No. 16-1918

In the
United States Court of Appeals
for the Eighth Circuit

I.Z.M., by and through his parents and
natural guardians, T.M. and L.M.,

Plaintiffs-Appellants,

v.

ROSEMOUNT-APPLE VALLEY-EAGAN PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 196;
ROSEMOUNT-APPLE VALLEY-EAGAN SCHOOL BOARD,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Minnesota – Minneapolis, No. 0:14-cv-05044-SRN.
The Honorable **Susan Richard Nelson**, Judge Presiding.

AMICUS CURIAE BRIEF OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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No. 16-1918 Caption: *I.Z.M. by and through his parents and natural guardians,* T.M. and L.M. *v. ROSEMOUNT-APPLE VALLEY-EAGAN PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 196; ROSEMOUNT-APPLE VALLEY-EAGAN SCHOOL BOARD*
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*/s/ Judith A. Gran*_____
JUDITH A. GRAN

Attorney for Amicus Curiae Council of Parent Attorneys and Advocates

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education ("FAPE") such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 (2012), *et seq*. COPAA also supports individuals with disabilities, their parents and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. ("ADA"). COPAA brings to this Court a unique perspective of parents and advocates for children with disabilities and their

[1] Pursuant to Fed. R. App. P. 29, *Amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

experiences with the challenges faced by such children, whose success depends not only on the right to secure the FAPE promised by the IDEA, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education. Counsel for COPAA sought consent to file from Appellees, which was declined. Appellants consented to the filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

By ignoring the separate and distinct 504/ADA anti-discrimination and FAPE requirements, the district court committed an error emblematic of a common misreading and analysis of Section 504, the ADA and the IDEA. As discussed more fully, *infra,* these statutes reflect Congressional intent to afford students not only the right to a FAPE under the IDEA, but also the right to be educated as adequately as their peers without disabilities and enjoy communication that is as effective as with their peers. The district court, ignoring the plain language of the laws, results in an incoherent interpretation of federal law.

ARGUMENT

A. Federal Courts Must Follow the Statutory Language and Purpose of the ADA and Section 504

"When . . . statutory 'language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to

enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)) (citations omitted). Thus, federal courts proceed with the understanding that, unless otherwise defined, statutory terms should be interpreted in accordance with their ordinary meaning. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013); *see also Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc., 13*4 S. Ct. 1749, 1756 (2014).

At the same time, courts construe federal laws by not only reading the text but also "considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S.1, 7 (2011) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)). This approach makes "statutes into more coherent schemes for the accomplishment of specified goals than they might otherwise be." David M. Driesen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 128 (2013).

As Professor Driesen notes:

> Coherence in turn helps legitimate law. To the extent we treat statutes as coherent schemes for accomplishing public ends, the law commands respect and obedience. Hence, when judges create rationales for statutory construction tying particular results to public

> objectives motivating congressional enactment, they increase the likelihood of faithful administration of the law, public acceptance of the law, and compliance with the law.

48 Wake Forest L. Rev. at 128.

The reasoning in *Sebelius* is instructive. In that case, involving the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1, *et seq.* ("NCVIA"), the Court rejected an interpretation of the word "filed" by relying upon the commonly understood definition of that word. 133 S. Ct. at 1893. Further, the Court observed, the alternative interpretation would undermine the goals of the fee provision in the NCVIA, enhancing the opportunity for individuals to present claims by making fee awards available for "non-prevailing good faith claims." *Id.* at 1893 (citation omitted). The rejected interpretation would have discouraged counsel from representing NCVIA petitioners, which would undermine the statutory purpose.

Likewise, coherent interpretation of the ADA and Section 504, relying upon the plain meaning of the statutes as well as the purpose behind the provisions, requires rejection of the district court's imposition of a "bad faith or gross misjudgment" standard upon an IDEA-eligible student who has demonstrated, by the court's own determination, a clear violation of the regulations implementing the statutes.

B. I.Z.M. is Entitled to Protection of the Broad Anti-Discrimination Mandates of the ADA and Section 504, Which Impose Different Obligations than the IDEA's FAPE Requirement

Congress enacted the precursor statute to IDEA "in 1970 to ensure that all children with disabilities are provided 'a free appropriate public education' [FAPE] which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985)). IDEA "embodies a strong federal policy to provide an appropriate education" for every child with disabilities. "[I]nterrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated by *Brown v Board of Educ.*, [347 U.S. 483 (1954)] and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, [334 F. Supp. 1257 (E.D. Pa. 1971), modified 343 F. Supp. 279 (1972)] and *Mills v. Board of Educ.,* [348 F. Supp. 866 (D.D.C. 1972)]. Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of

handicapped citizens." *Kruelle v. New Castle County Bd. of Educ.*, 642 F.2d 687, 690-691 (3d Cir. 1981).

To that end, the IDEA requires that states provide eligible students with "special education and related services that – (A) have been provided at public expense, under public supervision, direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of [IDEA]." 20 U.S.C. § 1401(9).

States provide these required services through an Individualized Educational Program ("IEP"). Ultimately, an IEP is intended to provide a student with a disability with "meaningful educational progress," as defined in the case law interpreting the IDEA. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982).

The ADA differs from the IDEA in purpose, scope, and rights afforded. The ADA is a comprehensive civil rights and equal opportunity statute. Congress found that "discrimination against individuals with disabilities persists in such critical areas as . . . education . . . ." 42 U.S.C. § 12101(a)(3). The ADA has a broad remedial purpose, to "provide a clear and

comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The broad anti-discrimination mandate states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

The IDEA explicitly preserves a student's ability to pursue claims under other federal civil rights laws, and "compliance with the IDEA does not automatically immunize a party from liability under" other federal laws. *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) (discussing application of the IDEA, Section 504 and the ADA); *cf. K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096 (9th Cir. 2012) (ADA imposes less elaborate procedural requirements but establishes different substantive requirements on public entities); *Hornstine v. Township of Moorestown Bd. of Educ.*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003) (plaintiff provided with FAPE under IDEA but also subjected to unlawful discrimination). In fact, in 1986, Congress passed the Handicapped Children's Protection Act ("HCPA"), Pub. L. No. 99-372, 100 Stat. 796 specifically to ensure that IDEA-eligible children would not be deprived of

other federal rights. This provision places a single restriction on non-IDEA litigation under Section 504 and the ADA, requiring potential litigants to exhaust administrative remedies when seeking relief also available under the IDEA.

"When Congress passes a statute, it does so against a background context of rules, procedures and deliberation. That context does not exist in anyone's head: it is public and constitutionally sanctioned." Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. Rev. 1613, 1615-1616 (2014). The context of the HCPA has particular significance in this case, where a district court relied upon a pre-ADA and pre-HCPA interpretation of disability discrimination laws to limit significantly the civil rights of a student because he was also IDEA-eligible.

Congress acted promptly in passing HCPA in response to *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* held that Education for all Handicapped Children Act of 1975, 94 Pub. L. No. 142, 89 Stat. 773 ("EHA"), a predecessor statute to the IDEA pre-empted any claim to attorney's fees because the EHA itself did not contain a fee provision. Basically, *Smith* held IDEA's predecessor precluded students eligible for special education from enforcing their civil rights under Section 1983 or

Section 504. *Id.* at 1013, 1021. In his dissent in *Smith*, Justice Brennan called on Congress to rectify the situation, noting: "It is at best ironic that the Court has managed to impose this burden on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children." 468 U.S. at 1031.

"Congress apparently agreed that the Court had misconstrued its intent, and it responded swiftly by enacting the [HCPA] . . . thus, in essence, overturning the *Smith* holding" in what amounted to "a sharp rebuke." Rosalie Berger Levinson, *Misinterpreting the Sounds of Silence: Why Courts Should Not Imply the Preclusion of Constitutional Claims*, 77 Fordham L. Rev. 775, 785-86 (2008). Indeed, the Court decided *Smith* on July 5, 1984, and the House and Senate Bills to remedy the Smith ruling were both introduced before the end of July, 1984. Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599. 612 n.91(1987) (citing S. 2859, 98th Cong., 2d Sess., 130 Cong. Rec. S. 9078 (daily ed. July 24, 1984); H.R. 6014, 98th Cong., 2d Sess., 130 Cong. Rec. H7688 (daily ed. July 24, 1984). Section 1415(*l*) was intended to "reaffirm . . . the viability of [S]ection 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep.

No. 296, 99th Cong., 1st Sess. 4 (1985) (House Report) (explaining goal of overruling *Smith*); *id.* at 6-7 (same); S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985) (Senate Report) (same).

By applying pre-ADA and pre-HCPA case law to limit I.Z.M.'s rights, the district court repeated the error of *Smith* and upset the balance between the various statutes and enforcement mechanisms. As discussed more fully in the next section, the district court's failure to take this into account, and refusal to even consider the subsequent cases that identify the interplay between these statutes—resulted in a decision inconsistent with the statutory protections afforded by the ADA, and more broadly, the overall protections the various schemes provided for given the ongoing passage of these unique laws. *See Howell ex rel. Howell v. Waterford Pub. Sch.*, 731 F. Supp. 1314, 1317-18 (E.D. Mich. 1990).

C. Application of *Monahan* Resulted in an Indefensible Denial of I.Z.M.'s Civil Rights

The district court, based upon a mischaracterization of I.Z.M.'s arguments,[2] did not even examine whether or not the school district had

[2] The district court incorrectly stated: "Plaintiffs do not dispute that, in order to recover under the ADA or Section 504, they must show proof of discriminatory intent." *Op.* at 32 (Addendum at 71) (citing *Pl. Opp.* at 40). In fact, I.Z.M. and his parents argued that he was entitled to relied under the ADA "upon demonstrating that the District failed to provide him effective communication and an equal opportunity. I.Z.M. should not lose his rights

complied with the ADA. Instead, the court cited to *B.M. ex rel. Miller v. S. Callaway R-2 Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013) for the proposition that the *Monahan* "bad faith/gross misjudgment" standard still applies. *Op.* at 32 (Addendum at 71). *B.M.,* however, specifically sidestepped the question of that standard's viability. *Id.* at 887 (because plaintiffs did not timely raise whether "bad faith/gross misjudgment" standard applied, those arguments were waived).

The district court also relied upon *M.P. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975 (8th Cir. 2003). However, *M.P.* relied upon *Monahan* without any discussion of the continued viability of the standard. Further, *M.P.* involved the question of whether school district personnel acted reasonably when notified of discrimination. The utter failure to comply with a regulatory mandate presents an entirely different question. It cannot, as a

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to effective communication and an equal opportunity because he is also protected by the IDEA. . . . Under this analysis, whether I.Z.M. made progress is irrelevant; it is sufficient that the facts presented by I.Z.M. demonstrate that he was repeatedly denied access to the materials and educational content provided to his nondisabled classmates. In I.Z.M.'s case, the evidence demonstrates that this denial occurred almost every school day." ECF No. 61 at p. 40. They went on to concede that, under the current state of the law, a plaintiff would have to show deliberate indifference in order to <u>*recover damages*</u>. *Id. Amicus* does not dispute that current case law may require a showing of deliberate indifference to recover damages for an ADA violation, but submits that this requirement is inconsistent with the statutory language. In addition, it has no application to I.Z.M.'s requests for prospective relief.

matter of law, be reasonable to completely ignore the requirements of a federal regulation like 28 C.F.R. 35.160.

This Court enunciated the "bad faith or gross misjudgment" standard in *Monahan* prior to the ADA statutory enactments in 1990 and prior to the HCPA. Significantly, the legislative history of the ADA reflects Congress' intent to preclude even non-intentional discrimination on the basis of disability.[3] The House Report accompanying the ADA indicates: "It is . . . the Committee's intent that section 202 [ADA Title II] . . . be interpreted consistent with *Alexander v. Choate*." H.R. Rep. No. 101-485, pt. 2, at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267, 367. In *Alexander v. Choate*, 469 U.S. 287 (1985), decided three years after *Monahan*, established unequivocally Section 504 reached unintentional 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. Thus, Representative Vanik, introducing the predecessor to § 504 in the House, described the treatment of the handicapped as one of the country's "shameful oversights," which caused the handicapped to live among society "shunted aside, hidden, and ignored." 117 Cong. Rec. 45974 (1971). Similarly, Senator Humphrey, who introduced a companion measure in the Senate, asserted that "we can no longer tolerate the invisibility of the handicapped in America. . . ." 118 Cong. Rec. 525-526 (1972). And Senator Cranston, the Acting Chairman of

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[3] Legislative history, such as Committee reports, can provide significant insight into statutory meaning. *See* Nourse, *supra,* 55 B.C. L.REV at 1637–38, 1655–1656; Driesen, *supra,* 48 Wake Forest L. Rev. at 102.

> the Subcommittee that drafted § 504, described the Act as a response to "previous societal neglect." 119 Cong. Rec. 5880, 5883 (1973). See also 118 Cong. Rec. 526 (1972) (statement of cosponsor Sen. Percy) (describing the legislation leading to the 1973 Act as a national commitment to eliminate the "glaring neglect" of the handicapped). Federal agencies and commentators on the plight of the handicapped similarly have found that ***discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus***.

469 U.S. at 295-296. The Court went on to state that "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." *Id.* at 296-297. Applying *Southeastern Comm. Coll. v. Davis*, 442 U.S. 297 (1979), the *Choate* Court found that Section 504 "requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.* at 301. Thus, *Choate* unequivocally rejected any requirement that a Section 504 plaintiff prove intentional discrimination when being denied access to a government benefit because of denial of reasonable accommodations.

Indeed, the ADA regulations state that a plaintiff may recover on a reasonable modification claim without proving intentional discrimination: "A 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." 28 C.F.R. § 35.130(b)(7).

In addition, applying a heightened intent standard to an individual *because* he has an IEP violates the HCPA. Section 1415(*l*) "expressly contemplates that aggrieved parties may invoke other statutes – including Title II of the ADA and Section 504 of the Rehabilitation Act – to secure relief for a violation of the substantive standards established in those statutes." Brief for the United States of America as *Amicus Curiae* in Support of Petition for Certiorari, *Fry v. Napoleon Comm. Sch.*, No. 15-497, in the United States Supreme Court available at https://www.justice.gov/crt/file/865291/download) (last viewed July 8, 2016), at 11. In non-special education cases, courts have routinely recognized that Section 504 and the ADA do not require victims to show discriminatory intent in order to prevail. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 199 (2002) (when federal funds recipient fails to comply with

legal obligation, injured party entitled to compensation); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 510 (4th Cir. 2016) ("Our conclusions here are not driven by concern that defendants are manipulating the election apparatus intentionally to discriminate against individuals with disabilities; our conclusions simply flow from the basic promise of equality in public services that animates the ADA"); *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846 (7th Cir. 1999) (rejecting the suggestion that liability under Title II of the ADA "must be premised on an intent to discriminate on the basis of disability"); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (ADA and Section 504 sought to eliminate discrimination based on thoughtlessness and indifference, not just invidious animus); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 912 (6th Cir. 2004); *Henrietta D. v. Giuliani*, 199 F. Supp.2d 181, 206 (S.D.N.Y. 2000) (government's motive or intent irrelevant to 504/ADA claims); Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 Boston Coll. L. Rev. 1417, 1448 (2015)("*Barnes* did nothing to disturb the compensatory damages remedy for failure to provide accommodations"). The district court's opinion compounds the discrimination felt by individuals with disabilities who happen to still be school-aged because it creates a

precedent by which they must prove *more* than any other disability discrimination plaintiff.

This error is compounded because the broad non-discrimination mandate in the ADA creates different, and sometimes greater, obligations for school districts than does IDEA's FAPE requirement. For example, I.Z.M. alleged that the school district violated the "effective communication" regulation, 28 C.F.R. § 35.160, which provides:

> (a) (1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.
>
> ***
>
> (b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.
>
> **(2)** The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. *In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities*. *In order to be effective*, auxiliary aids and services must be provided in accessible formats, *in a timely manner*, and in such a way as to protect the privacy and independence of the individual with a disability.

"Auxiliary aids and services" include "Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision; . . . Acquisition or modification equipment or devices; and . . . Other similar services and actions." 28 C.F.R. § 35.104.

In this case, the district court's own factual findings established that the school district had violated the "effective communication" regulation. Specifically, the district court found that:"

- Some of I.Z.M.'s Brailled textbooks "were not provided in a timely manner." *Op.* at 4.
- "I.Z.M. did not receive handouts in Braille in any of his classes on the first day of school." *Id.*
- "[P]eriodically after that he did not receive instructional materials in a timely manner." *Id.*
    - In Geometry, the school district failed to supply I.Z.M. with Brailled assignments, quizzes, and a study guide in a timely manner. *Id.* at 6.

- I.Z.M.'s English teacher conceded that he had received several reading assignments late. *Id.* at 7.
- Because I.Z.M.'s Earth Science teacher did not proceed in a linear fashion, he did not always have the correct chapters for class. *Id.* at 8. This impeded his ability to complete assignments. *Id.* at 9.
- "[T]here were several instances throughout the semester [in Science] when I.Z.M. did not receive an assignment or handout on the same day as his classmates received their copies." *Id.*
- In the Government class, "emails show that there were several instances where I.Z.M. did not receive an assignment at the same time that his classmates received their copies." *Id.* at 9-10.
- I.Z.M. did not receive a functioning talking calculator until the spring of the school year. *Id.* at 13.

Although that these factual findings undeniably establish a plethora of violations of 28 C.F.R. § 35.160, the district court excused these violations because of the determination that the school district had provided a FAPE and I.Z.M. had not shown "bad faith or gross misjudgment." In this manner, the district court relied upon *Monahan* to disregard a later statutory enactment, severely restricting I.Z.M.'s civil rights.

In *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014) the Ninth Circuit Court of Appeals recognized that the IDEA sets the "floor of access to education," while Title II and its implementing regulations "require public entities to take steps toward making existing services not just accessible, but *equally* accessible to people with communication disabilities." *Id.* at 1092. Thus, a school "district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA [does not] also necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA." *Id.* The court did "not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the schools context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied."[4] This scenario—wherein there were issues regarding a student's access to educational program stemming from communication and disability related needs—is on all fours with what

[4] The court of appeals noted that the Department of Justice ("DOJ") had filed an amicus brief in support of the plaintiff that includes an interpretation of the relevant Title II regulations, to which the court afforded deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and which bolstered the court's conclusion. *Id.* at 1092; *see also* Brief of the United States as Amicus Curiae Supporting Appellant and Urging Remand in *K.M. v. Tustin Unified Sch. Dist.*, No. 11-56259, in the United States Court of Appeals for the Ninth Circuit, filed Jan. 24, 2012, *available at https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/kmtustinbr.pdf* (last visited July 7, 2016).

I.Z.M. sought remedy for, and the refusal to explore post-ADA jurisprudence was in error. The district court should have engaged in a *Tustin*-like analysis, rather than ignoring the separate and distinct obligations created by the ADA and Section 504.

The school district's failure to comply with the ADA's effective communication regulation resulted in another violation of the ADA. The aforementioned violations forced I.Z.M. to attend a residential school far from home. Thus, the school district not only violated 28 C.F.R. 35.160, but also the regulation requiring delivery of programming "in the *most integrated setting appropriate* to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (emphasis supplied). *Cf. Olmstead v. L.C. by Zimring*, 527 U.S. 581, 600 (1999) ("unjustified institutional isolation of persons with disabilities is a form of discrimination" by reason of disability). Significantly, in *Olmstead*, the Supreme Court did not impose any animus requirement when it required Georgia to provide services for people with disabilities outside in integrated settings consistent with the ADA. *See* Weber, *supra*, 56 B.C. L. Rev. at 1443-1444.

In sum, the district court undeniably found as a fact that the school district had violated regulations implementing the ADA. However, because I.Z.M. was a student with an IEP, those violations did not matter because of

an intent standard articulated in a case that pre-dated the ADA, as well as 20 U.S.C. § 1415(*l*). The continued application of *Monahan* in these cases is not merely inconsistent with the plain statutory language of the ADA, Section 504, and the Section 1415(*l*) of the IDEA. *See*, Weber, *supra,* 56 B.C. L. Rev. at 1457-1458. This interpretation also punishes students who are protected by the IDEA by denying to them civil rights available to all others.

CONCLUSION

The district court committed reversible error in failing to analyze Plaintiffs-Appellants' Section 504 and ADA claims. The decision below, which ignores the plain language of the Act and subverts federal civil rights laws, should be reversed.

Date: July 14, 2016

Respectfully submitted,

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Dated: July 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion for Leave to File and accompanying Brief of *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on the 14th day of July 2016. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to:

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