts treat an explicit use of race, sex, or age the same as a decision motivated by animus, even if the classification is imposed for paternalistic or perceived socially beneficial goals, see, e.g., *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (exclusion of potentially fertile females from some jobs), or realistic economic considerations, see, e.g., *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (sex-differentiated pension contributions).

³³ See *infra* text accompanying note 39 (discussing stereotyping).

³⁴ Early applications of deliberate indifference tied it to causation, specifically the causal link between a municipal defendant and the deprivation of the constitutional rights of the plaintiff. Later, however, the Court adapted that caselaw and applied it to a Title IX damages claim, establishing deliberate indifference as a standard of intent. See *infra* text accompanying notes 133–138 (discussing Title VI and Title IX intent requirements).

³⁵ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (stating that Court has found employer liability for coworker harassment based on "demonstrable negligence"). See generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (suggesting courts should recognize broader category of negligent discrimination); Karlan, *supra* note 16, at 125–28 (suggesting liability based on negligence for discrimination in violation of equal protection, but questioning extension of liability to disparate impacts).

³⁶ See *infra* text accompanying notes 40–43.

³⁷ E.g., *Staub v. Proctor Hosp.*, 561 U.S. 411, 416–17, 422 (2011) (holding that supervisor's act motivated by discriminatory animus and causing adverse employment action creates liability for employer under Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–

The intent standard in discrimination law affects both liability and remedies. Liability under Title VII for employment discrimination on the basis of race, sex, religion, or national origin may be established by showing animus³⁸ or stereotyping,³⁹ or by demonstrating a disparate impact and not being defeated by proof of business necessity.⁴⁰ Disparate impacts violate regulations promulgated under Title VI of the Civil Rights Act, a statute that prohibits discrimination on the basis of race, national origin, and religion in federally assisted activities.⁴¹ However, a private right of action to enforce that law exists only for intentional discrimination.⁴² Disparate impact creates liability under the Age Discrimination in Employment Act, but an affirmative defense exists for employer actions that are based on reasonable factors other than age.⁴³ Under 42 U.S.C. § 1981, liability for race discrimination in making employment and other contracts exists only when the defendant has acted with intent.⁴⁴

Remedies for all violations of Title VII—both disparate impact violations and intentional ones—may include money in the form of front pay and back pay, as well as orders for hiring, reinstatement, promotion, and adjustments to seniority status.⁴⁵ If the plaintiff demonstrates intentional discrimination, the remedies may also include compensatory and punitive damages, up to limits

4335 (2012), drawing comparisons to Title VII). In contrast to *Staub*, which relied heavily on agency law, *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 283 (1998), expressed skepticism about applying agency principles for liability under Title IX of the Education Amendments. See *infra* text accompanying notes 131–143 (discussing *Gebser*).

³⁸ The showing may be made by inference, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), or by direct evidence, e.g., *Johnson Controls*, 499 U.S. at 200.

³⁹ E.g., *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

⁴⁰ E.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Other affirmative defenses may defeat even intentional discrimination claims. See, e.g., 42 U.S.C. § 2000e-2(e)(1) (bona fide occupational qualification provision).

⁴¹ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (reasoning that Congress intended to create implied cause of action only under Civil Rights Act itself, and that only intentional discrimination constitutes violation).

⁴² *Id.*

⁴³ *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 97 (2008).

⁴⁴ *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). Section 1981 provides in part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2012).

⁴⁵ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (“[F]ederal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.”); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 422–23 (1975) (reversing denial of back pay award and rejecting requirement of showing of bad faith in disparate impact case).

based on the size of the employer.⁴⁶ Punitive damages are available to remedy only the most blameworthy type of intent, i.e., when “the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”⁴⁷ If the defendant commits an intentional violation of § 1981’s prohibition on race discrimination, relief may include compensatory and punitive damages without any limits based on employer size.⁴⁸

II. INTENT IN EMPLOYMENT DISCRIMINATION CLAIMS UNDER THE ADA

The ADA’s employment provisions in Title I of the statute are the most familiar parts of the law and provide a starting point for discussing intent under the ADA. As with other civil rights law, intent affects the ADA employment title’s substantive provisions as well as its remedial ones. As the discussion below demonstrates, liability for employers’ failure to make reasonable accommodations for workers with disabilities is strict, and monetary remedies are broadly available for denials of reasonable accommodations.

A. Intent in Relation to ADA Title I’s Prohibitions

With regard to disability discrimination in employment, Title I of the ADA forbids much of the same discriminatory conduct as Title VII does with race and sex discrimination.⁴⁹ As with Title VII, for some of the conduct, an intent standard may be implied, and for other conduct it is clearly not demanded. Thus, the ADA’s prohibition on limiting, segregating, and classifying employees and applicants in a way that impairs employment opportunities or status because of disability⁵⁰ seems to require intent at least in the sense of knowledge that the conduct is occurring and indifference to the result.⁵¹ On the other hand, ADA Title I forbids using standards, criteria, or methods of administration that have the effect of employment discrimination on the basis of disability,⁵² a classic disparate impact standard, which means there is no intent requirement. A separate disparate impact provision bans qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual or

⁴⁶ 42 U.S.C. § 1981a(a)(1), (b)(3) (2012). “Compensatory damages” in this context do not include back pay, interest on back pay, or similar monetary remedies; those amounts remain available and are not limited by the employer size-related caps of subsection (b)(3). *Id.* § 1981a(b)(2).

⁴⁷ *Id.* § 1981a(b)(1).

⁴⁸ *See id.* § 1981a(a)(1) (restricting applicability of § 1981a to when “the complaining party cannot recover under section 1981 of this Title”).

⁴⁹ Michael Creta, Note, *The Accommodation of Last Resort: The Americans with Disabilities Act and Reassignments*, 55 B.C. L. REV. 1693, 1698, 1700 (2014).

⁵⁰ 42 U.S.C. § 12112(b)(1) (2012).

⁵¹ *Compare id.*, with 42 U.S.C. § 2000e-2(a)(2) (2012) (similar Title VII provision).

⁵² 42 U.S.C. § 12112(b)(3)(A).

class of individuals with a disability.⁵³ Both kinds of disparate impact claims may be met with a defense if the employer shows that the standard, test, selection criterion, or other practice is job-related and consistent with business necessity.⁵⁴ This defense section of the statute legalizes a range of conduct that might otherwise be barred,⁵⁵ but does not alter the strict-liability, no-intent-needed character of the disparate impact-based liability.⁵⁶

The ADA also requires employers to make reasonable accommodations to known physical or mental limitations of otherwise qualified individuals with disabilities unless the employer demonstrates undue hardship on the operation of its business.⁵⁷ It further bans denying employment opportunities to otherwise qualified individuals with disabilities if the denial is based on the need to accommodate.⁵⁸ This accommodation requirement is unlike anything found in Title VII.⁵⁹ It represents a major innovation in anti-discrimination law,⁶⁰ and is

⁵³ *Id.* § 12112(b)(6); *see also id.* § 12112(b)(7) (requiring that tests reflect skill, aptitude or other quality being tested, rather than reflect disabilities not relevant to what test purports to measure). Provisions of ADA Title I concerning medical and other examinations and inquiries also lack any intent or negligence requirement, thus imposing strict liability. *See id.* § 12112(d).

⁵⁴ 42 U.S.C. § 12113(a) (2012).

⁵⁵ *See Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 78–79 (2002) (discussing ADA Title I defenses).

⁵⁶ *Cf.* 42 U.S.C. § 2000e-2(k) (Title VII provision codifying disparate impact liability, not imposing intent requirement).

⁵⁷ *Id.* § 12112(b)(5)(A).

⁵⁸ *Id.* § 12112(b)(5)(B).

⁵⁹ This statement is perhaps a slight exaggeration. A Title VII regulation requires “reasonable accommodation” of religious needs of employees. 29 C.F.R. § 1605.2(c) (2015); *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977). Congress, however, made clear that the ADA provision demands much more than the minimal duties described in *Hardison*. H.R. REP. NO. 101-485, pt. 2, at 68 (1990) (“The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable to this legislation.”); S. REP. NO. 101-116, at 36 (1990) (same). As a general matter, reasonable accommodation is foreign to Title VII. *See, e.g., Samuel Issacharoff & Justin Nelson, Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 311 (2001) (“In the ADA context, by contrast [with Title VII], the overwhelming sweep of cases concern not discrimination simpliciter, but a claimed failure to redistribute in the form of accommodation.”) (footnotes omitted); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2–4 (1996). Critics of Issacharoff et al. do not claim that Title VII has an ADA-style accommodation mandate, but instead emphasize the similar moral imperatives behind both accommodation and traditional anti-discrimination, and point out that employers bear costs of changing policies and taking other steps to comply with mandates against race and sex discrimination. *See, e.g.,* Bagenstos, *supra* note 21, at 837; Crossley, *supra* note 23, at 889–97; Jolls, *supra* note 23, at 684, 686–87; Stein, *supra* note 23, at 597–636.

⁶⁰ *See* Karlan & Rutherglen, *supra* note 59, at 4–5; *see also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 1 (2009) (“Importantly, the statute takes the concept of forbidden discrimination beyond intentional and overt exclusion; it also treats as discrimination the failure to provide ‘reasonable accommodations’ to people with disabilities.”); Stein, *supra* note 23, at 636 (“The ADA’s accommodation mandate is an appropriate antidiscrimination remedy because it corrects artificial (i.e., non-inevitable and/or easily remediable) exclusion.”); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1121 (2010)

the key adaptation needed to make an anti-discrimination mandate effective for people with disabilities.⁶¹

A reasonable accommodation claim does not require any showing of discriminatory intent; the liability is strict. The First Circuit made this point clear in *Higgins v. New Balance Athletic Shoe, Inc.*,⁶² when it vacated a grant of summary judgment on a former employee's claim that the employer should have provided him reasonable accommodations. Higgins, who had a hearing impairment, alleged that New Balance failed to put a fan near his work station in the factory to clear steam that damaged his hearing aid, and refused to move a loudspeaker that made it hard for him to understand what co-employees near him were saying.⁶³ The district court granted summary judgment to the employer on the ground that there was no proof of any disability-based animus against the worker.⁶⁴ The court of appeals vacated that judgment.⁶⁵ It stressed that unlike some other kinds of discrimination, liability for refusal to provide accommodations does not require any kind of showing of intent:

Rather, any failure to provide reasonable accommodations for a disability is necessarily "because of a disability"—the accommodations are only deemed reasonable (and, thus, required) if they are needed because of the disability—and no proof of a particularized discriminatory animus is exigible. Hence, an employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the proposed accommodations would create undue hardship for its business.⁶⁶

Other authorities are in accord.⁶⁷ Not surprisingly, the sole Supreme Court ADA case on reasonable accommodations in employment, *U.S. Airways, Inc.*

("This accommodation duty is the defining characteristic of modern disability discrimination statutes.").

⁶¹ See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach. Were that not so, the 'reasonable accommodation' provision could not accomplish its intended objective.").

⁶² 194 F.3d 252, 264 (1st Cir. 1999).

⁶³ *Id.* at 257–58.

⁶⁴ *Id.* at 263.

⁶⁵ *Id.* at 265.

⁶⁶ *Id.* at 264 (citation omitted).

⁶⁷ *E.g.*, *Lenker v. Methodist Hosp.*, 210 F.3d 792, 799 (7th Cir. 2002) ("[I]f the plaintiff demonstrated that the employer should have reasonably accommodated the plaintiff's disability and did not, the employer has discriminated under the ADA and is liable."); *Scalera v. Electrograph Sys., Inc.*, 848 F. Supp. 2d 352, 362 (E.D.N.Y. 2012) ("[T]here is no burden on Plaintiff to show that her disability played any motivating role in Electrograph's failure to provide the requested accommodation."); see Jacqueline Rau, *No Fault Discrimination?*, 27 OHIO ST. J. ON DISP. RESOL. 241, 264–65 (2012) ("The ADA . . . focuses on reasonable accommodation without discussion of the intent of the employer.");

v. *Barnett*,⁶⁸ does not include a single word about intent or any other mental state of the employer, even as it remanded for further proceedings a worker's claim that U.S. Airways failed to provide the accommodation of keeping him in a less physically demanding position after he became disabled due to a back injury.⁶⁹ The courts of appeals have roundly held that because plaintiffs need not show intent to make out a violation of the reasonable accommodation duty, courts in accommodations cases should not apply the burden-shifting framework used for Title VII intentional discrimination claims.⁷⁰

The law on which the ADA was based, section 504 of the Rehabilitation Act of 1973,⁷¹ has interpretive regulations that establish employment rights and obligations similar to those in Title I of the ADA for the federal grantees to which it applies.⁷² Hence section 504's intent requirements regarding employment and the absence of any intent requirement as to reasonable accommodation violations match ADA Title I.⁷³

Bryan Joggerst, Note, *Reasonable Accommodation of Mixed Motive Claims Under the ADA*, 35 CARDOZO L. REV. 1587, 1589 (2014) ("Under the ADA, even when the employer acts with no discriminatory intent, it is nonetheless liable if a 'reasonable accommodation' of the employee's disability was possible but not adopted.").

⁶⁸ *Barnett*, 535 U.S. 391.

⁶⁹ *Id.* at 406. The Court held that the accommodation might be reasonable even though it would violate an established seniority system, but said ordinarily such an accommodation would fail the reasonableness test. *Id.* at 403–05.

⁷⁰ *Lenker*, 210 F.3d at 799 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) ("[W]hen a plaintiff brings a claim under the reasonable accommodation part of the ADA, the burden shifting method of proof [defined in *McDonnell Douglas*] is both unnecessary and inappropriate."); *Higgins*, 194 F.3d at 264 (stating that since reasonable accommodation does not require an employer's action be motivated by discriminatory animus directed at disability, "[i]t follows inexorably that the *McDonnell Douglas* scheme is inapposite in respect to such claims"); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc) ("Aka's reasonable accommodation claim . . . is not subject to analysis under *McDonnell-Douglas* . . ."); *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1283 (7th Cir. 1996) ("If it is true that FWCS should have reasonably accommodated Bultemeyer's disability and did not, FWCS has discriminated against him. There is no need for indirect proof or burden shifting."); see Kevin W. Williams, Note, *The Reasonable Accommodation Difference*, 18 BERKELEY J. EMP. & LAB. L. 98, 152 (1997) ("[I]n a claim based on a failure to reasonably accommodate . . . [t]he purpose of the plaintiff's prima facie case . . . is not to raise a rebuttable presumption of discriminatory intent. Instead, the 'elusive factual question' to be determined is whether the employer complied with its statutory obligation to provide reasonable accommodation.").

⁷¹ 29 U.S.C. § 794 (2012). As noted above, this law forbids disability discrimination by recipients of federal financial assistance and by federal government agencies.

⁷² 29 C.F.R. §§ 32.12–.17 (2015).

⁷³ *E.g.*, *Nadler v. Harvey*, No. 06-12692, 2007 WL 2404705, at *8 (11th Cir. Aug. 24, 2007) (unpublished) (in employment discrimination action against Postal Service under section 504, stating that for "reasonable accommodation cases . . . there is no need to prove discriminatory motivation"); *Peebles v. Potter*, 354 F.3d 761, 766 (8th Cir. 2004) (in action for employment discrimination under section 504 stating, "[A] claim against an employer for failing to reasonably accommodate a disabled employee does not turn on the employer's intent or actual motive").

B. Intent in Relation to Remedies Under ADA Title I

Although Title I provides for liability without intent or any other mens rea in disparate impact and reasonable accommodation cases, the availability of some relief in ADA employment cases turns on the state of mind of the defendant. In cases of unlawful intentional discrimination, as well in those of violations of the reasonable accommodation provisions, the law permits compensatory and punitive damages, within limits based on the size of the employer.⁷⁴ It also allows Title VII-style equitable remedies that include back and front pay, hiring, reinstatement, and so on.⁷⁵

There is, however, a limited affirmative defense with respect to compensatory damages in reasonable accommodation cases. Damages may not be awarded for denials of reasonable accommodation when the employer or other covered entity demonstrates good faith efforts, in consultation with the person with a disability who informed the entity that the accommodation was needed, to identify and make a reasonable accommodation.⁷⁶ Other monetary remedies such as back and front pay remain available, along with injunctive relief; the remedies when the affirmative defense applies are thus the same as those for disparate impact disability discrimination.⁷⁷

Like Title VII, ADA Title I conditions punitive damages on the defendant's state of mind. Punitive damages are permitted when the complaining party demonstrates that the respondent engaged in a discriminatory practice with

⁷⁴ 42 U.S.C. § 1981a(a)(2) (2012). Section 1981a provides remedies in employment discrimination actions. It states:

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990, or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id. The language thus applies to employment discrimination cases brought under Title II of the ADA and section 504. The statute does not impose any intent requirement for reasonable accommodation cases, and it provides the same remedies in those cases as it does in intentional discrimination cases.

⁷⁵ *Id.*

⁷⁶ *Id.* § 1981a(a)(3).

⁷⁷ *See id.* § 1981a(a)(2).

malice or reckless indifference to the federally protected rights of an aggrieved individual.⁷⁸

With regard to ADA employment cases, the law thus creates a hierarchy of intent and corresponding remedies, with malice and reckless indifference at the top, then ordinary intent, then denial of reasonable accommodation without any showing as to state of mind, then disparate impact, then denial of reasonable accommodation with a demonstration of good faith effort by the defendant. Notably, everything that is a violation at all merits some monetary remedy such as back pay, as well as the whole range of injunctive remedies, the same as Title VII.

Courts have applied the intent-related remedy provisions of Title I in a straightforward manner. For example, in *Equal Employment Opportunity Commission v. Autozone, Inc.*,⁷⁹ the Seventh Circuit upheld a jury award of back pay and compensatory and punitive damages in a case alleging that the employer failed to accommodate a car parts sales manager, whose back condition left him unable to mop floors, by refusing to shift that part of his job responsibilities.⁸⁰ On appeal, no defense was raised concerning good faith efforts to achieve an accommodation in consultation with the employee.⁸¹ The court upheld the compensatory damages award, holding that the damages were not excessive in comparison to other cases or the magnitude of plaintiff's suffering.⁸² The court upheld the punitive damages award as well, ruling that a reasonable jury could have found that Autozone acted with reckless indifference to the employee's rights. The court noted that the supervisors who refused to adjust the worker's job responsibilities had all received ADA training, and that Autozone failed to follow its own established procedures for dealing with the worker's accommodation request.⁸³

The remedial hierarchy of Title I and its relation to intent make sense. Having back pay and injunctive remedies available for disparate impact disability discrimination gives meaningful relief to those plaintiffs who are the inadvertent victims of forbidden employment decisions.⁸⁴ The enhanced remedies for intentional discrimination and denial of reasonable accommodations—

⁷⁸ *Id.* § 1981a(b)(1).

⁷⁹ 707 F.3d 824, 833–34 (7th Cir. 2013).

⁸⁰ *Id.* at 829.

⁸¹ *Id.* at 837–38.

⁸² *Id.* at 832–33.

⁸³ *Id.* at 835–36.

⁸⁴ See Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator*, 24 *HAMLIN J. PUB. L. & POL'Y* 225, 246 (2003) (“The ADA encompasses a type of discrimination that has been branded as wrongful, insofar as it is unreasonable for certain employment decisions to be predicated on such grounds, yet the courts and the public believe that well-intentioned people may at times make decisions based on illicit criteria. When they do, no public shaming attach, the defendant is simply asked to rectify the wrong.”).

payment for pain and suffering or other emotional distress and consequential damages—provide fuller make-whole relief to the plaintiff and reinforce the moral opprobrium that should attach to that conduct, even in the absence of animus.⁸⁵ These remedies also allow for the greater likelihood that emotional injury will occur when the violation is intentional or is the denial of an accommodation rather than wholly incidental conduct that harms the disabled employee. When animus is present, the blame should be much greater, so the statute makes punitive remedies available.⁸⁶

The range of remedies under Title I that do not need a showing of intent does not just correspond to society's moral sense; it also takes into account the troublesome reality of proving intentional discrimination. Speaking of discrimination remedies in general, Professor Stone observed, "As with a tort plaintiff invoking the doctrine of *res ipsa loquitur*, an employment discrimination plaintiff is not ideally situated to procure the evidence that she will need to demonstrate another person's motivation or state of mind at the time that a given decision was made."⁸⁷ Plaintiffs unable to show more than a disparate impact receive some relief, both monetary and injunctive, but less than those proving intentional discrimination or denial of a reasonable accommodation.

⁸⁵ H.R. REP. NO. 102-40 (II), at 25 (1991), as reprinted in 1991 U.S.C.C.A.N. 694, 718. The House Report notes:

Victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies. The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination. Thus, victims of intentional discrimination are discouraged from seeking to vindicate their civil rights.

Id.

⁸⁶ See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) ("Conduct warranting punitive awards has been characterized as 'egregious,' for example, *because* of the defendant's mental state."); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1779 (2012) ("Our legal system judges the entitlement to some form of action against the defendant in light of what the defendant did to the plaintiff. In particular, it judges that the scope of the response entitlement may reach beyond the self-restorative to the injury-inflicting where the underlying wrong was itself a willful or wanton infliction of injury."); see also CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79 (1935) (discussing requirement of "real and not fictitious ill will").

⁸⁷ Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 142, 157 (2011). The inference established for Title VII cases under *McDonnell Douglas*, 411 U.S. at 802, discussed *supra* text accompanying note 70, compensates in part for the difficulties in proving the defendant's intent, but a more efficient solution is dispensing with an intent requirement altogether, albeit in exchange for a reduced set of remedies. See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 964 (2005) ("One obvious possibility . . . is that disparate impact is merely a technique to reach defendants who are acting with discriminatory intent when proof sufficient to establish a disparate treatment case is lacking.").

III. INTENT IN GOVERNMENT SERVICES CLAIMS UNDER ADA TITLE II AND CLAIMS UNDER SECTION 504

Though there may be isolated problems with courts improperly imposing intent requirements in ADA Title I cases, the intent issue in Title I is not controversial. To clarify intent issues in ADA Title II and section 504 cases, the areas of disability discrimination law where they are controversial, it is helpful to separate the specific obligations that the laws impose from the remedies that apply when individuals are harmed because those obligations have not been met. Intent plays a role in both halves of the analysis.

A. Intent and ADA Title II and Section 504 Prohibitions

ADA Title II bars all state and local government entities from excluding qualified individuals with disabilities from participation in the entity's services, programs, and activities, and from denying qualified individuals with disabilities the benefits of the entity's services, programs, or activities; the statute also bans subjecting qualified individuals with disabilities to discrimination on the basis of disability.⁸⁸ The text does not define discrimination further, but provides that the Attorney General shall promulgate regulations consistent with the regulations originally devised by the Department of Health, Education and Welfare covering recipients of federal financial assistance under section 504.⁸⁹ Section 504 of the Rehabilitation Act of 1973 forbids the same discriminatory conduct as Title II, on the part of any program or activity receiving federal financial assistance, as well as United States executive agencies and the Postal Service, and it delegates authority to promulgate regulations to heads of each agency.⁹⁰ The definitions section incorporates the ADA's definition of disability⁹¹ and individual with a disability.⁹²

The Attorney General's ADA Title II regulations repeat the statute's general prohibition on discrimination,⁹³ and elaborate on it by outlawing actions that on the basis of disability: deny qualified individuals with disabilities the opportunity to participate in or benefit from a government aid, benefit or service; afford an opportunity to participate or benefit that is not equal to that afforded others; or provide an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, gain the same benefit, or

⁸⁸ 42 U.S.C. § 12132 (2012).

⁸⁹ 42 U.S.C. § 12134(a)–(b) (2012). Program accessibility, accessibility of existing facilities, and communications are excepted; for these topics the regulations are to be consistent with other, similar Department of Justice section 504 regulations. *Id.* § 12134(b).

⁹⁰ 29 U.S.C. § 794(a) (2012). Section 504 includes the language “solely by reason of her or his disability.” The ADA omits “solely.”

⁹¹ 29 U.S.C. § 705(9)(B) (2012).

⁹² *Id.* § 705(20)(B).

⁹³ 28 C.F.R. § 35.130(a) (2015).

reach the same level of achievement as that provided others.⁹⁴ The regulations also make it illegal to provide different or separate aids, benefits, or services unless necessary to make them as effective as those provided others, and to limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.⁹⁵

The portion of the regulations just described covers intentional conduct that violates Title II. But the regulations also interpret Title II to forbid actions that simply have discriminatory effects, rather than discriminatory intent:

A public entity may not . . . utilize criteria or methods of administration that have *the effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability or have the purpose *or effect* of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.⁹⁶

Various courts have upheld claims based on this provision without requiring any allegation or showing of intent.⁹⁷ Even some courts that have ruled against various disparate impact claims on the merits have not rejected the claims for want of a showing of intent.⁹⁸

The regulations further interpret Title II to require reasonable modifications—the equivalent of reasonable accommodations in Title I—again without imposing any obligation on plaintiffs to prove intentional discrimination: “A

⁹⁴ *Id.* § 35.130(b)(1)(i)–(iii).

⁹⁵ *Id.* § 35.130(b)(1)(iv)–(vii).

⁹⁶ *Id.* § 35.130(b)(3) (emphasis added). The same rule applies to site selection, contracting, and licensing. *Id.* § 35.130(b)(4)–(6). The regulations also bar imposing eligibility criteria that tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity unless such criteria are shown to be necessary for the provision of the service, program, or activity being offered. *Id.* § 35.130(b)(8).

⁹⁷ *See, e.g.,* *United States v. City of New Orleans*, No. 12-2011, 2013 WL 1767787, at *6–7 (E.D. La. Apr. 24, 2013) (denying motion to dismiss in case alleging violations of Title II by financing moratorium that included housing for people with disabilities; noting that moratorium was facially neutral policy with allegedly greater effect on low income people with disabilities); *cf. Smith v. Henderson*, 982 F. Supp. 2d 32, 46 (D.D.C. 2013) (dismissing disparate impact claim in action challenging closing of under-enrolled public schools when plaintiffs did not allege failure to provide meaningful benefit).

⁹⁸ *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) (stating that for disparate impact claim, “plaintiff need not show the defendant’s action was based on any discriminatory intent,” but ruling that plaintiffs failed to establish disparate impact when defendant applied fire code to forbid planned group home); *Grider v. City & County of Denver*, No. 10-CV-00722, 2012 WL 1079466, at *2–3 (D. Colo. Mar. 30, 2012) (holding that plaintiffs did not allege facts showing prohibition on pit bulls had disparate impact, but stating that disparate impact claims do not require examination of subjective intent); *Abrahams v. MTA Long Island Bus*, No. 10-CV-1535, 2010 WL 2134288, at *5–6 (E.D.N.Y. May 25, 2010) (in action over paratransit cutbacks, stating that plaintiffs need not show intent for disparate impact claim, but dismissing claim for failure to allege neutral practice that resulted in discrimination, when remaining service met ADA standards), *aff'd*, 644 F.3d 110 (2d Cir. 2011).

public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”⁹⁹ Title II itself provides guidance on the meaning of reasonable modifications by defining a qualified individual with a disability as one “who with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or provision of auxiliary aids or services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”¹⁰⁰ The courts that have read the law carefully have not found an intent requirement in Title II reasonable modification cases,¹⁰¹ though the record is mixed, as discussed in greater detail below.¹⁰²

Closely aligned with the reasonable modification provision is the requirement that state and local governmental services must be provided in the most integrated setting appropriate.¹⁰³ Reasonable modifications to policies, practices, or procedures are often needed for people to be served in less restrictive settings, a fact demonstrated by the leading ADA Title II case on the topic, *Olmstead v. L.C.*¹⁰⁴ In *Olmstead*, the Supreme Court held that the ADA may require placement of individuals with mental disabilities in community settings rather than institutions. The court cited both the most-integrated-setting and the reasonable modification regulations in concluding that Georgia needed to alter its practices in delivering mental health services to permit people with mental impairments who can be treated in the community to be placed there.¹⁰⁵

Like the reasonable modification regulation, the integration regulation does not demand a showing of intent in order to make a claim; the *Olmstead* opinion did not rely on any finding of animus, deliberate indifference, or any other mental state on the part of the government. *Helen L. v. DiDario*,¹⁰⁶ a

⁹⁹ 28 C.F.R. § 35.130(b)(7). The fundamental alteration defense in the Title II regulation corresponds to the undue hardship defense in ADA Title I.

¹⁰⁰ 42 U.S.C. § 12131(2) (2012); see Weber, *supra* note 60, at 1168 (comparing reasonable accommodation duty in ADA employment cases and reasonable modification duty in ADA state and local government cases).

¹⁰¹ E.g., *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (discussed *infra* text accompanying notes 106–107); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 206–07 (E.D.N.Y. 2000) (in reasonable modification case regarding services for individuals with HIV, holding that government’s motive or intent is irrelevant), *aff’d sub nom.* *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

¹⁰² See *infra* text accompanying notes 159–167, 192–204 (collecting reasonable modification cases).

¹⁰³ 28 C.F.R. § 35.130(d) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”).

¹⁰⁴ 527 U.S. 581, 606–07 (1999) (plurality opinion).

¹⁰⁵ *Id.* at 592.

¹⁰⁶ *Helen L.*, 46 F.3d 325.

Third Circuit decision that foreshadowed *Olmstead*, made the point explicit when it upheld the ADA claim of a woman maintained by the state Department of Public Welfare in a nursing home even though she could have been accommodated with in-home services:

Because the ADA evolved from an attempt to remedy the effects of “benign neglect” resulting from the “invisibility” of the disabled, Congress could not have intended to limit the Act’s protections and prohibitions to circumstances involving deliberate discrimination. Such discrimination arises from “affirmative animus” which was not the focus of the ADA or section 504.¹⁰⁷

The section 504 regulations on which the Title II regulations are based also contain prohibitions on denying qualified individuals the opportunity to participate in or benefit from the aid, benefit, or service; denying an opportunity to participate or benefit that is not equal to that afforded others; providing any aid, benefit, service or training that is not as effective as that provided others; providing different aids, benefits, services or training unless necessary to be effective; and limiting a qualified individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.¹⁰⁸ There is a prohibition on disparate impact discrimination and a requirement that programs and activities be administered in the most integrated setting appropriate.¹⁰⁹ Reasonable accommodations are addressed in the regulations pertaining to employment¹¹⁰ and program accessibility,¹¹¹ and are covered as well in regulations of specific agencies pertaining to their employees and grantees.¹¹²

These disparate impact, reasonable modifications, and integrated services regulations implementing the ADA government services title and section 504 are based on the recognition that for persons with disabilities, what discriminates against them, what Congress was trying to change, is government activity and inactivity that prevents them from achieving equality in the enjoyment of public spaces, public schools, public health services, public transportation, and the wealth of programs and facilities that modern government furnishes its citizens. That harm is no less real for being heedless. Applying an intent stand-

¹⁰⁷ *Id.* at 335.

¹⁰⁸ 28 C.F.R. § 41.51(b)(1) (2015).

¹⁰⁹ *Id.* § 41.51(b)(3), (d).

¹¹⁰ 28 C.F.R. § 41.53 (2015).

¹¹¹ 28 C.F.R. § 39.150(a) (2015) (incorporating fundamental alteration limit, imposing burden on covered entity).

¹¹² *See, e.g.*, 34 C.F.R. § 104.12 (2015) (requiring reasonable accommodation of employees of grantees of Department of Education); *id.* § 104.44 (requiring academic adjustments for students in programs of grantees engaged in higher education). Even more specific modification duties apply to programs that provide preschool, elementary, and secondary education. *See id.* §§ 104.32–.39.

ard would prevent the disability discrimination law from achieving its most basic goals.

In general, the combination of the statutory provisions and regulations for state and local government programs under ADA Title II and federally assisted activities under section 504 mirrors that of ADA Title I regarding disability discrimination in employment.¹¹³ The differences are that the specifics with regard to modifications and disparate impact are found in the regulations rather than in the statute itself, and non-employment cases lack a detailed remedies provision such as the one that applies to ADA Title I, 42 U.S.C. § 1981a.

B. Intent and Remedies Under Title II and Section 504

Remedies—in the broad sense of what violations of the law individuals may present to courts and the narrower one of what a court should do to grant relief for a violation—are where things become more complex. Because the remedies under ADA Title II and section 504 are those of Title VI of the Civil Rights Act,¹¹⁴ many courts have looked to the caselaw regarding non-intentional race and sex discrimination under Title VI and Title IX of the Education Amendments¹¹⁵ in deciding ADA Title II and section 504 remedies questions. For reasons explained below, this comparison is misguided. The Supreme Court’s definitive interpretation of non-intentional disability discrimination under section 504 provides the approach that ought to control, the one that Congress ratified when it enacted ADA Title II. The source for additional guidance is not a wooden reading of the Title VI caselaw, but rather the Supreme Court’s reasoning in interpreting remedies under ADA Title II in the one case that considered the issue.

1. Title VI and Title IX Cases and Related Remedies Developments for Non-Intentional Race and Sex Discrimination

Early caselaw under Title VI of the Civil Rights Act permitted actions to proceed on allegations of disparate impact on the basis of race and national

¹¹³ This conclusion should be unremarkable, for Title II and section 504 cover employment as well as other activities of the entities covered by the two statutes. 28 C.F.R. § 35.140(a) (2015). Employees of government or federally assisted enterprises with fewer than fifteen employees will be covered only by Title II or section 504, and not by Title I, because of the latter’s employer-size restrictions. 42 U.S.C. § 12111(5)(A) (2012). Some courts, however, have held Title II inapplicable to employment despite explicit coverage in the Title II regulations and legislative history support. *See* *Brumfeld v. City of Chicago*, 735 F.3d 619, 624–31 (7th Cir. 2013) (collecting authorities). *Contra* *Bledsoe v. Palm Beach Conservation Dist.*, 133 F.3d 816, 821–23 (11th Cir. 1998).

¹¹⁴ *See* 42 U.S.C. § 12133 (2012) (incorporating “remedies, procedures, and rights set forth in section 794a of title 29” for violations of ADA Title II); 29 U.S.C. § 794a(a)(2) (2012) (incorporating “remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964” for violations of section 504).

¹¹⁵ 20 U.S.C. §§ 1681–1688 (2012). The wording of Title VI and Title IX is identical.

origin, although judges often relied on the Title VI regulations rather than the statute itself. The Supreme Court's 1974 decision in *Lau v. Nichols* exemplified this approach in upholding a claim based on San Francisco's failure to afford meaningful educational services to students who spoke only Chinese.¹¹⁶ Nevertheless, several years later, apparently to avoid a conflict in which the Equal Protection Clause might permit a race-conscious affirmative action program while Title VI forbade it, the Supreme Court declared that Title VI's prohibition on race discrimination was no broader than that of the Equal Protection Clause.¹¹⁷ The Court in *Washington v. Davis* had held that the Equal Protection Clause did not bar disparate impacts,¹¹⁸ and in the context of a sex discrimination case, *Personnel Administrator v. Feeney*, the Court said that the discrimination the Equal Protection Clause outlawed was negative treatment undertaken because of, rather than despite, its effect on women.¹¹⁹

This interpretation imposed a requirement of animus.¹²⁰ The provisions challenged in the equal protection cases were purposeful discrimination in the sense that Massachusetts officials in *Feeney* knew that the veteran's preference had a negative effect on women but kept it anyway,¹²¹ just as the District of Columbia in *Davis* certainly knew that its employment test had a negative effect on African-Americans and kept it anyway.¹²² But the Court found no liability for that sort of intent. What mattered to the Court was that there was no showing of actual hostility on the basis of sex or race in those equal protection challenges.

¹¹⁶ 414 U.S. 563 (1974).

¹¹⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *id.* at 328 (joint op. of Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) ("The threshold question we must decide is whether Title VI . . . bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.").

¹¹⁸ 426 U.S. 229, 239–40 (1976); see *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) ("Our decision last Term in *Washington v. Davis* made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

¹¹⁹ 442 U.S. 256, 276 (1979) ("The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."). The Court limited its analysis to statutes that are facially gender-neutral. *Id.* at 274.

¹²⁰ See *id.* ("[T]he . . . question is whether the adverse effect reflects invidious gender-based discrimination.").

¹²¹ See *id.* at 278–79 ("[I]t cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable. 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences.").

¹²² The city defended its practice on the basis of Title VII standards, which permit disparate impacts supported by business necessity. See *Davis*, 426 U.S. at 238 n.8.

Then in 1983, in *Guardians Ass'n v. Civil Service Commission*,¹²³ a Title VI case alleging a disparate racial impact in employment, the Supreme Court formed conflicting majorities for two propositions. First, discriminatory intent would not be required to establish liability—three justices said that the Title VI regulations validly embodied a disparate impact standard and two said that discriminatory animus is not an essential element of a violation of Title VI itself.¹²⁴ But second, without proof of discriminatory animus, compensatory relief should not be ordered; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only private remedies for Title VI violations.¹²⁵ The basis for the second proposition also reflected a split among the justices, with two saying that make-whole remedies are not ordinarily appropriate in private actions for violations of spending clause statutes, but an exception should be made in instances of intentional discrimination;¹²⁶ two saying that private relief should never be granted under Title VI;¹²⁷ and one saying that the regulations imposing a disparate impact standard were not valid, but monetary relief for conduct violating Title VI itself, that is, intentional conduct only, is permitted.¹²⁸ There was no conflict with *Lau*, because the plaintiffs there did not demand monetary relief.¹²⁹ The Court did not elaborate on what nature or degree of intent would be needed to support a monetary remedy; however, disparate impact did not suffice.¹³⁰

Next in sequence, the Court decided *Gebser v. Lago Vista Independent School District*¹³¹ and *Davis v. Monroe County Board of Education*,¹³² holding that to sustain damages actions under Title IX against school districts for teacher and peer sex harassment, the plaintiff had to show deliberate indifference by a

¹²³ 463 U.S. 582, 584 (1983).

¹²⁴ *Id.* at 607.

¹²⁵ *Id.* at 607 n.2.

¹²⁶ *Id.* at 597–603.

¹²⁷ *Id.* at 608 (Powell, J., joined by Burger, C.J., concurring in judgment).

¹²⁸ *Id.* at 612–13 (O'Connor, J., concurring in judgment).

¹²⁹ *See Lau*, 414 U.S. at 564 (“No specific remedy is urged upon us.”).

¹³⁰ In 1979, the Supreme Court recognized an implied cause of action, apparently for both injunctive relief and damages, under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979), and the Court’s holding extended readily to Title VI and section 504, as demonstrated by *Guardians Ass'n*, 463 U.S. 582, and *Alexander v. Choate*, 469 U.S. 287 (1985).

¹³¹ 524 U.S. 274, 277 (1998) (“We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”).

¹³² 526 U.S. 629, 650 (1999) (“We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”).

responsible official to a known deprivation of equal educational opportunity.¹³³ This standard strongly resembles the knowledge-indifference standard in criminal law and intentional tort law;¹³⁴ it appears to be distinct from and lower in blameworthiness than animus, though higher than negligence or strict liability.

The Court in *Davis v. Monroe County* linked the use of the deliberate indifference standard to the intent requirement, citing *Guardians Ass'n's* lead opinion¹³⁵ for the proposition that although Title VI funding recipients must have notice of potential damages liability for damages to be appropriate, “this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute.”¹³⁶ The Court also linked deliberate indifference to causation, saying that the deliberate indifference standard eliminates the risk that a recipient would be liable in damages not for an official decision but for its employees’ independent actions, citing and quoting *Gebser*.¹³⁷ *Davis v. Monroe County* states that “*Gebser* thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination.”¹³⁸ Title IX differs from Title VII, which allows company liability for intentional discrimination on the basis of employee actions, applying agency law.¹³⁹ According to *Davis v. Monroe County*, “in *Gebser* we expressly rejected the use of agency principles in the Title IX context.”¹⁴⁰

The *Gebser* Court said it would “frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of respondeat superior or constructive notice.”¹⁴¹ The Court stressed that when Title IX was enacted in 1972, even Title VII permitted only equitable relief, and that § 1981a limited the amount of damages recoverable in any individual case when it expanded Title VII’s remedies in 1991.¹⁴² The Court said that “whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on ‘protecting’

¹³³ *Id.* The standard was drawn from cases such as *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), and *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

¹³⁴ See *supra* text accompanying note 29 (describing knowledge-indifference standard in criminal and tort law).

¹³⁵ See *Davis v. Monroe County*, 526 U.S. at 640 (citing *Guardians Ass'n*, 463 U.S. at 597–98). The Court also relied on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). *Davis v. Monroe County*, 526 U.S. at 639–40.

¹³⁶ *Davis v. Monroe County*, 526 U.S. at 642.

¹³⁷ *Id.* (referring to *Gebser*, 524 U.S. at 290–91).

¹³⁸ *Id.* at 643.

¹³⁹ See, e.g., *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998) (applying principles of agency law to liability of employer in Title VII sex harassment case).

¹⁴⁰ *Davis v. Monroe County*, 526 U.S. at 643.

¹⁴¹ *Gebser*, 524 U.S. at 285.

¹⁴² *Id.* at 285–86. Title VII did of course permit monetary awards in the form of back pay as equitable remedies before 1991. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

individuals from discriminatory practices carried out by recipients of federal funds.”¹⁴³

In a culmination of its Title VI and Title IX holdings, in 2001, the Court decided *Alexander v. Sandoval*, ruling that no private litigant could assert a disparate impact claim under Title VI or its regulations because Title VI covers only intentional discrimination, and there is no private right of action to enforce the regulations promulgated under it, the provisions that prohibit disparate impact.¹⁴⁴ The Court relied heavily on the statements about Title VI’s scope in *Regents of the University of California v. Bakke*.¹⁴⁵ Therefore no Title VI case, and likely no Title IX case, may be brought by a private litigant for anything but intentional discrimination, even if the case is solely for injunctive and declaratory relief. *Sandoval* did little to define the content of the intent standard. Nevertheless, if the analogy is drawn to *Davis v. Monroe County* and *Gebser*, deliberate indifference to known discriminatory conduct suffices, but disparate impact and respondeat superior do not.

2. Non-Intentional Discrimination Under ADA Title II and Section 504

These cases might seem to affect disability discrimination law, but in fact they do not. The controlling precedent is quite different. In 1985, the Supreme Court decided *Alexander v. Choate*, declaring that Congress in section 504 perceived discrimination against people with disabilities “to be most often the product, not of invidious animus, but rather of thoughtlessness—of benign neglect,” and “much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.”¹⁴⁶ The Court cited architectural barriers, transportation, special education, and rehabilitation services as areas where that would be the case.¹⁴⁷ The Court concluded that it would “assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.”¹⁴⁸

¹⁴³ *Gebser*, 524 U.S. at 287.

¹⁴⁴ 532 U.S. 275, 279–93 (2001). The Court rejected a challenge to Alabama’s failure to provide driver’s license exams in any language other than English, facts parallel to *Lau*. The Court said it had already rejected *Lau*’s interpretation of Title VI, if not its interpretation of the Title VI regulations. *Id.* at 285.

¹⁴⁵ *Id.* at 280–81 (citing *Bakke*, 438 U.S. at 287). See generally *supra* note 117 and accompanying text (discussing *Bakke*).

¹⁴⁶ 469 U.S. at 296.

¹⁴⁷ *Id.* at 297 (“For example, elimination of architectural barriers was one of the central aims of the Act, see, e.g., S. Rep. No. 93-318, p. 4 (1973), U.S. Code Cong. & Admin. News 1973, pp. 2076, 2080, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped.”).

¹⁴⁸ *Id.* at 299. The endorsement of a disparate impact theory appears to be central to the Court’s reasoning in the case, but even if it were characterized as “considered dicta,” lower courts should observe it. See *Fond du Lac Band of Lake Superior Chippewa v. Frans*, 649 F.3d 849, 852–53 (8th

Ultimately, the Court refused to find a violation of section 504 from the disparate impact created by a reduction in the number of hospital days covered by a state Medicaid program, but it distinguished statewide resource allocation decisions about public benefits from disparate impacts that include denial of special education services and architectural barriers that disadvantage wheelchair users.¹⁴⁹

Choate explicitly rejected the comparison of section 504 to Title VI as interpreted by *Guardians Ass'n*, the case that eliminated damages relief for non-intentional Title VI violations. The Court said that *Guardians Ass'n* made two holdings: “First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.”¹⁵⁰ This latter point meant that Congress delegated the selection of disparate impacts that the law would address to the administrative agencies writing the regulations.¹⁵¹ The Court concluded that “*Guardians*, therefore, does not support [the state’s] blanket proposition that federal law proscribes only intentional discrimination against the handicapped.”¹⁵² Citing an earlier case permitting monetary relief for a section 504 violation pertaining to employment, the Court went on to say, “Moreover, there are reasons to pause before too quickly extending even the first prong of *Guardians* to § 504.”¹⁵³

The disparate-impact approach focus attributed to Congress in *Choate*’s reading of section 504 is the polar opposite of animus-based intentional discrimination. Professor Green captures the difference:

Disparate impact theory presents a monumentally different conceptualization of discrimination than that embraced by traditional disparate treatment jurisprudence. Defining discrimination in terms of consequence rather than purpose or motive, disparate impact theory

Cir. 2011) (“[F]ederal courts . . . are not free to limit Supreme Court opinions precisely to the facts of each case. Instead, federal courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings” (quoting *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007)); *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000) (“[W]e should not idly ignore considered statements the Supreme Court makes in dicta.”).

¹⁴⁹ *Choate*, 469 U.S. at 298–99. The Court reasoned that section 504 did not reach all disparate impacts: “Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.” *Id.* at 299. This led to the conclusion that the across-the-board Medicaid cut did not transgress the statute, particularly since the federal Medicaid law delegated decisions of that type to the states and people with disabilities retained meaningful access to Medicaid. *Id.* at 302–04.

¹⁵⁰ *Id.* at 293 (footnotes omitted).

¹⁵¹ *Id.* at 293–94.

¹⁵² *Id.* at 294.

¹⁵³ *Id.* (citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632–633 n.13 (1984) (upholding section 504 employment discrimination action for monetary relief)).

. . . require[s] that members of protected groups not be unnecessarily harmed . . . because of group differences.¹⁵⁴

The Supreme Court recognized this distinction in *Choate*. Disavowing the application of *Guardians Ass'n* to section 504, the Court said that section 504 itself—not its regulations but what Congress sought to do and actually enacted—forbade non-intentional discrimination.

Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect. . . . [M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.¹⁵⁵

When Congress enacted the ADA a few years after *Choate*, it incorporated the disparate-impact interpretation into Title II: “It is . . . the Committee’s intent that section 202 [ADA Title II] . . . be interpreted consistent with *Alexander v. Choate*.”¹⁵⁶ The legislative history also endorses judicial decisions requiring reasonable accommodations¹⁵⁷ and forbidding a practice with a disparate impact on people with disabilities.¹⁵⁸

In the wake of *Choate*, many courts have eschewed any intent requirement in Title II and section 504 disparate impact and reasonable accommodation cases. As noted above, in *Helen L.*, which held that failure to modify rules requiring services to a person with a disability be provided only if she lived in a nursing home violated ADA Title II, the Third Circuit rejected any need for a showing of animus or other intent: “Because the ADA evolved from an attempt to remedy the effects of ‘benign neglect’ resulting from the ‘invisibility’ of the disabled, Congress could not have intended to limit the Act’s protections and

¹⁵⁴ Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 136 (2003).

¹⁵⁵ *Choate*, 469 U.S. at 295–97 (emphasis added) (footnote omitted). The Court made extensive reference to the legislative history of section 504. *Id.* at 297.

¹⁵⁶ H.R. REP. NO. 101-485, pt. 2, at 84 (1990), as reprinted in 1990 U.S.C.C.A.N. 267, 367. For an extensive discussion of the propriety of using authoritative legislative history such as committee reports to interpret statutes, see Weber, *supra* note 60, at 1125–29 (collecting authorities); see also Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1637–38, 1655–1656 (2014) (arguing that careful examination of legislative history and context of legislative decisions is crucial for correct statutory interpretation).

¹⁵⁷ H.R. REP. NO. 101-485, pt. 3, at 50–51, as reprinted in 1990 U.S.C.C.A.N. at 474 (citing *ADAPT v. Skinner*, 881 F.2d 1184, 1203 (3d Cir. 1989) (Mansmann, J., concurring) (wheelchair lifts for all new buses); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (readers for blind public aid caseworkers), *aff'd*, 732 F.2d 146 (3d Cir. 1984)).

¹⁵⁸ H.R. REP. NO. 101-485, pt. 2, at 71–72, as reprinted in 1990 U.S.C.C.A.N. at 354 (citing *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (elimination of written test for heavy-equipment operator with reading disability)).

prohibitions to circumstances involving deliberate discrimination.”¹⁵⁹ In *Henrietta D. v. Giuliani*, the plaintiffs asserted that New York City failed to modify rules to ensure access to public benefits and services for persons with HIV.¹⁶⁰ The court ruled in favor of plaintiffs, holding that the government’s motive or intent was irrelevant to the fact of the violation.¹⁶¹ Other cases involving failure to furnish accommodations or failure to modify standard procedure have followed suit.¹⁶² The Supreme Court has not addressed intent in Title II or section 504 cases since *Choate*. Nevertheless, as noted above, in *Olmstead*, the Supreme Court case enforcing the integrated-services mandate of the ADA Title II regulations, the Court did not impose any animus or other mental state

¹⁵⁹ 46 F.3d at 335.

¹⁶⁰ 119 F. Supp. 2d at 206–07.

¹⁶¹ *Id.*

¹⁶² See *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 846 (7th Cir. 1999) (affirming preliminary injunction against application of eight-semester athletic eligibility rule to student held back on account of disability, stating: “We cannot accept the suggestion that liability under Title II of the Discrimination Act must be premised on an intent to discriminate on the basis of disability.”); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (upholding section 504 claim, stating: “[A] plaintiff need not prove that defendants’ discrimination was intentional.”), *superseded as to statute of limitations*, P.P. *ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 737 (3d Cir. 2009); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 817 (D. Kan. 1994) (granting relief in case alleging failure to provide curb ramps and other accessible facilities, stating: “The prohibition of Title II applies to action that carries a discriminatory effect, regardless of the City’s motive or intent.”); see also *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013) (upholding claim under Title II access to communications regulation with no discussion of intent, stating: “[I]n determining whether K.M. and D.H. were denied meaningful access to the school’s benefits and services, we are guided by the specific standards of the Title II effective communications regulation.”), *cert. denied*, 134 S. Ct. 1493, 1494 (2014); *Frame v. City of Arlington*, 657 F.3d 215, 231 n.71 (5th Cir. 2011) (upholding claim based on city’s failure to provide accessible sidewalks, stating: “We express no opinion as to whether (or when) a failure to make reasonable accommodations should be considered a form of intentional discrimination, a form of disparate impact discrimination, or something else entirely.”); *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) (upholding section 504 claim, stating: “For purposes of determining whether a particular regulation is ever enforceable through the implied right of action contained in a statute, the pertinent question is simply whether the regulation falls within the scope of the statute’s prohibition. The mens rea necessary to support a damages remedy is not pertinent at that stage of the analysis.”); *Ability Ctr. v. City of Sandusky*, 385 F.3d 901, 912 (6th Cir. 2004) (“Title II reaches beyond prohibiting merely intentional discrimination.”); *Tsombanidis*, 352 F.3d at 574–75 (distinguishing claim of intentional discrimination from claim of failure to accommodate in application of fire code to group home); *Drazen v. Town of Stratford*, No. 09CV896, 2013 WL 1385265, at *4–5 (D. Conn. Apr. 2, 2013) (in case challenging closing of space used for meetings of individuals recovering from substance abuse, distinguishing reasonable accommodation claim from intentional discrimination claim and not discussing state of mind for reasonable accommodation claim), *vacated in part not relevant*, 2013 WL 4094355 (D. Conn. Aug. 3, 2013); *Mason v. City of Huntsville*, No. CV-10-S-02794-NE, 2012 WL 4815518, at *14 (N.D. Ala. Oct. 10, 2012) (denying motion to dismiss ADA Title II claim based on failure to make modifications to ensure accessibility of public facilities, not discussing intent); *Benavides v. Laredo Med. Ctr.*, No. L-08-105, 2009 WL 1755004, at *1 (S.D. Tex. June 18, 2009) (denying motion to dismiss claim for damages under section 504 in case alleging failure to furnish sign language interpreter to hospital patient, rejecting animus requirement and holding that willful failure to provide advantage constitutes discrimination).

requirement when it required the defendant state agency to provide services for people with intellectual disabilities outside of state institutions.¹⁶³

Consistent with the lack of any intent standard, and contrary to the interpretation of Title IX in *Gebser* and *Davis*, courts have permitted respondeat superior liability in section 504 and ADA Title II cases.¹⁶⁴ They do not demand that there be a policy or its equivalent on the part of the defendant,¹⁶⁵ which would be the necessary first step in tracing adverse action back to the intentional conduct of a governmental actor without using respondeat superior.¹⁶⁶

¹⁶³ 527 U.S. at 598.

¹⁶⁴ See *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 372–73 (D. Md. 2011) (denying summary judgment on several claims of failure to accommodate deaf motorist following arrest for driving while intoxicated). The court stated:

Both Title II of the ADA and § 504 of the Rehabilitation Act contemplate *respondeat superior* liability. The Fourth Circuit has said: ‘Under the ADA and similar statutes, liability may be imposed on a principal for the statutory violations of its agent,’ rather than only for an official “policy of discrimination.” *Rosen v. Montgomery County*, 121 F.3d 154, 157 n.3 (4th Cir. 1997) (emphasis in original). See also *T.W. ex rel. Wilson v. School Bd. of Seminole County*, 610 F.3d 588, 604 (11th Cir. 2010) (stating that the ADA “permits an employer to be held liable for the actions of its agents,” and assuming, *arguendo*, that the Rehabilitation Act also “permits respondeat superior liability”)

....

Id.

¹⁶⁵ Cf. *Los Angeles County v. Humphries*, 562 U.S. 29, 39 (2010) (holding that municipality will not be liable under 42 U.S.C. § 1983 even for injunctive relief in absence of policy or custom); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978) (“Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. . . . [A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”).

¹⁶⁶ In upholding a compensatory damages verdict for a deaf person who was not accommodated with regard to communications during an arrest for drunk driving, the Fifth Circuit observed:

The Fourth, Seventh, Ninth, and Eleventh circuits have all agreed that when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA [section 504 of the Rehabilitation Act], the public entity is liable for the vicarious acts of any of its employees as specifically provided by the ADA. . . .

Furthermore, while we have not yet spoken on the question of whether a policy of discrimination must be identified to sustain a claim under the ADA or the RA, the Fourth Circuit has considered the issue and has concluded that a policy is not required. We agree with our sister circuit on this point. The ADA expressly provides that a disabled person is discriminated against when an entity fails to “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.” A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability. Thus, although it is true that for claims asserted under § 1983, an official policy must be identified, the same rule cannot be reconciled with Congress’s legislative objectives in enacting the ADA and the RA, and *Victoria County* has not cited any authority supporting this position.

Delano-Pyle v. Victoria County, 302 F.3d 567, 574–75 (5th Cir. 2002) (citations omitted). The court said deliberate indifference was not required, although it did say that intentional discrimination was needed for a damages claim; it said the facts supported a finding of intentional discrimination because

Of course, finding violations of ADA Title II and section 504 based on non-intentional conduct is fully consistent with what courts do in ADA Title I employment cases.¹⁶⁷

3. Remedies for Non-Intentional Discrimination Under ADA Title II and Section 504

The Title VI and Title IX caselaw also leaves disability discrimination remedies unaffected. To repeat, the remedies of ADA Title II are those of section 504, and the remedies of section 504 are those of Title VI of the Civil Rights Act.¹⁶⁸ A facile reading of *Sandoval*, the last word on Title VI from the Supreme Court, might suggest that no private remedies exist at all for disparate impact cases under Title II and section 504, and that compensatory damages and all other remedies¹⁶⁹ are available only for intentional wrongdoing, that is, animus-based conduct under *Bakke*, *Guardians Ass'n*, and the equal protection references, and for deliberate indifference under the Title IX caselaw. Unless reasonable accommodation cases are deemed to be intentional discrimination actions, they would then be in some remedial limbo, for they have no analogue in Title VI.

That reading runs straight into *Choate*, however, which said disparate impact claims were the primary cases Congress wanted to address with section 504, and does not even have support in *Sandoval*. *Sandoval* reasoned that Title VI itself, in section 601 of the Civil Rights Act, reaches only intentional conduct.¹⁷⁰ Conduct with a disparate impact is not outlawed, but instead is “permissible under § 601.”¹⁷¹ Disparate impacts can be addressed only by the regulations authorized under section 602.¹⁷² The Court recognized that authoritative regulations interpreting a statute are enforceable through a private right of action whenever the statute can be privately enforced: “A Congress that intends the statute to be enforced through a private cause of action intends the authori-

it was clear from video evidence that the plaintiff could not understand the police officer but the officer continued to use verbal communication. This “intent” requirement was thus merely the intention not to accommodate, and was not the application of a requirement of animus or intent of the Title VI-Title IX-Equal Protection variety.

¹⁶⁷ See *supra* text accompanying notes 62–70 (discussing absence of intent requirement in Title I reasonable accommodation cases). Needless to say, as with Title I employment cases, some claims alleging discrimination barred by Title II will require a showing of intent, for example, claims alleging retaliation. See *D.B. v. Esposito*, 675 F.3d 26, 40 (1st Cir. 2012) (rejecting retaliation claim for lack of evidence of animus).

¹⁶⁸ See *supra* note 114 and accompanying text.

¹⁶⁹ Except for punitive damages. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). See generally *infra* text accompanying notes 181–188 (discussing *Barnes*).

¹⁷⁰ *Sandoval*, 532 U.S. at 280.

¹⁷¹ *Id.* at 281.

¹⁷² *Id.* at 281, 286.

tative interpretation of the statute to be so enforced as well.”¹⁷³ But according to the Court, the Title VI disparate impact regulations do not interpret section 601; on the contrary, they “forbid conduct that § 601 permits.”¹⁷⁴ Therefore the private right of action to enforce Title VI does not apply to the disparate impact regulations.¹⁷⁵

However, the Court in *Sandoval* explicitly placed *Choate*’s discussion of disparate impact under section 504 into the category of authoritative interpretations of the statute, rather than extensions of the statute that forbid conduct the statute permits.¹⁷⁶ It is hard to imagine that the *Sandoval* Court could do otherwise, because the relevant discussion in *Choate* emphasized that unintentional discrimination is what Congress wanted to forbid by passing section 504. Thus, disparate impact is the heart of the statutory duty under section 504 and Title II of the ADA, and the private right of action under these two statutes embraces disparate impact. It is also hard to imagine that the private cause of action could be read to exclude failure to make reasonable modifications, a violation that is closer to intentional discrimination on the spectrum of mens rea¹⁷⁷ and is also the most celebrated innovation in disability discrimination law.¹⁷⁸

¹⁷³ *Id.* at 284.

¹⁷⁴ *Id.* at 285.

¹⁷⁵ *Id.* at 285–86.

¹⁷⁶ *Id.* The court stated:

The many cases that respondents say have “assumed” that a cause of action to enforce a statute includes one to enforce its regulations illustrate (to the extent that cases in which an issue was not presented can illustrate anything) only this point [regarding authoritative interpretations]; each involved regulations of the [authoritative interpretation] type we have just described, as respondents conceded at oral argument, Tr. of Oral Arg. 33. See . . . *School Bd. of Nassau Cnty. v. Arline*, 480 U. S. 273, 279–281 (1987) (regulations defining the terms “physical impairment” and “major life activities” in § 504 of the Rehabilitation Act of 1973); . . . *Alexander v. Choate*, 469 U.S., at 299, 309 (regulations clarifying what sorts of disparate impacts upon the handicapped were covered by § 504 of the Rehabilitation Act of 1973, which the Court assumed included some such impacts).

Id. (citations omitted). At another point the Court also cited with approval *Choate*’s interpretation of Title VI when *Choate* was cautioning against applying Title VI caselaw to section 504 cases. *Id.* at 281.

¹⁷⁷ The position here is not that failure to provide reasonable accommodation is intentional discrimination as the Court defined the term for purposes of equal protection, Title VI, or Title IX, but it may be noted that one recent decision, after extensively reviewing holdings in accommodations cases, reached the conclusion that a denial of reasonable accommodations is intentional discrimination sufficient to support damage claims. *Borum v. Swisher County*, No. 2:14-CV-127-J, 2015 WL 327508, at *8 (N.D. Tex. Jan. 26, 2015) (denying motion for summary judgment in ADA and section 504 action for failure to accommodate prisoner with multiple disabilities by modifying feeding and medical care practices). For a similar approach, see *Delano-Pyle*, 302 F.3d at 574–75 (discussed *supra* note 166).

¹⁷⁸ See *supra* text accompanying notes 57–61 (discussing reasonable accommodation); see also *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 156 F.3d 321, 331 (2d Cir. 1998) (affirming damages award for failure to provide accommodations on bar exam, reasoning that policy of denying accom-

If *Sandoval* thus falls out of the remedial picture for ADA Title II and section 504 claims, what of *Guardians Ass'n*?¹⁷⁹ Could there be a private cause of action for disparate impacts but no monetary relief when the discrimination is unintentional? But *Guardians Ass'n* is no more applicable than *Sandoval*. As the Court emphasized in *Sandoval*, *Guardians Ass'n* barred monetary relief for disparate impact discrimination because the statute—Title VI itself—outlawed only intentional discrimination.¹⁸⁰ Its holding is not relevant when a statute, as authoritatively interpreted by its regulations, forbids disparate impact discrimination. Under the provisions incorporating Title VI remedies into section 504 and ADA Title II, all actual violations of section 504 and Title II, including the disparate impacts to which it extends and failures to make reasonable modifications, call for the remedies permitted for actual violations of Title VI. The actual violations of Title VI are intentional discrimination; in contrast, the actual violations of section 504 and ADA Title II embrace a wide range of conduct with disparate impacts, as well as failure to make reasonable accommoda-

modations based on results of unreliable disability evaluation constituted deliberate indifference), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999). The court in *Helene L.* reinforced the conclusion that reasonable accommodation is at the heart of section 504 and the ADA by stressing the centrality of the duties imposed in the section 504 regulations to what Congress explicitly commanded in Title II:

Moreover, because Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former regulations have the force of law. When Congress re-enacts a statute and voices its approval of an administrative interpretation of that statute, that interpretation acquires the force of law and courts are bound by the regulation. The same is true when Congress agrees with an administrative interpretation of a statute which Congress is re-enacting. Although Title II of the ADA is not a re-enactment of section 504, it does extend section 504's anti-discrimination principles to public entities. Furthermore, the legislative history of the ADA shows that Congress agreed with the coordination regulations promulgated under section 504. *See, e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) ("The first purpose of [Title II] is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to . . . state and local governments . . ."); H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 50. ("The general prohibitions set forth in the section 504 regulations are applicable to all programs and activities in Title II").

46 F.3d at 332 (case citations omitted); *see Henrietta D.*, 331 F.3d at 273 ("The obligation reasonably to accommodate derives from the statute itself."); *see also Frame*, 657 F.3d at 224 (upholding claim based on city's failure to provide accessible sidewalks, reasoning that relevant regulations "apply Title II's substantive ban on disability discrimination"). Some courts have maintained that not all the duties included in the Title II regulations are sufficiently closely tied to the statute to support a private cause of action, however. *See Ability Ctr.*, 385 F.3d at 907–15 (affirming relief in Title II claim regarding curb ramps under accessibility regulation but holding that violations of regulation requiring transition plan are not actionable); *cf. Lemahieu*, 513 F.3d at 939 ("[T]o be enforceable through the § 504 implied private right of action, regulations must be tightly enough linked to § 504 that they authoritatively construe that statutory section, rather than impose new obligations.").

¹⁷⁹ *Guardians Ass'n*, 463 U.S. at 582.

¹⁸⁰ *Sandoval*, 532 U.S. at 281.

tions. There is no barrier in *Guardians Ass'n* or *Sandoval* for compensatory damages or other monetary relief for those violations.

The only Supreme Court case discussing ADA Title II remedies is *Barnes v. Gorman*, in which a man with paraplegia who used a wheelchair obtained a verdict of over \$1 million in compensatory damages and \$1.2 million in punitive damages for injuries he sustained when he fell off the bench in a police van while being transported after an arrest.¹⁸¹ According to the Court, his “suit claimed petitioners had discriminated against respondent on the basis of his disability, in violation of § 202 of the ADA and § 504 of the Rehabilitation Act, by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries.”¹⁸² It was thus a case based on failure to provide reasonable modifications to the police department’s ordinary procedures, which permitted transportation in a van not equipped to accommodate wheelchair users. The Court overturned the punitive damages award.¹⁸³ It looked to the ADA provision adopting section 504 remedies, which in turn adopts Title VI remedies. The Court declared that Title VI, as a Spending Clause statute, “is much in the nature of a contract” and extended the contract analysis to remedies.¹⁸⁴ Compensatory damages and injunctions are traditionally available in contract actions, and federal grant recipients should be aware of their availability when they accept the funding that is subject to Title VI’s restrictions (and those of section 504 and ADA Title II).¹⁸⁵ Punitive damages are not ordinarily available for breach of contract, however, so they are not proper remedies for a violation.¹⁸⁶

Barnes did nothing to disturb the compensatory damages remedy for failure to provide accommodations. In fact, it reinforced the conclusion that compensatory damages are available for failures to provide reasonable modifications:

Our conclusion is consistent with the “well settled” rule that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is “made good” when the recipient

¹⁸¹ 536 U.S. at 184.

¹⁸² *Id.*

¹⁸³ *Id.* at 189–90.

¹⁸⁴ *Id.* at 186.

¹⁸⁵ *Id.* at 187.

¹⁸⁶ *Id.* at 187–88.

compensates the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.¹⁸⁷

Compensatory damages and other monetary relief thus may be required to make good the losses due to failure to modify policies and procedures and provide accommodations.

Similarly, *Barnes* did nothing to limit compensatory remedies in disparate impact cases, and its contract law analysis suggests that monetary relief should be available when disparate impact could be expected to cause losses that money can remedy. The measure of damages in contract cases is ordinarily that of reasonable expectations, so monetary relief based on that measure should be available in ADA Title II and section 504 disparate impact actions.¹⁸⁸

Thus, broad remedies, consistent with concepts of reasonable expectations of loss, and including compensatory damages and other monetary relief, are available for violations of section 504 and the ADA's reasonable accommodations and disparate impact discrimination provisions. The legislative history of Title II emphasizes that a wide range of remedies exists for violations of the statute. The House Committee Report states that Congress intended to make the "full panoply of [section 504] remedies available" in Title II cases,¹⁸⁹ and cited a case providing damages against a governmental unit under section 504.¹⁹⁰

¹⁸⁷ *Id.* at 189 (citations omitted).

¹⁸⁸ See DAN B. DOBBS, *LAW OF REMEDIES* § 12.1(1), at 752 (2d ed. 1993) ("[Contract] [d]amages remedies most frequently aim at protecting the plaintiff's expectation or expectancy interest. . . . (The expectation interest may also be protected by specific performance.)") (footnotes omitted); see also MCCORMICK, *supra* note 86, § 138, at 562 ("[D]amages for breach of contract can be recovered only for such losses as were reasonably foreseeable, when the contract was made, by the party to be charged.").

¹⁸⁹ H.R. REP. NO. 101-485, pt. 3, at 52 n.62, as reprinted in 1990 U.S.C.C.A.N. at 475 n.62 (citing *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982)).

¹⁹⁰ *Id.* at 52; see *Henrietta D.*, 331 F.3d at 289 n.18. The *Henrietta D.* court stated:

The legislative history indicates that Congress intended the "full panoply of remedies" to be available [in a reasonable modifications case under ADA Title II], H.R. Rep. No. 485, pt. 2, at 98 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 381; H.R. Rep. No. 485, pt. 3, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 475, and the House Judiciary Committee Report cited as an example of the remedies available under Title II, the Eighth Circuit's decision in *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982), which held that an implied private right of action for damages and injunctive relief was available under § 504 where officials were sued in their official capacities, H.R. Rep. No. 485, Pt. 3, at 52 n. 62, reprinted in 1990 U.S.C.C.A.N. at 475 n. 62.

Of course, availability of a remedy does not mean that it should be granted in every case. The propriety of various forms of relief in non-intentional disability discrimination cases is discussed below.¹⁹¹

IV. INSISTING ON INTENT: THREE ERRORS

A number of prominent opinions from the lower courts demand showings of intent in section 504 and ADA Title II cases, particularly those that request monetary relief. Courts in these cases commit three errors. The first, the misguided use of analogies to Title VI and Title IX cases, has been explored above and is found in cases covering a range of subject matters. The other two are peculiar to elementary and secondary education cases: the reliance on a 1982 appellate case that was dubious when written and is now legislatively overruled, and a related, unnecessary effort to avoid a conflict between section 504-ADA remedies and those of the Individuals with Disabilities Education Act.

A. Misguided Analogies to Guardians Ass'n and the Title IX Cases

Despite *Alexander v. Choate's* rejection of *Guardians Ass'n v. Civil Service Commission* in interpreting section 504, a number of courts have applied the case when making decisions about remedies in Title II ADA and section 504 reasonable modification cases. Thus, they require that the plaintiff show intentional discrimination in order to obtain monetary relief, though usually they also apply the *Gebser v. Lago Vista Independent School District-Davis v. Monroe County Board of Education* interpretation of Title IX and allow deliberate indifference to suffice. It is as though the courts are reading an aggravated denial of accommodations requirement into the statute in monetary relief cases.

¹⁹¹ See *infra* text accompanying notes 248–261. There might be some concern about whether Eleventh Amendment principles give state government entities immunity from monetary relief in Title II ADA and section 504 cases. The Supreme Court held that state workers could not obtain back wages under ADA Title I when the disability discrimination did not rise to a violation of the Fourteenth Amendment and was not within the area that could be banned prophylactically to prevent constitutional violations. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 372–73 (2001). The Court, however, also ruled that Congress validly abrogated state immunity in Title II cases, at least those that implicate fundamental rights such as access to courts and public court proceedings, *Tennessee v. Lane*, 541 U.S. 509, 529 (2004), and lower courts have extended *Lane's* reasoning to cases involving education, see *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 556 (3d Cir. 2007); *Toledo v. Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006); *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005). Moreover, courts have agreed that acceptance of federal funds constitutes a valid waiver of constitutional immunities for purposes of section 504 claims. See, e.g., *Miller v. Tex. Tech. Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005) (en banc); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc). Finally, units of local government, which typically include school districts, are not protected by Eleventh Amendment immunity. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977).

For example, in *Meagley v. City of Little Rock*, the Eighth Circuit affirmed a district court judgment against the plaintiff in a case in which she alleged that the incline of a bridge in a pathway of the municipal zoo was too steep to meet ADA accessibility standards, which caused her electric rental scooter to tip over, injuring her.¹⁹² The district court ruled that the plaintiff had failed to prove the city acted with deliberate indifference.¹⁹³ In upholding the need for the showing, the court of appeals reasoned that the ADA and section 504 were modeled on Title VI and adopt Title VI's remedies.¹⁹⁴ It cited *Guardians Ass'n's* statement that no compensatory relief should be given in Title VI cases unless discriminatory animus is shown and concluded that "Meagley's claims under both the ADA and Rehabilitation Act thus require proof of discriminatory intent to recover compensatory damages."¹⁹⁵ The court said that deliberate indifference, rather than "personal ill will or animosity," was the appropriate test for intentional discrimination in such a case, but that since there was no evidence the zoo knew that the bridge was out of compliance with ADA standards, blocked it off immediately after the accident, and later modified it so it was flat, deliberate indifference was not shown.¹⁹⁶ The court did not consider *Choate's* rejection of *Guardians Ass'n* in interpreting section 504. It did not recognize the fundamental difference between statutes such as Title VI and Title IX, for which intentional conduct is the only conduct that violates the statute, and section 504 and the ADA, where the authoritative interpretation of the statute embraces unintentional conduct, as the Supreme Court recognized in *Alexander v. Sandoval*.

In another example of the same reasoning, the Tenth Circuit affirmed a grant of summary judgment against family members who alleged that the state motor vehicle agency failed to provide a reasonable accommodation by allowing someone other than the parent or guardian of a student driver to supervise her practice driving when the student's parent was blind and thus did not qualify for a driver's license.¹⁹⁷ The family proposed that her grandfather could provide the supervision.¹⁹⁸ The state refused the proposal because the grandfather did not have legal guardianship of the student, though ultimately the legislature amended the statute and the student completed the required supervised

¹⁹² 639 F.3d 384, 386 (8th Cir. 2011).

¹⁹³ *Id.* at 387 ("The court ruled that Meagley had not provided proof of intentional discrimination which was required to obtain compensatory damages . . .").

¹⁹⁴ *Id.* at 389.

¹⁹⁵ *Id.* (citing *Guardians Ass'n*, 463 U.S. 582, 607 n.27 (1983)).

¹⁹⁶ *Id.* at 390.

¹⁹⁷ *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222 (10th Cir. 2009). The court did not discuss the relief requested, but since the student had her license by the time the case was adjudicated and the statute was amended, monetary relief would be the only remedy that could keep the case from becoming moot.

¹⁹⁸ *Id.* at 1225.

driving with her grandfather.¹⁹⁹ The court demanded a showing of intentional discrimination, though like the court in *Meagley*, it said deliberate indifference would be enough, stating that the state officials offered a limited guardianship, which would be “eminently reasonable,” but going on to say that there was no deliberate indifference because the senior official seemed “genuinely concerned” and “very sympathetic,” and the state promptly amended the statute.²⁰⁰ The first point the court made suggests that the state did in fact offer a reasonable modification, which could be grounds for rejecting the claim, but that has nothing to do with intent or deliberate indifference. The second point about concern and sympathy falls right into the problem that Congress was attempting to solve by enacting section 504 and the ADA.²⁰¹ Concern and sympathy are not what the statutes require.²⁰² Modifications are.

Many cases that employ the *Guardians Ass’n*-Title IX analogy concern education services for children with disabilities. Like the non-special education decisions discussed above, they make the analogy and demand intent, which they typically say may be met with a showing of deliberate indifference. Simple refusal to offer reasonable modifications is not enough. In several instances, it is clear that the plaintiff framed the case in terms of intentional discrimination, so the use of intentional discrimination standards is not surprising.²⁰³ Nevertheless, many other claims could readily be described as failure to make reasonable modifications to practices, such as the use of misguided disciplinary techniques when because of the child’s disability the disciplinary practic-

¹⁹⁹ *Id.* at 1227.

²⁰⁰ *Id.* at 1230.

²⁰¹ In some cases, plaintiffs prevail (or at least survive dispositive motions) even when the deliberate indifference standard is imposed; most of these cases fall into categories other than K–12 education. *See, e.g.,* *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334 (11th Cir. 2012) (reversing summary judgment for hospital in section 504 case for compensatory damages for failure to respond to repeated requests for sign-language interpreter for woman seeking emergency room treatment including emergency removal of gallbladder; applying deliberate indifference standard and collecting cases); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268 (2d Cir. 2009) (vacating grant of summary judgment to defendant in case in which hospital failed to provide sign language interpreter and other communication assistance despite repeated requests; applying deliberate indifference).

²⁰² Hence the title of a prominent account of the ADA’s enactment: JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1994). A judge applying the deliberate indifference standard who nonetheless understood this lesson is Judge Kobayashi in *Mark H. v. Hamamoto*, No. 00-00282, 2012 WL 3444138, at *1 (D. Haw. Aug. 14, 2012) (in damages action for failure to provide autism-related education services in violation of section 504, excluding evidence of education department employees’ good faith beliefs and sincerity and testimony that they had children’s best interests at heart).

²⁰³ *See, e.g.,* *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 260 (3d Cir. 2013) (in case of child who was mistakenly identified as child with disabilities but in fact was not disabled and lost opportunities for advanced coursework, affirming summary judgment in favor of district, relying on absence of knowledge on part of district of wrong diagnosis); *T.W. v. Sch. Bd. of Seminole Cty.*, 610 F.3d 588, 604 (11th Cir. 2010); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 452–56 (6th Cir. 2008).

es interfere with learning.²⁰⁴ The courts apply the intentional discrimination test nonetheless.

An education decision that gets this part of the analysis right (but, as argued below, commits a different interpretive error) is the original Fifth Circuit panel opinion in *Stewart v. Waco Independent School District*.²⁰⁵ *Stewart* involved a student with a cognitive disability and speech and hearing impairments.²⁰⁶ Following an instance of sexual contact between the student and peers at school, the defendant modified the student's educational program to provide for separating her from male students and keeping her under close supervision.²⁰⁷ Nevertheless, she was sexually assaulted on two later occasions

²⁰⁴ See, e.g., *T.W.*, 610 F.3d at 607 (Barkett, J., dissenting) ("T.W.'s disability manifested itself in several specific behaviors that were expected, normal, and uncontrollable for him. . . . In light of these known symptoms, which were characteristic of T.W.'s disabilities, the assessment warns and reiterates at multiple points that *physical contact with T.W. was to be avoided at all costs due to the harm that it would cause him.*"); see also *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 537 Fed. App'x 90, 96 (3d Cir. 2013) (applying deliberate indifference standard in case of long-term failure to provide child educational services adapted to her disabilities, but reversing summary judgment against plaintiff on claim); *Mark H. v. Lemahieu*, 513 F.3d 922, 939 (9th Cir. 2008) (applying deliberate indifference standard despite characterizing failure to provide services for children with autism as lack of reasonable accommodation, but overturning summary judgment for defendant); *Patrick B. v. Paradise Protectors & Agric. Sch.*, No. 1:11-CV-00927, 2012 WL 3233036, at *8–9 (M.D. Pa. Aug. 6, 2012) (denying motion to dismiss but requiring intent in section 504 action for damages in action over failure to make appropriate assessments and adapt disciplinary measures to child's disability); *Alexander v. Lawrence Cty. Bd. of Developmental Disabilities*, No. 1:10-CV-697, 2012 WL 831769, at *11 (S.D. Ohio Mar. 12, 2012) (denying motion for judgment on pleadings in case alleging frequent restraint of child; requiring intent but ruling that inference of intent may be drawn from improper action based on disability); *A.M. v. N.Y.C. Dep't of Educ.*, 840 F. Supp. 2d 660, 683 (E.D.N.Y. 2012) (granting summary judgment in case concerning failure to accommodate dietary needs of child for want of evidence of deliberate indifference); *Zachary M. v. Bd. of Educ.*, 829 F. Supp. 2d 649, 662 (N.D. Ill. 2011) (requiring intentional discrimination in case over allegations of inadequate accommodations for child with attention deficit hyperactivity disorder, noting that it may be inferred from deliberate indifference, and ruling in favor of school district); *Kaitlin C. v. Cheltenham Twp. Sch. Dist.*, No. 07-2930, 2010 WL 786530, at *5 (E.D. Pa. Mar. 5, 2010) (requiring deliberate indifference and dismissing claim in case of failure to follow restrictions on child's physical activity); *Brenneise v. San Diego Unified Sch. Dist.*, No. 08CV28, 2008 WL 4853329, at *11 (S.D. Cal. Nov. 7, 2008) (dismissing section 504 and ADA claims in case alleging failure to accommodate need for tube feeding and to make other services available, applying deliberate indifference standard, and declaring that child was treated similarly to students without disabilities); *S. L.-M. v. Dieringer Sch. Dist.* No. 343, 614 F. Supp. 2d 1152, 1159–62 (W.D. Wash. 2008) (requiring intent defined as deliberate indifference in case in which promised program modifications were not provided, but denying summary judgment for defendant); *AP v. Anoka-Hennepin Indep. Sch. Dist.* No. 11, 538 F. Supp. 2d 1125 (D. Minn. 2008) (requiring culpable intent in form of deliberate indifference and granting summary judgment for defendant on claim of failure to train personnel to administer glucagon in an emergency to child with diabetes; denying motion on claims concerning blood testing and insulin pump).

²⁰⁵ 711 F.3d 513, 522–23 (5th Cir. 2013), *vacated & superseded on reh'g*, No. 11-51067, 2013 WL 2398860 (5th Cir. June 3, 2013). On petition for rehearing and rehearing en banc, the court issued a nonprecedential decision remanding the case to the district court to consider potential exhaustion and limitations defenses.

²⁰⁶ *Id.* at 517.

²⁰⁷ *Id.*

and subjected to a student exposing himself on another occasion; the defendant responded to two of the incidents by suspending her.²⁰⁸ She alleged, among other things, that the defendant failed to provide her with accommodations needed to prevent repeated peer sexual abuse.²⁰⁹

Judge Haynes said that the student's section 504 claim premised on allegations of deliberate indifference and based on the analogy to Title IX was properly dismissed, but the judge contrasted that claim with one based on failure to make reasonable accommodations. She wrote that "Stewart pleads no facts showing that the District knew its responses to each incident created an obvious and substantial risk of recurring abuse, and municipal-liability precedent precludes equating negligence with deliberate indifference," but went on to say that "Stewart may nonetheless state a § 504 claim based on the District's alleged refusal to make reasonable accommodations for her disabilities."²¹⁰

On the reasonable accommodation claim, the court said that an action lies even when there is no explicit refusal to make an accommodation, in instances "where a district's course of action goes strongly against the grain of accepted standards of educational practice."²¹¹ The court applied a gross-misjudgment standard to that situation, saying that the standard differs from deliberate indifference, and is in fact "a species of heightened negligence" that should be "measured by professional standards of educational practice."²¹² The plaintiff plausibly stated such a claim.²¹³ The panel thus refused to employ the analogy to Title VI and Title IX in an action for monetary relief under section 504 for failure to provide reasonable modifications. As discussed below, its embrace of a gross-misjudgment standard for the claim lacks statutory support, but the critical departure from other courts is that it treated denial of a reasonable accommodation, without evil intent or deliberate indifference, as the violation of section 504 and the ADA that it demonstrably is.

Other education cases that avoid the intent-deliberate indifference trap include one in which a child, who was allegedly abused by an aide and a teacher, stated a claim under the ADA and section 504 by alleging that normal abuse reporting and investigation procedures were not followed because the defendant school board discredited the child's allegations due to his severe disabil-

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 522–23.

²¹¹ *Id.* at 523.

²¹² *Id.* at 525.

²¹³ *Id.* at 526. A recent decision that separates the reasonable accommodation and intentional discrimination claims and does not embrace the bad faith-gross misjudgment standard, yet comes down against the student, is *CTL ex rel. Trebatoski v. Ashland School District*, 743 F.3d 524 (7th Cir. 2014) (affirming summary judgment in favor of school district in case concerning accommodations for student with diabetes).

ity.²¹⁴ The court imposed no intent or any other state of mind requirement. Paraphrasing the plaintiff's argument, it asked whether "the Board of Education failed to provide John with equal access to a safe educational environment,"²¹⁵ and said the complaint provided sufficient facts to state a claim for relief.²¹⁵ In another case, the court denied a motion to dismiss section 504 and ADA claims when the complaint alleged that the defendant refused to accommodate a student with an anxiety disorder and post-traumatic stress syndrome by separating her from the brother of an individual who had been convicted of molesting her sister.²¹⁶ The complaint alleged that the brother was repeatedly placed in the student's class and that both brothers harassed her at school.²¹⁷ The court drew no analogy to Title VI or Title IX and demanded no intent or deliberate indifference on the part of the defendant. It sustained the complaint simply on the basis that it alleged that the denial of a modification, separating M.S. from the two brothers, "denied M.S. the benefits of an educational program."²¹⁸ Still other cases uphold claims based on failure to provide real-time captioning services for students with hearing impairments, in violation of the ADA Title II regulation that requires equally effective communication for people with disabilities, without any mention of the state of mind of the defendant.²¹⁹

B. The Strange Legacy of Monahan v. Nebraska in Elementary and Secondary Education Accommodations Cases

Many courts that do not impose an intent requirement (and some that do) nevertheless dismiss section 504 and ADA claims brought by students with disabilities against educational authorities on the ground that a violation necessitates "something more than a mere failure to provide the 'free appropriate education'

²¹⁴ *Doe ex rel. Doe v. Darien Bd. of Educ.*, No. 3:11cv1581, 2012 WL 4092662, at *4 (D. Conn. Sept. 17, 2012).

²¹⁵ *Id.* at *9.

²¹⁶ *M.S. v. Marple Newtown Sch. Dist.*, No. 11-5857, 2012 WL 3815563, at *4 (E.D. Pa. Sept. 4, 2012).

²¹⁷ *Id.* at *1.

²¹⁸ *Id.* at *4.

²¹⁹ *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013) (reversing summary judgment in favor of school district on claim that failure to provide communication-access real-time translation ("CART") violated ADA effective-communication regulation, 28 C.F.R. § 35.160, which requires accommodations including auxiliary aids and services for individuals with disabilities), *cert. denied*, 134 S. Ct. 1493 (2014), *on remand*, *D.H. ex rel. Harrington v. Poway Unified Sch. Dist.*, No. 09-cv-2621, 2013 WL 6730163 (S.D. Cal. Dec. 19, 2013) (granting preliminary injunction), *reconsideration denied*, 2014 WL 129070 (S.D. Cal. Jan. 14, 2014). This reasoning extends to cases demanding damages. *Poway Unified Sch. Dist. v. K.C. ex rel. Cheng*, No. 10CV897, 2014 WL 129086, at *7 (S.D. Cal. Jan. 14, 2014) (dismissing claim for injunction as moot, but not dismissing damages claim brought by graduated student over school district's past failure to provide CART; noting evidence of failure to provide student "an equal opportunity to gain the same benefit as her nondisabled peers" but denying student summary judgment on issue).

required by” the Individuals with Disabilities Education Act (“IDEA”).²²⁰ These courts require “that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children.”²²¹ Like the courts that insist on intent, these courts demand aggravated denial of reasonable accommodation instead of simply asking whether the defendant failed to make the accommodation. Bad faith satisfies the demand, although huge departures from professional judgment do too. This is not precisely an intent requirement, nor exactly the same as deliberate indifference, but it is close, and its practical effect is the same. In fact, the court that originated the language later referred to the bad faith-gross misjudgment standard as an intent requirement.²²²

The origin of the language is dicta²²³ from *Monahan v. Nebraska*, an Eighth Circuit case from 1982 concerning the legitimacy of a procedure for appeals in disputes over special education services, in which plaintiffs alleged

²²⁰ *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982). See generally 20 U.S.C. § 1412(a)(1)(A) (2012) (imposing duty on states accepting federal special education funds to guarantee provision of “free, appropriate public education” to all children with disabilities).

²²¹ *Monahan*, 687 F.2d at 1171.

²²² *M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 890 (8th Cir. 2008). The court stated:

There is no evidence in the record that District possessed the requisite bad faith or gross misjudgment in denying M.Y. special education transportation. District’s decision fully complied with the terms of M.Y.’s IEP [Individualized Education Program] which stated that M.Y. was not eligible for ESY [Extended School Year] and related services such as transportation. Accordingly, we affirm the district court’s decision granting summary judgment in favor of District on the basis that District did not possess the requisite *intent* in order to be liable under section 504.

Id. (emphasis added); see also *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5th Cir. 2010) (“We concur that facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for *intentional* discrimination under § 504 or ADA against a school district predicated on a disagreement over compliance with IDEA.”) (emphasis added); *Baker v. S. York Cty. Sch. Dist.*, No. 1:08-CV-1741, 2012 WL 6561434, at *3 (M.D. Pa. Dec. 17, 2012) (“The Third Circuit has not articulated the level of intent necessary for a showing of intentional discrimination [for a section 504 damages claim]. Several circuit courts have adopted a ‘deliberate indifference’ standard. Other circuits require a more stringent showing of ‘bad faith or gross misjudgment.’”) (citations omitted); *A.G. v. Lower Merion Sch. Dist.*, No. 11-5025, 2012 WL 4473244, at *7 (E.D. Pa. Sept. 28, 2012) (“[A] plaintiff must adduce some ‘evidence of intent, such as bad faith, gross misjudgment, or deliberate indifference, to sustain a claim for compensatory damages’ under the Rehabilitation Act and the ADA.”) (citations omitted); *J.D. ex rel. Degelia v. Georgetown Indep. Sch. Dist.*, No. A-10-CA-717LY, 2011 WL 2971284, at *7 (W.D. Tex. July 21, 2011) (linking bad faith-gross misjudgment standard to supposed requirement of showing “animus toward . . . disabled children”).

²²³ See *Monahan*, 687 F.2d at 1170 (“Our affirmance of a dismissal without prejudice technically leaves the way open to a re-filing of these cases on a new complaint. We have no wish to breed litigation that will do no one any good, so we add a few words for the guidance of the District Court and the parties if the matter is pursued.”). It is dicta also in the sense that what section 504 might require regarding impartiality on appeals of hearings (the issue in *Monahan*) has little bearing on what constitutes reasonable accommodation in provision of education and other public services.

that the state commissioner of education reviewed decisions of hearing officers in violation of the impartiality provisions of the law that is now IDEA, thus also violating section 504.²²⁴ The court said it had the “duty to harmonize the Rehabilitation Act [section 504] and [IDEA] to the fullest extent possible, and to give each of these statutes the full play intended by Congress.”²²⁵ The court said it also wanted to balance interests of children with disabilities and state educational officials and to pull courts out of the fray of educational disputes.²²⁶ The sole direct authority on which the court relied for its bad faith-gross misjudgment standard was a case concerning violations of substantive due process in the treatment of persons with cognitive impairments involuntarily committed to state institutions, a decision that required a substantial departure from professional practice to make out a constitutional violation.²²⁷ Many courts have relied on the language in *Monahan* to insist on a showing of gross misjudgment or bad faith conduct before they will consider a section 504 or ADA claim for monetary relief that arises in the setting of elementary and secondary education.²²⁸

Reliance on *Monahan*, however, is an error. The federal special education law was amended after *Monahan* to include the following language:

²²⁴ *Id.* at 1167. The law was then known as the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

²²⁵ *Monahan*, 687 F.2d at 1171.

²²⁶ *See id.* (“The standard of liability we suggest here accomplishes this result and also reflects what we believe to be a proper balance between the rights of handicapped children, the responsibilities of state educational officials, and the competence of courts to make judgments in technical fields.”).

²²⁷ *See id.* (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)). With regard to *Youngberg*, one might wonder why, if the duty to avoid bad faith and gross misjudgment as to services for people with disabilities already existed under the Constitution, Congress felt the need to enact section 504 and the ADA. *Youngberg* demonstrated that 42 U.S.C. § 1983 already furnished a remedy for constitutional violations. *See Youngberg*, 457 U.S. at 309.

²²⁸ *E.g.*, *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 (2d Cir. 2014); *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013); *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013); *Stewart*, 711 F.3d at 523–26; *D.A.*, 629 F.3d at 454–55; *M.Y.*, 544 F.3d at 889–90; *Sellers ex rel. Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir. 1998). Claimants in those cases sought monetary relief, though one court applied the dictum in a case seeking compensatory education. *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, No. 11-4029, 2012 WL 5818001, at *5 (W.D. Mo. Nov. 15, 2012), *aff’d*, 732 F.3d 882 (8th Cir. 2013). The court of appeals did not discuss the extension of the doctrine, and the case appears to be an outlier. *See id.*; *see also K.D. v. Starr*, 55 F. Supp. 3d 782, 788–89 (D. Md. 2014) (requiring showing of bad faith or gross misjudgment in nondamages case but upholding claim). Cases applying the gross misjudgment-bad faith standard and upholding plaintiffs’ claims include the original panel opinion in *Stewart*, 711 F.3d 513. *See also M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (permitting claim based on school district’s conduct following disclosure of student’s schizophrenia); *Centennial Sch. Dist. v. S.D.*, No. 10-CV-4129, 2011 WL 2441297, at *3–5 (E.D. Pa. June 17, 2011) (permitting compensatory damages claims under section 504 and ADA). In many cases, the courts rely on other courts’ repetition of the *Monahan* language rather than tracing the language back to its origins.

Rule of construction

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, [section 504] 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 [IDEA] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.²²⁹

Congress enacted this provision in 1986 to overrule *Smith v. Robinson*,²³⁰ in which the Supreme Court held that the statute that is now IDEA preempted remedies under section 504 for denial of free, appropriate public education for children with disabilities. The *Smith* Court did not deny that section 504 requires school districts receiving federal money to provide a free, appropriate public education. It was willing to assume “that the reach of § 504 is coextensive with that of the [IDEA].”²³¹ But it found that the remedies of the special education law supplanted any available under section 504 in the context of special education.²³² Like *Monahan*, *Smith* sought to harmonize IDEA and section 504 by saying that a section 504 claim could not proceed unless it alleged something more than the denial of free, appropriate public education.

The Handicapped Children’s Protection Act of 1986 (“HCPA”)²³³ restored the availability of section 504 remedies for violations of that statute that are also violations of IDEA,²³⁴ though it made the remedies subject to administrative exhaustion when the relief being sought is available under IDEA. The purpose and result was to overrule *Smith* and restore the section 504-IDEA

²²⁹ 20 U.S.C. § 1415(l) (2012).

²³⁰ 468 U.S. 992, 1019 (1984). By the time it reached the Court, *Smith* was an appeal regarding attorneys’ fees, with the plaintiffs relying on constitutional claims under 42 U.S.C. § 1983 and a section 504 claim, which had been pled but not decided, to support their petition; the federal special education statute did not have a fees provision at the time whereas section 504 and § 1983 did. *Id.* at 994–95.

²³¹ *Id.* at 1018–19.

²³² *Id.* at 1020–21. The Court noted in *Smith* that courts interpreting the law that is now IDEA had ruled that the statute permitted damages only under exceptional circumstances. *Id.* at 1020 n.24.

²³³ Pub. L. No. 99-372, 100 Stat. 796.

²³⁴ The statute aimed to overrule *Smith* and bring back all rights that parents and children lost by the decision. See *Handicapped Children’s Protection Act: Hearing on H.R. 1523 Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor*, 99th Cong. 7–8 (statement of Rep. Pat Williams, Chairman of the Subcomm. on Select Educ.); 132 CONG. REC. 16,823 (1986) (statement of Sen. Weicker) (“The handicapped children of this country have paid the costs for two years now. But today we correct this error. In adopting this legislation, we are rejecting the reasoning of the Supreme Court in *Smith v. Robinson*, and reaffirming the original intent of Congress . . .”).

overlap. The extent of the harmonization permitted is merely the imposition of the exhaustion requirement in cases where the relief asked for is the same.

More than twenty years ago, in *Howell ex rel. Howell v. Waterford Public Schools*, a district court was asked to follow *Monahan* and dismiss a section 504 claim.²³⁵ The court recognized that the HCPA overruled *Monahan* and responded:

[D]efendants' reliance on *Monahan* is misplaced. The language from *Monahan* . . . (language which, incidentally, was dicta) is similar to the following, taken from *Smith v. Robinson*: "Even assuming that the reach of § 504 is co-extensive with that of the [IDEA], there is no doubt that the remedies [and] rights . . . set out in the [IDEA] are the ones it intended to apply to a handicapped child's claim to a free appropriate public education." As cases have subsequently observed, however, *Smith* is no longer good law.²³⁶

The *Howell* court quoted extensively from a Second Circuit opinion interpreting the language that is now in § 1415(l), then codified in § 1415(f):

By enacting this nonexclusivity provision Congress expressly overruled *Smith*. Congress stated that § 1415(f) was designed to "reestablish statutory rights repealed by the U.S. Supreme Court in *Smith v. Robinson*" and to "reaffirm, in light of this decision, the viability of section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children."²³⁷

The court's quotation of the Second Circuit opinion continued:

Congress stressed that its original aim had been to allow resort to other judicial remedies for claims based on [IDEA]. See 1985 House Report, supra, at 7; 1986 Senate Report, supra, at 15; see also Handicapped Children's Protection Act of 1985: Hearings on S.415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 99th Cong., 1st Sess. 2 (1985) (opening statement of Senator Weicker) (Section 1415(f) "is intended to be a simple restoration and clarification of congressional intent.") Moreover, Congress specifically identified § 1983, § 504 of the Rehabilitation Act of 1973, and the Constitution as other sources

²³⁵ *Howell ex rel. Howell v. Waterford Pub. Schs.*, 731 F. Supp. 1314 (E.D. Mich. 1990). The plaintiff alleged that the public schools provided him physical and occupational therapy that was inadequate as to amount and manner, in violation of the law that is now IDEA and section 504; his section 504 claim for injunctive relief and damages survived defendant's motion to dismiss. *Id.* at 1315.

²³⁶ *Id.* at 1317–18 (citations omitted).

²³⁷ *Id.* at 1318 (quoting *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754–55 (2d Cir. 1987) (citations omitted)).

of rights and remedies in special education cases. See 20 U.S.C. § 1415(f) [now § 1415(l)]; H.R. Conf. Rep. No. 687, 99th Cong., & Admin. News 1807, 1809.²³⁸

The post-HCPA cases relying on *Monahan* ignore 20 U.S.C. § 1415(l) and its legislative abrogation of *Smith* and cases that mimic *Smith*'s reasoning. It is as though the courts are trying to overrule the legislative overruling of *Smith*.

As *Howell* exemplifies, not every court considering claims for monetary relief for reasonable modification and other section 504-ADA violations in the area of K-12 education has been misled by *Monahan*. In one instance, a court granted a motion for partial summary judgment on liability in favor of a student with autism on a section 504 and ADA claim alleging inadequacy of special education services when the services had been found not to meet IDEA's appropriate education standard.²³⁹ The court found that failure to make a reasonable modification of a behavioral intervention plan excluded the child from participation in school or denied the child educational benefits.²⁴⁰ The court specifically rejected imposing any requirement of bad faith, gross misjudgment, or intentional discrimination.²⁴¹ It found a violation of section 504 from the simple failure to provide the accommodation of a behavior plan adapted to the child's needs.²⁴² In another case, a court denied a motion to dismiss section 504 and ADA claims brought on behalf of a child with multiple disabilities who had been deprived of appropriate education over several school years by the provision of ineffective services.²⁴³ The court rejected an argument that the student "cannot receive both an IDEA remedy and a 504 remedy for the same denial of" appropriate education, relying on the plain language of § 1415(l), and declared, "Plaintiffs need not allege any new facts aside from those previously litigated in the IDEA administrative proceedings to establish a violation of section 504, as long as those facts state a prima facie case."²⁴⁴ The court specifically said that the student need not show intentional discrimination.²⁴⁵

²³⁸ *Id.* (quoting *Mrs. W.*, 832 F.2d at 754-55).

²³⁹ *Ind. Area Sch. Dist. v. H.H.*, 428 F. Supp. 2d 361, 364 (W.D. Pa. 2006).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 363 n.3.

²⁴² *Id.* at 364. The court reserved judgment on whether the damages remedy that was sought would be available under the facts of the case. *Id.* at 365. On the propriety of compensatory damages in cases such as *H.H.*, see *infra* text accompanying notes 248-261.

²⁴³ *J.L. ex rel. J.L. v. Ambridge Area Sch. Dist.*, 622 F. Supp. 2d 257, 275 (W.D. Pa. 2008).

²⁴⁴ *Id.* at 274.

²⁴⁵ *Id.* at 275; see also *Lemahieu*, 513 F.3d at 934 ("Congress has clearly expressed its intent that remedies be available under [section 504] for acts that also violate the IDEA, overriding the holding of the Supreme Court in *Smith v. Robinson*."); *Pollack v. Regional Sch. Unit 75*, 12 F. Supp. 3d 173, 186, 193-94 (D. Me. 2014) (in case of nonverbal teen with autism and other conditions whose parents alleged he had been subject to abuse at school and requested he be permitted to wear recording device, ruling that IDEA does not preempt ADA and section 504 claim for failure to make reasonable modifi-

C. Avoiding Nonexistent Conflicts with Remedial Limits on the Individuals with Disabilities Education Act

The Title VI and Title IX analogy, as applied to education cases, and the living-dead *Monahan* precedent are but two manifestations of the judicial urge to restrict special education law to one sphere and disability discrimination law to another. One court remarked:

While Section 504 can be used as the basis for a cause of action in many contexts, it has taken on a unique meaning in the special education context when a plaintiff's claim is based on an alleged failure to accommodate. *See, e.g., Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982) (analyzing the standard under which § 504 special education claims must be brought by comparing § 504 to the IDEA); *Doe v. Arlington Cnty. Sch. Bd.*, 41 F.Supp.2d 599, 608 (E.D. Va. 1999) (“*In the special education context, the standard of proving a § 504 claim is extraordinarily high.*”) (emphasis added)

.....²⁴⁶

The court concluded:

Much of that difference in treatment appears to come from the existence of IDEA. These courts have consistently held that it is harder for a plaintiff to prevail on a failure-to-accommodate claim under § 504 than a failure-to-accommodate claim under IDEA, assuming that the plaintiff is covered under both § 504 and IDEA.²⁴⁷

The flaw in this analysis is that Congress did not write the legislation that way. There is no hint in section 504 or the ADA that reasonable accommodation claims are to be treated differently in elementary and secondary education cases, and the only relevant proviso in IDEA is merely that the claims are subject to an exhaustion requirement in some circumstances.

When Congress speaks directly to the issue at hand, the debate should be over. As a matter of policy, however, is it wise to have a section 504-ADA remedy that includes all forms of relief, including damages for emotional distress and pain and suffering, coexist with an IDEA remedy that the consensus of courts restricts to non-damages relief, permitting tuition reimbursement but

cations; denying motion to dismiss ADA and section 504 reasonable modification claims despite hearing officer denial of IDEA claim); *cf. K.M.*, 725 F.3d at 1102 (upholding claim for accommodation under Title II access to communications regulation despite dismissal of identical claim under IDEA), *cert. denied*, 134 S. Ct. 1493 (2014).

²⁴⁶ *H. v. Montgomery Cty. Bd. of Educ.*, 784 F. Supp. 2d 1247, 1262 (M.D. Ala. 2011).

²⁴⁷ *Id.*

no other monetary awards?²⁴⁸ Should “something more” be required in order to obtain damages when both statutory provisions apply?²⁴⁹

Requiring “something more” would make sense only when there is a policy justification to withhold damages for failure to provide reasonable modifications. One such instance would be where there is in fact no denial of reasonable modifications—where a lesser accommodation offered by the defendant is reasonable, or where the plaintiff is demanding a fundamental alteration rather than a reasonable modification. Taking an example from the non-educational context, in the case where the student whose parent was blind could not complete her supervised driving hours, the court described the limited guardianship solution offered by the defendant as “eminently reasonable.”²⁵⁰ If the court of appeals was correct, there was no violation of the reasonable accommodation requirement at all, and no need to demand some special showing beyond denial of reasonable accommodation.

Other cases in which damages would not be appropriate would be those in which the alleged emotional distress that is the basis of the damages claim is not severe,²⁵¹ or the causal connection between the failure to accommodate and the distress is too attenuated.²⁵² The claim in *Monahan* itself, for example, is difficult to interpret as one for reasonable accommodation, but if it somehow were characterized that way, damages for emotional distress would not appear to be an appropriate remedy for the past operation of a faulty administrative

²⁴⁸ *Smith* stated, “There is some confusion among the Circuits as to the availability of a damages remedy under § 504 and under [IDEA]. Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504, but are available under [IDEA] only in exceptional circumstances.” 468 U.S. at 1020 n.24. The consensus has not changed, although the Supreme Court has never resolved the issue concerning IDEA, apart from approving tuition reimbursement awards under the statute. *See, e.g., Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 233 (2009).

²⁴⁹ Proponents of this argument would be conceding that some monetary relief, specifically tuition reimbursement, would apply in cases of unintentional discrimination that violate section 504 and Title II of the ADA, and to that extent would be rejecting the *Guardians Ass’n*-Title VI-Title IX analogy.

²⁵⁰ *Barber*, 562 F.3d at 1230.

²⁵¹ Under typical approaches to compensation for emotional injuries, the distress must be severe at least in the absence of physical impact. DAN B. DOBBS, *THE LAW OF TORTS* § 308, at 836 (2000). The Supreme Court has disapproved damages based on the abstract value of a right, as well as presumed or general damages, even for constitutional violations. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309–11 (1986).

²⁵² The usual proximate cause tests apply in section 504 and ADA cases. *See Cheryl L. Anderson, What Is “Because of the Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 *BERKELEY J. EMP. & LAB. L.* 323, 378–82 (2006) (concluding that ordinary approaches to causation should be applied in reasonable accommodation cases). The case involving the scooter that tipped over at the zoo might have failed on the ground of a lack of proximate causation between the accessibility violation and the accident. *See Meagley*, 639 F.3d at 384 (discussed *supra* text accompanying notes 192–196).

appeals procedure.²⁵³ Other traditional damages rules, such as the general rule that the proper remedy for nonpayment of money excludes consequential damages and emotional distress,²⁵⁴ may also bar damages in section 504 and ADA cases. Similarly, damages premised on a prediction of future disadvantage would be excluded if the prediction is speculative or unsupported.²⁵⁵ In fact, in many cases where the IDEA and section 504-ADA claims overlap, the remedies available under IDEA—tuition reimbursement, compensatory services, and prospective relief—may well be adequate to repair whatever wrong has been done.²⁵⁶

But the default rule should be precisely as it is in non-education reasonable modification cases such as *Barnes v. Gorman*.²⁵⁷ Compensatory damages are available when reasonable accommodations have been denied, the remedy is not otherwise forbidden by Congress, and there is no better remedy to restore injured parties to their rightful position.²⁵⁸ For example, a claim for damages should be sustained in the case of a student with profound hearing loss who experienced continual headaches and exhaustion in high school for most of her freshman year and in some upper-level courses as she struggled to understand what was going on in class, before the school was finally ordered to provide real-time captioning services.²⁵⁹ Evidence in that case supported a

²⁵³ See *Carey v. Piphus*, 435 U.S. 247, 263–64 (1978) (noting that emotional distress is rarely caused by deprivation of procedural due process alone).

²⁵⁴ DOBBS, *supra* note 188, § 12.4(1), at 776–77.

²⁵⁵ *Id.* § 3.4, at 234 (“Consequential damages must be proved with reasonable certainty.”).

²⁵⁶ A court that upheld a claim under 42 U.S.C. § 1983 for violations of IDEA made a similar point regarding remedial restraint where non-damages remedies suffice: “We caution that in fashioning a remedy for an IDEA violation, a district court may wish to order educational services, such as compensatory education beyond a child’s age of eligibility, or reimbursement for providing at private expense what should have been offered by the school, rather than compensatory damages for generalized pain and suffering.” *W.B. v. Matula*, 67 F.3d 484, 495 (3d Cir. 1995), *abrogated*, *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007). If Congress were to clarify matters in future legislation, it might want to conform Title II more closely to Title I by spelling out that limited monetary remedies would be available in all accommodations cases, but that an affirmative defense would exist for emotional distress damages when the defendant has undertaken in good faith and in cooperation with the claimant to make a reasonable modification. See *supra* text accompanying notes 74–77 (describing Title I remedy and affirmative defense in accommodations cases).

²⁵⁷ 536 U.S. 181, 187 (2002). See generally *supra* text accompanying notes 181–188 (discussing *Barnes*).

²⁵⁸ See *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” (footnotes omitted)); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (“The question then, is . . . whether compensatory relief is ‘necessary’ or ‘appropriate’ to the vindication of the interest asserted.”).

²⁵⁹ *Poway*, No. 10CV897, 2014 WL 129086, at *3–4. The claim for damages also covered classes after freshman year where the services were not provided. *Id.* at *5.

finding that the substitute accommodations offered failed to provide her with communications as effective as those with nondisabled students, as required by the ADA, and she experienced tangible suffering as a result.²⁶⁰ She had graduated by the time the case was decided, so a damages award was the only appropriate remedy.²⁶¹

CONCLUSION

This article submits that the imposition of intent requirements in section 504 and ADA Title II cases, particularly those requesting monetary relief, is the consequence of insufficient attention to *Alexander v. Choate*, *Alexander v. Sandoval*, *Barnes v. Gorman*, statutory text and legislative history, and the policy considerations that ought to determine the scope of liability and relief. Intent will be required for some claims, and damages will not always be the proper remedy in cases where intent is not shown, but courts must engage in the hard task of determining whether reasonable accommodations have been denied and what relief is appropriate, rather than reflexively dismissing cases for lack of proof of intent.

²⁶⁰ See *id.* at *7 (nevertheless denying student's motion for summary judgment on liability on ground that issues of fact existed).

²⁶¹ See *id.* at *5. Similarly, when a child with an emotional disturbance was forcibly restrained and removed from school when she overreacted to another student physically threatening her, the court properly upheld an ADA damages claim despite dismissing claims for constitutional violations and an intentional tort. See *O.F. v. Chester Upland Sch. Dist.*, No. 00-779, 2000 WL 424276, at *3 (E.D. Pa. Apr. 19, 2000) ("For now, the assertion that Plaintiff was excluded from services as a result of her disability is sufficient to allow the ADA claim to survive dismissal."). The cases described above in which courts have insisted on intent but allowed damages claims to proceed would of course also be strong candidates for damages relief if no intent requirement were imposed. See *supra* note 204 (collecting cases). So also would be some cases regarding similar injuries that were rejected on the ground that intent was not proven. For an additional discussion of the ADA-section 504 remedies issue in elementary and secondary education cases, see Weber, *Procedures and Remedies*, *supra* note 24, at 642-46.