UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3264

CARROL DURRELL, PARENT AND
EDUCATIONAL DECISION MAKER FOR S.H., AND S.H.,
Plaintiff-Appellant,

v.

LOWER MERION SCHOOL DISTRICT,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLANT, CARROL DURRELL, PARENT AND EDUCATIONAL DECISION MAKER FOR S.H., AND S.H.

Sonja D. Kerr
Pa. Bar No. 95137
Benjamin D. Geffen
Pa. Bar No. 310134
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19130
Telephone:(215) 627-7100
Fax:(215) 627-3183
Email:skerr@pilcop.org
bgeffen@pilcop.org

Attorneys for Appellants Durrell and S.H.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction of subject matter pursuant to 28 U.S.C. § 1331 and 20 U.S.C. § 1415(i) because the claims asserted arose under the Individuals with Disabilities Education Act ("IDEA"),[1] 20 U.S.C. §§ 1400 et seq., the Americas with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. and as amended, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794.

This Court has jurisdiction to review a district court's final order pursuant to 28 U.S.C. § 1291; see also Lauren W. v. Deflaminis, 480 F.3d 259, 265 (3d Cir. 2007); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 389 (3d Cir. 2006).

[1] While this brief uses the term "IDEA" throughout, some authorities use the terms "Individuals with Disabilities Education Improvement Act" or "IDEIA" to refer specifically to the most recently amended version of the statute. See Phillips v. District of Columbia, 736 F. Supp. 2d 240, 245 n.3 (D.D.C. 2010).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. **Whether the District Court erred when it dismissed Appellants' claim for misidentification under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.**

   Suggested answer: Yes.

   Preserved for review: App. 90-106 (Appellee's Motion to Dismiss); 107-20 (Appellants' Opposition); 4-10 (District Court's Memorandum and Order).

2. **Whether the District Court erred when it entered summary judgment for Appellee on Appellants' "regarded as" discrimination claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.**

   Suggested answer: Yes.

   Preserved for review: App. 131-52 (Appellee's Motion for Summary Judgment); 874-86 (Appellants' Opposition); 1255-68 (Appellee's Reply); 15-35 (District Court's Memorandum, Order, and Judgment).

STATEMENT OF THE CASE

On November 23, 2009, Appellants filed a special education "due process" complaint against Appellee, the Lower Merion School District (the "District" or "LMSD"). The complaint alleged that the District had deprived S.H. of a "free appropriate public education" under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq., and the Pennsylvania Code, 22 Pa. Code Chapter 14. Appellants specifically requested an Independent Educational Evaluation ("IEE") to determine whether LMSD had accurately evaluated and identified S.H. The IEE concluded S.H. was not and never had been a student with a specific learning disability. In April 2010, S.H. was exited from special education. LMSD then moved to dismiss the hearing, which the Hearing Officer did on August 10, 2010.

On November 5, 2010, Appellants timely appealed by filing a civil action in the United States District Court for the Eastern District of Pennsylvania. They alleged a violation of the IDEA, requesting reversal of the hearing decision. In addition, Appellants asserted that the District had violated the Rehabilitation Act and the Americans with Disabilities Act because it had wrongly "regarded" S.H. as disabled, when, in fact she was not, and that this had resulted in deprivations of her federally protected rights. S.H. sought compensatory education, monetary damages, attorneys' fees, and costs as remedies for the District's actions.

On June 30, 2011, the District Court dismissed Appellants' IDEA claim for failure to state a claim under Rule 12(b)(6), concluding that because Appellants asserted that S.H. was not disabled, they had no claim pursuant to the IDEA.

Later, on July 19, 2012, the District Court entered summary judgment in favor of Appellee on Appellants' Rehabilitation Act and ADA claims. Although the Court recognized that Appellants had established that the District "regarded" S.H. as disabled and that the District was subject to the Rehabilitation Act and the ADA, the Court concluded that Appellants had failed to produce sufficient proof for a jury to conclude that the District had engaged in "bad faith, gross misjudgment or intentional discrimination" when it misidentified S.H. as disabled and placed her in special education through most of her school career.

This appeal ensued.

STATEMENT OF FACTS

The District misidentified S.H., who is African American and is now nineteen years old, as learning disabled, and on that basis relegated her to an education inconsistent with her needs and abilities for most of her primary and secondary education, in spite of her stated objection to placement in special education, and in spite of the District's ample awareness of the risk of over-identification. Because of LMSD's actions, S.H. lost confidence in her academic abilities, missed out on appropriate educational opportunities, and was insufficiently prepared for college. See App. 910-31. Yet, despite all this, the District Court erroneously denied Appellants their right to an administrative remedy from a special education hearing officer pursuant to the IDEA and erroneously denied them relief under the ADA and Section 504.

When S.H. was in fifth grade, in a predominantly white school district, she was tested for special education; during that evaluation, S.H. politely told the examiner that she "did not want to go into Special Education." App. 950. S.H. was right to resist. As multiple experts have since found, S.H. was never learning disabled and never should have been diagnosed as such. App. 1017-32; 1034-46; 1230-31.

School districts routinely over-identify African-American students as requiring special education services. 20 U.S.C. § 1400(c)(12)(a). LMSD was

specifically aware of the over-identification of African-American students within the District since it was a defendant in a related case, Blunt v. LMSD, 826 F. Supp. 2d 749, 753-54, 757, 760 (E.D. Pa. 2011) (noting evidence of over-identification in LMSD), that specifically raised that concern. App. 1145-47. Despite awareness of the over-identification issue, and despite even a 2006 self-assessment confirming the problem within the District, the District failed to take any action to ensure that African-American students were accurately placed into special education. App. 1148 (no plan to re-evaluate students); App. 1169-70 (no memo to parents that African-American students may have been disproportionately identified for special education, and no explanation as to how parents could know what to do to ensure their child had not been wrongly identified); App. 1154-57 (no mechanism in place to ensure that students are not incorrectly identified as learning disabled and no notification to parents about erroneous identification).

From the very beginning of her academic career, S.H. experienced differential treatment from LMSD. In her first-grade year, LMSD placed S.H. in Title I classes, a remedial program. See App. 914-15. LMSD did not have specific criteria for placing students in this program, creating the risk of arbitrary designations. App. 1107-08. Furthermore, when placing S.H. in Title I, LMSD mischaracterized the program to S.H.'s mother, Appellant Carroll Durrell. LMSD told Ms. Durrell that the Title I reading program was an "enrichment" program to

provide her child with an "extra boost." But LMSD's Title I reading program is not a "reading enrichment program"; as the District's own designated witness on Title I, see Fed. R. Civ. P. 30(b)(6), testified, Title I is intended "only for students in need of help." App. 1105-06; see also App. 1098. Ms. Durrell, unfortunately, believed LMSD's mischaracterizations and did not at the time understand that Title I was actually a remedial program. App. 1223-24; 1005.[2] As a result, S.H. remained in Title I from her first-grade year through her fifth-grade year. App. 1037; 168 at ¶ 78. The Title I program forced S.H. to miss important core-curriculum courses—such as grade-level reading—because it required her to be pulled out of her regular education classroom to receive special instruction. App. 914-15.

In 2004—S.H.'s fifth-grade year—after she had spent five years in remedial classes, LMSD inappropriately determined S.H. to have a specific learning disability in reading and math. App. 954-55. LMSD's school psychologist Santa Cucinnotta would later acknowledge that her determination to place S.H. into special education was made in part on the basis of S.H.'s having "received Title I

[2] The District Court did not adequately appreciate the LMSD's mischaracterization of Title I as an "enrichment program" because it believed that the only evidence that Title I is actually a "remedial program" was basedon the parent's testimony, which it characterized as hearsay. See App. 19 n.2. In fact, Appellants offered direct testimonial evidence from Ms. DeRosa, the District's Rule 30(b)(6) witness on Title I, to establish that Title I is, in fact, a remedial program. See App. 890 at ¶ 17 (citing App. 1105-06).

support since first grade." App. 953. Ms. Cucinotta could not confirm that S.H. had received the same exposure to words in her Title I reading program as had her peers who had the opportunity to participate in the regular education curriculum. App. 1083-84.

Ms. Cucinotta's Initial Evaluation Report was in line with LMSD practice, yet by prevailing school psychology standards it was sloppy, arbitrary, and riddled with error. First, LMSD neglected to perform the classroom observation mandated at the time by Pennsylvania regulations. App. 1087. Second, LMSD's evaluation found that S.H. had an average IQ and average scores for reading comprehension and numerical operations, yet it still declared her to have a learning disability based on reading and math. App. 950; 1167; 966. LMSD justified this conclusion based upon a discrepancy between S.H.'s ability scores and IQ; however, the evaluation failed to apply any coherent metric when making this determination. App. 1088. Indeed, there was even disagreement within LMSD about how to appropriately analyze discrepancies between IQ and ability for purposes of diagnosing learning disabilities. App. 1203-04; 1193-95. Finally, at the time she prepared her Initial Evaluation Report, Ms. Cucinotta was aware that S.H. had been emotionally devastated by a 2002 murder-suicide that took the lives of five of S.H.'s relatives, including a fourteen-year-old cousin, yet this did nothing to dissuade Ms. Cucinotta from making her determination. App. 949-56; 988-89.

S.H. herself knew that she did not belong in special education and said as much to her teachers and to Ms. Cucinotta. App. 928-30. Nevertheless, because of the nonexistent disability ascribed to her by a slipshod evaluation, LMSD repeatedly and consistently placed S.H. in special education classes. This special education curriculum was below S.H.'s ability level. App. 916; 1019.

LMSD had evidence S.H. was not disabled almost as soon as she was placed into special education. As a fifth-grader, and less than three months after she was placed into special education in fifth grade, S.H. demonstrated above-grade-level reading ability of Grade 5.7 on a Woodcock Reading Mastery Test, with grade-level 6.4 vocabulary skills and 6.7 word comprehension skills. App. 1240-46; 990-92; 1001. Despite this countervailing evidence, S.H. continued in special education classes such as Instructional Support Lab ("ISL"), a resource-room setting for students with learning disabilities. App. 914-17; 1113-17; 1233.

S.H. was excluded from regular education programming because of her placement in special education. S.H. complained that ISL was an unnecessary "waste of time" that made her "back step instead of progressing forward." App. 922. S.H. testified that, for as long LMSD kept her in ISL, she "never knew what it was like to actually try hard" because her teachers would hand-hold her as she completed homework and exams, inculcating dependence on such unnecessary assistance. App. 917-20. Also, as a consequence of this unnecessary special

education course load, LMSD prevented S.H. from taking certain regular classes, including eighth-grade Science and Spanish. App. 923; 914-15; 937; 1041. Missing out on these core classes negatively impacted S.H.'s attitude toward education and her self-confidence, and it left her unprepared for high school. App. 1041; 1036. In high school, ISL—which did not count toward a student's grade point average—also kept S.H. from taking additional core classes that could have allowed her to increase her GPA. App. 1131-32. If LMSD had not inappropriately kept S.H. in special education, she could have taken additional, higher-level classes at Lower Merion High School and therefore would have been better prepared to apply to, get scholarships for, and succeed in college. App. 912; 925; 1045-46; 1052.

In 2009, five years after the initial evaluation identifying her for special education, LMSD reevaluated S.H. App. 1059-60. At this point, S.H. was in the tenth grade. This reevaluation was performed by Dr. Craig Cosden, a District school psychologist, and it concluded that S.H. continued to be eligible for special education. App. 1074. Like Ms. Cucinotta's prior evaluation, Dr. Cosden's report also suffered from deficiencies. First, Dr. Cosden measured S.H.'s IQ as 86, some 20 points lower than when it was measured in 2004 by Ms. Cucinotta. App. 1065. Dr. Cosden testified that he could think of no explanation for the steep drop of S.H.'s IQ other than a decline in her "motivation" and "focus." App. 970. However, Dr. Cosden neglected to take into account other crucial circumstances.

During the 2004-2005 school year, Ms. Durrell remarried. App. 1018. In addition, tragedy struck S.H. for a second time in 2006, when her close friend died in a car accident. App. 1018. As with the 2002 murder-suicide, these circumstances affected S.H. emotionally and in her performance at school. App. 1018; 1053; 987-89. Yet Dr. Cosden's 2009 Reevaluation Report omits mention of either of these events, both of which may have impacted S.H.'s emotional status. App. 1058-78. Second, Dr. Cosden failed to adequately take into account S.H.'s improved academic performance since her 2004 evaluation. Evidence of such improved academic performance includes: S.H.'s previously mentioned scores on the 2004 Woodcock-Johnson Reading Test, App. 1240-46, 990-92; 2007 classroom-based assessments indicating high comprehension levels, App. 995-96; middle school report cards with passing grades, App. 995-96; and good performance on assessments such as the Pennsylvania System of School Assessment ("PSSA") exams, App. 1019-20.[3] Yet Dr. Cosden failed to recognize these data as counterevidence to S.H.'s supposed underachievement.

In November 2009, after Dr. Cosden had completed his reevaluation, he attended a meeting to decide upon an Individualized Education Program ("IEP") for S.H. Ms. Durrell also attended the meeting with counsel. App. 961-62. During this IEP meeting, Ms. Durrell's counsel asked Dr. Cosden for a copy of the testing

[3] There was slippage, however, in S.H.'s sixth-grade PSSA performance.

protocols relating to the reevaluation. Dr. Cosden replied to both counsel and the family that the testing protocols had been destroyed. App. 961-62. This was not true. Dr. Cosden had not destroyed the testing protocols, and he knew that this was the case. App. 963. Dr. Cosden later admitted that he had "intentionally misled the family as to the destruction of the protocols" because he did not think it was "ethical" for him to disclose the protocols to "persons who have no ability to be able to process and understand the information." App. 963.

Following the meeting with Dr. Cosden, on November 23, 2009, S.H.'s parent filed a Due Process Complaint Notice requesting a special education hearing, appropriate relief in light of the District's failure to appropriately identify and evaluate S.H., and an IEE. App. 69. LMSD consented to the IEE request, and Ms. Durrell selected Dr. Umar Abdullah-Johnson, a nationally certified school psychologist, to perform the evaluation. App. 1246.3, 983-85.

The IEE was performed in January 2010 by Dr. Abdullah-Johnson. He administered intelligence tests that placed S.H.'s IQ at exactly 100, which is in the middle of the average range. App. 1030. Dr. Abdullah-Johnson's achievement testing also placed S.H. in the "average" range in four out of six composite score areas, in the "below average" range for "Reading Comprehension & Fluency," and in the "superior" range for "Basic Reading." App. 1030. Any discrepancy between S.H.'s IQ and her achievement scores was too small to constitute a severe

discrepancy under any recognized standard. App. 1024; 1030. Dr. Abdullah-Johnson's report concluded that S.H.'s identification as learning disabled was and always had been erroneous. App. 1029. He determined that even at the time of the 2004 Initial Evaluation Report, the data available did not support LMSD's conclusion that S.H. had a learning disability. App. 1029; 987-89.

In 2010, after Dr. Abdullah-Johnson's IEE, Dr. Cosden prepared a follow-up Reevaluation Report. App. 932-47. In that Report, Dr. Cosden wrote that "[a]lthough the September 2009 Reevaluation Report recommended [S.H.] be exited from Speech and Language services, [her] mother asked that those services continue." App. 940. This was not true. Ms. Durrell had removed S.H. from speech and language services in late 2009. App. 983-85.

Following the May 2010 administrative hearing and commencement of litigation in the District Court, two additional experts reviewed the data and agreed with Dr. Abdullah-Johnson's conclusion that S.H. "never met the criteria for a diagnosis of Specific Learning Disability . . . ." App. 1029. Tawanna Jones, Ed.S., M.S., a certified school psychologist, performed interviews, a classroom observation, and a thorough review of records, after which she concluded that S.H. should never have been identified as a student with a disability. App. 1037; 1230-31. Based on a records review and an interview of S.H. and Ms. Durrell, Ronald Rosenberg, Ph.D., a licensed psychologist, also agreed with Dr. Abdullah-Johnson

and Ms. Jones that S.H.'s placement in special education had been inappropriate. App. 1054; 1249-50.

Long-term placement in special education damaged S.H.'s self-confidence and burdened her with learned helplessness. App. 917; 1039-40; 1053. As a result of years of exclusion from portions of the regular curriculum, S.H. spent her high-school years lacking confidence in her ability to thrive academically, particularly in higher-level courses. App. 911, 917, 924-26; 1036-37; 1053. Now, S.H. will require significant supplemental support in order to complete her undergraduate degree program, including at least two additional years of study and extensive therapy, tutoring, and mentoring. App. 1044-46.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This proceeding is related to the case of Blunt v. Lower Merion School District, now on appeal to this Court, Case Nos. 11-4200 and 11-4201. Carol Durrell and S.H. were part of the initial group of plaintiffs in the Blunt lawsuit.

Another case now on appeal to this court, A.G. et al. v. Lower Merion School District, Case No. 12-4029, arrives in a similar procedural posture and raises similar legal issues.

STATEMENT OF THE STANDARD OF REVIEW

A District Court in an IDEA review applies a nontraditional standard of review, requiring deference to the administrative hearing officer's factual findings. Shore Reg'l High Sch. Bd. of Ed v. P.S., 381 F.3d 194, 199 (3d Cir. 2004). Appellate review of an IDEA claim dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is plenary over the legal determinations made by the District Court. Mary T. v. Sch. Dist. of Phila., 575 F.3d 235, 242 (3d Cir. 2009); see also Brown v. Card Serv. Ctr., 464 F.3d 450, 452 (3d Cir. 2006). In reviewing a dismissal, the Court of Appeals "accept[s] all well-pled allegations in the complaint as true and draw[s] all reasonable inferences in favor of the non-moving party." 464 F.3d at 452.

Appellate review of an entry of summary judgment pursuant to Federal Rule of Civil Procedure 56 is plenary and applies the same standard as the District Court. See Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 635 F.3d 87, 92 (3d Cir. 2011) (citing Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 387 (3d Cir. 2010)). Summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact. See id.; see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) ("[W]here the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true.").

ARGUMENT

1. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THE IDEA HEARING OFFICER LACKED AUTHORITY TO DECIDE S.H.'S MISIDENTIFICATION AND DISMISSED APPELLANTS' IDEA CLAIM.

The District Court affirmed an IDEA hearing officer's determination, after a hearing, that he lacked any authority to hear Appellants' claim of misidentification. This was in error.

The IDEA unambiguously provides that each state must have available a complaint and hearing system in which parents are able to contest "any matter" related to the "identification and evaluation" of children. 20 U.S.C. § 1415(b)(6)(A); see also 34 C.F.R. § 300.507(a)(1). It is undisputed that children who **are** disabled or who believe they **are** disabled are entitled to due process hearings when their schools fail to properly identify them. See Compton Unified Sch. Dist. v. Addison, 598 F.3d 1181 (9th Cir. 2010), cert. denied, 132 S. Ct. 996 (2012). Here, Appellants ask this Court simply to acknowledge the flip side of the "identification" coin: that after a school district has, through the IDEA's procedures, misidentified an African-American child as having a disability, the child enjoys the same protections of the IDEA hearing process.

Unique to this case, the findings of the IDEA explicitly state, "Greater efforts are needed to prevent the intensification of problems connected with

mislabeling and high dropout rates among minority children with disabilities." 20 U.S.C. § 1400(c)(12)(A). The statute then goes on to state:

> More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population. African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts. In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities. Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

Id. § 1400(c)(12)(B)-(E).

The IDEA clearly recognizes the significant problem of the misidentification of African-American children as disabled when in fact they are not. Appellants' situation therefore fits squarely into an explicit statutory concern of the IDEA: S.H. is an African-American child in a school district with predominately white students and teachers and has been incorrectly labeled as disabled. Congress took specific note of this problem when instituting the IDEA's statutory scheme.

The legislative history explains the reasons for the statutory references concerning misidentification. As the House Committee on Education found during its hearings, the misidentification of minority children as disabled is a significant national problem. H.R. Rep. No. 108-77, at 98-99 (2003). The House of Representatives Report on H.R. 1350, the most recent reauthorization of the IDEA,

makes clear that among Congress's chief purposes was "reducing over-identification/misidentification of nondisabled children (particularly minority youth)." Id. at 78. In addition, the House Report states that the Committee on Education and the Workforce "heard from numerous experts" regarding the twin problems of over-identification and misidentification, especially of minorities and particularly of African Americans, and that it agreed with the conclusion that this posed a problem for special education. See id. at 98-99.[4]

Congress would not have expressed such concern about the misidentification of African-American children as disabled and then left those same children without any recourse under the IDEA. Congress established the due process procedures of the IDEA to address complaints that parents have with "any matter relating to the identification, evaluation, or educational placement of the child . . . ." 20 U.S.C. § 1415(b)(6)(A). Therefore, the District Court reached a conclusion contrary to the statute and its legislative history and erred in concluding that S.H. could not bring her IDEA misidentification claim before an IDEA

[4]But see id. at 103-04 (discussing that pre-referral services will be used to address the problem of misidentification and that children receiving pre-referral services will not receive the rights and protections of sections 614 and 615, now 20 U.S.C. § 1414 and 20 U.S.C. § 1415 respectively); id. at 122-23 (discussing that over-identification will be addressed in part through data collection and analysis). While Congress intended that states and schools would address the nationwide epidemic of misidentification through pre-referral services and data analysis, the legislative history does not appear to preclude the ability of an individual misidentified child and her parents to seek relief through a due process hearing.

hearing officer for an appropriate remedy, since it was clearly "any matter" under the IDEA.

Moreover, publicly available statistics and judicial economy all favor the use of the IDEA's procedural safeguards for resolving situations of misidentification of minority children. Numerous studies have demonstrated the extent of the misidentification problem for African Americans.[5] For LMSD, this phenomenon is no mere abstraction. "In 2005, the Pennsylvania Department of Education found that there was a disproportionate number of African American students in special education programs in Lower Merion." Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749, 757 (E.D. Pa. 2011). In the 2005-2006 school year, while 18.1% of the student body as a whole received special education services, 32.6% of African Americans did. Id. By the 2009-2010 school year, 8.6% of all students in LMSD were African American, while 14.3% of the special education students were African American. Id. The court found these statistics insufficient to prove racial discrimination but noted that it was not deciding an IDEA case, having already dismissed all IDEA claims. See id. at 763.

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[5]See, e.g., Amanda L. Sullivan et al., Confronting Inequity in Special Education, Part I: Understanding the Problem of Disproportionality, NASP COMMUNIQUÉ (Sept. 2009), available at http://www.nasponline.org/publications/cq/mocq381disproportionality.aspx; Jamila Codrington & Halford H. Fairchild, Special Education and the Mis-education of African American Children: A Call to Action, THE ASSOCIATION OF BLACK PSYCHOLOGISTS (Feb. 13, 2012), available at http://www.abpsi.org/pdf/specialedpositionpaper021312.pdf.

The causes of misidentification and over-identification are manifold and overlapping. Greater awareness and proactive measures on the part of school districts would help address the issue. See Torin D. Togut, The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities, 20 AM. U. J. GENDER SOC. POL'Y & L. 163, 174 (2011) (listing strategies to reduce overrepresentation). By finding that misidentified children like S.H. can access IDEA administrative hearings, this Court would ensure that specially trained hearing officers, who routinely handle other special education matters of identification and evaluation, would be available to address these concerns. This would reduce potential costs to school districts as well as provide a forum for the usual remedies available to children under the IDEA (e.g., new evaluations, correction of school records, compensatory education, and tutoring reimbursements). This would in turn ensure that school districts would pay closer attention to the likelihood of misidentification, especially with regard to minorities, and thus further the IDEA's goal of alleviating the harms caused by inappropriate identification, evaluation, and placement in special education.

In addition to the specific concern about misidentification of African-American students, the IDEA's so-called "Child Find" provision explicitly requires States to ensure that "[a]ll children with disabilities residing in the State . . . and

who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). Compliance with this duty and responsibility "falls squarely" on the school district, not parents. Hicks v. Purchase Line Sch. Dist., 251 F. Supp. 2d 1250, 1253 (W.D. Pa. 2003) (citing M.C. v. Cent. Reg'l Sch. Dist., 81 F. 3d 389, 397 (3d Cir. 1999); see also P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009) (recognizing district's continuing Child Find duty, without parental request); Taylor v. Altoona Sch. Dist., 737 F. Supp. 2d 474 (W.D. Pa. 2010). "Child Find" or eligibility for services is a hearable issue in special education administrative hearings, including the misidentification of African-American students. Nothing in the statute suggests that misidentification of African-American children was to be excluded from the IDEA provision governing due process complaints that explicitly permits a parent "to present a complaint . . . with respect to **any** matter relating to the identification, evaluation, ..." 20 U.S.C. § 1415(b)(6)(A) (emphasis added). A claim that a child was improperly identified or evaluated is a claim for violations of the IDEA's "Child Find" obligations and is thus a "matter relating to the identification [or] evaluation . . . of the child," id., and therefore a hearable issue, see Compton Unified Sch. Dist., 598 F.3d at 1185; Forest Grove Sch. Dist. v. T. A., 557 U.S. 230, 245 (2009) ("It would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special-

education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."). Students, including misidentified African-American students, who are not properly evaluated and identified must be afforded at least an administrative hearing including a decision on the merits. See Compton Unified Sch. Dist., 598 F.3d at 1185; Forest Grove Sch. Dist, 557 U.S. at 245; P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009) (considering the merits of a claim for failure to properly identify a disabled student); Bell v. Bd. of Educ., No. CIV 06-1137, 2008 U.S. Dist. LEXIS 69087 (D.N.M. Mar. 26, 2008) (African-American student misidentified as having mental retardation rather than a specific learning disability was required to exhaust through an administrative proceeding).[6]

Just as improperly evaluated and potentially disabled students have a right to IDEA procedural protections and a due process hearing under the IDEA, so too should improperly evaluated non-disabled students. Given that the nature of the duties under "Child Find" is to identify students eligible for services, it does not make sense to limit the right to IDEA remedies only to those students who are correctly determined to be eligible when the issue itself is evaluation. See J.P. v.

[6]The IDEA provides the hearing process to not yet identified students who are in the process of evaluation. See 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534.

Anchorage Sch. Dist., 260 P.3d 285, 293 (Alaska 2011) ("Because an evaluation is necessary to determine whether a child is 'disabled' within the meaning of the IDEA, disability cannot logically be considered a prerequisite for the rights implied by the IDEA's 'child find' requirement."). A school district's duty to evaluate children for eligibility under the IDEA is simply not dependent on the ultimate determination that the child is in fact "a student with a disability." See id. (holding that a student deemed ineligible for services under the IDEA is nevertheless eligible for evaluation at school district expense under IDEA's "Child Find" requirement). Where, as here, the LMSD utilized the IDEA procedures, and incorrectly determined S.H. eligible under the IDEA, S.H. must be afforded the full protections of the hearing system.

Further, the courts have uniformly recognized that hearing officers have equitable authority and relief authority that is coextensive with that of the federal courts[7] and consistent with the Congressional intent of the IDEA. S-1 by and through P-1 v. Spangler, 650 F. Supp. 1427, 1431 (M.D.N.C. 1986), vacated as moot, 832 F. 2d 294 (4th Cir. 1987) (incongruous that Congress intended a reviewing court to have greater authority to order relief than a hearing officer in

[7]The only exceptions to this are that hearing officers lack authority to award monetary damages, e.g., W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995), overruled on other grounds by A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007) (en banc), or attorneys' fees, e.g., Patrick B. v. Paradise Protectory & Agric. Sch., Inc., No. 1:11-cv-927, 2012 U.S. Dist. LEXIS 44954, at *12 (M.D. Pa. Mar. 30, 2012).

light of hearing officer's expertise in the area); Cocores v. Portsmouth, 779 F. Supp. 203, 205-06 (D.N.H. 1991) (citing S-1 and concluding that the hearing officer's ability to award relief must be "coextensive" with that of the court); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990) (finding that relief designed to cure deprivations must accord with congressional intent, allowing compensatory education remedy past age 21 for minor deprived prior to age 21); I.K. v. Sch. Dist. of Haverford Twp., No. 10-cv-4397, 2011 U.S. Dist. LEXIS 28866 (E.D. Pa. Mar. 21, 2011) (hearing officers can determine whether settlements exist between parents and school districts). Limiting the hearing officer's jurisdiction to afford relief when the claim is one of "Child Find," see 20 U.S.C. § 1412(a)(3), in the case of a misidentified African-American student, is inconsistent with the statute itself and with longstanding jurisprudence deferring to hearing officers on these extremely technical types of cases.

Ironically, in the related litigation of Blunt v. Lower Merion School District, the District Court even acknowledged the importance of the administrative hearing process, rejecting class certification in part, on the grounds that an individual determination about each child's circumstances under the IDEA was necessary through that very process; later, the District Court dismissed the classwide ADA and Section 504 claims for failing to exhaust these very administrative remedies that were effectively denied to S.H. 826 F. Supp. 2d 749

(E.D. Pa. 2011); 262 F.R.D. 481 (E.D. Pa. 2009); 559 F. Supp. 2d 548 (E.D. Pa. 2008). Altogether barring S.H. from meaningfully accessing such administrative remedies undercuts that conclusion, particularly in light of Congress's concern, as firmly stated in the IDEA, about the misidentification of African-American students and the clear duty of districts to perform "Child Find."

2. THE DISTRICT COURT ERRED BY REQUIRING APPELLANTS TO PROVE INTENTIONAL DISCRIMINATION ON THEIR "REGARDED AS" CLAIMS UNDER THE ADA AND SECTION 504.

Before the District Court, S.H. raised claims pursuant to the ADA and Section 504. Under Section 504, a public school cannot deny an individual with a disability participation in, or the benefits of, the entity, or subject the individual to discrimination under any program or activity receiving federal funds. See 29 U.S.C. §§ 794(a), (b)(2)(B). Title II of the ADA similarly prohibits exclusion from the participation in, the denial of benefits of, or discrimination on the basis of disability by any public entity, including public school districts. See 42 U.S.C. §§ 12131-12132. The definition of disability under both the ADA and Section 504 includes not only an individual who is actually disabled but also anyone who is "regarded as" having a disability. See 42 U.S.C. § 12102(1)(C); 29 U.S.C. § 705(2)(B). Therefore, to prevail on their claims, Appellants must demonstrate that S.H.: (1) was regarded as disabled by the LMSD; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program

or was otherwise subject to discrimination because of her disability. Chambers v. Sch. Dist. of Phila., 587 F.3d 176, 189 (3d Cir. 2009) (citing Nathanson v. Med. Coll. of Pa., 926 F.2d 227, 230) (3d Cir. 1991)). A "regarded as" plaintiff can seek remedies under Section 504 and the ADA when an entity treats the person differently because it wrongly believes that person to be disabled. "[T]he law in this circuit is that a 'regarded as' plaintiff can make out a case if the [defendant] is innocently wrong about the extent of his or her impairment." Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 191 (3d Cir. 1999). See generally Eshelman v. Agere Sys., 554 F.3d 426, 434 (3d Cir. 2009) ("Under the ADA, a person is 'regarded as' having a disability if she . . . . Has [no such impairment] but is treated by a covered entity as having a substantially limiting impairment." (alteration in original)).

The District Court concluded that S.H. undisputably met the first two prongs on her ADA and 504 claims. App. 28 (finding that there was "no dispute that S.H. was regarded as disabled by LMSD and that she was otherwise qualified to participate in school activities"). Thus, the only issue addressed by the District Court was whether S.H. "put forth sufficient evidence to raise a genuine dispute of material fact that [S.H.] was denied the benefits of a school program or was subjected to discrimination on the basis of her perceived disability." App. 28 The District Court collapsed a variety of standards and concluded that S.H. was required to show "some evidence of intent, such as bad faith, gross misjudgment,

or deliberate indifference" in order to sustain a discrimination claim under the ADA and Section 504. App. 29 (citing Chambers v. Sch. Dist. Of Phila., 827 F. Supp. 2d 409, 425 (E.D. Pa. 2011)); see also Barnes v. Gorman, 536 U.S. 181, 185 (2002) (holding that the remedies for violations of the ADA and the Rehabilitation Act are "coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964"); Alexander v. Sandoval, 532 U.S. 275, 282-83 (2001) (holding that a plaintiff may not recover under Title VI absent proof of intentional discrimination).

The District Court entered summary judgment for the District, concluding that Appellants failed to produce "evidence that would allow a reasonable jury to find that the School District intentionally discriminated against S.H. when it regarded her as disabled." App. 34-35. This Court should reverse the order below and allow the matter to go before a jury.

The District Court erred by requiring a showing of intentional discrimination, particularly on Appellants' exclusion claims. Section 504 and the ADA both state that a qualified individual cannot be "excluded from the participation in, or be denied the benefits of" a school district's programs because the district regarded her as disabled. 29 U.S.C. § 794(a); 42 U.S.C. § 12132. Appellants contend S.H. was excluded from regular education programming and denied participation in regular education programming because the District

incorrectly regarded her as having a disability. But the District Court required Appellants to proffer evidence that LMSD had engaged in bad faith or gross misjudgment or intentional discrimination when it excluded S.H. from regular educational programming by placing her into Title I reading, misidentifying her as having a specific learning disability, precluding her from Science and Spanish during middle school, and from GPA-credit-granting and Honors classes in high school.[8]

This Court has yet to address whether intentional discrimination is required when a misidentified African-American student seeks a remedy for her exclusion from the regular education environment under the ADA or Section 504. The Court should find that intentional discrimination is not required. Such a holding would be in keeping with current Supreme Court jurisprudence surrounding the ADA and Section 504, it would help fulfill the purposes of those statutes, and it would allow plaintiffs to bring claims against the insidious forms of exclusion that Section 504 and the ADA were designed to cure.

In one of the early United States Supreme Court cases to address Section 504, Alexander v. Choate, 469 U.S. 287 (1985), the Court pointed out that the Rehabilitation Act was directed particularly at unintentional conduct because

[8]Appellants also offered proof that the District lacked policies and procedures to meet its Section 504 obligations. App. 878-79; 891 at ¶ 22; 893-96 at ¶¶ 34-49; 904-07 at ¶¶ 89-103.

"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." Id. at 295 (footnote omitted).[9] No Supreme Court decision since Choate has reversed this view. Moreover, the United States Supreme Court has found that discrimination and exclusion of people with disabilities continues to be a pervasive problem in this country. See, e.g., Tennessee v. Lane, 541 U.S. 509, 516 (2004) (in case concerning physical accessibility of a courthouse, discussing Congress's recognition of the history of treatment resulting from stereotypic assumptions about people with disabilities); Olmstead v. L.C., 527 U.S. 581, 598 & n.10 (1999) (recognizing that individuals encounter various forms of discrimination and that in the case of individuals with

[9] The Court has held that the remedies available to Section 504 and ADA plaintiffs are those remedies available to Title VI plaintiffs. See Alexander v. Sandoval, 532 U.S. 275, 282-83 (2001); Barnes v. Gorman, 536 U.S. 181, 185 (2002). This does not mean, however, that the standards for ADA and Section 504 claims should be identical to those for Title VI claims. Indeed, the Court in Choate was clear that "too facile an assimilation of Title VI law to § 504 must be resisted." 469 U.S. at 294 n.7. Furthermore, that cautionary statement about assimilating Title VI rules to a Section 504 context was prompted by the defendant's reliance on the Court's earlier holding in Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 593 (1983), which was a Title VI case. Like the defendant in Choate, the District Court also cited Guardians when it concluded that intentional discrimination was required for ADA and Section 504 claims. Requiring a showing of intentional discrimination in cases like the one at bar simply because this is the norm in the Title VI context is exactly the kind of "facile . . . assimilation" that the Choate Court warned against.

disabilities it is not necessary to prove uneven treatment of similarly situated individuals).

Congress has explicitly recognized the necessity of protecting people from being incorrectly regarded as disabled not only in Section 504, but also in the ADA, and most recently reaffirmed that prong of disability discrimination in the ADA Amendments Act of 2008. 42 U.S.C. § 12101(a)(1) ("The Congress finds that . . . others who . . . are regarded as having a disability also have been subjected to discrimination."); id. § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."). Regarding an individual as having a disability clearly has significant societal connotations because of the ongoing and pervasive problem of discrimination on the basis of disability. Even if the ADA's or Section 504's "regarded as" prongs did not anticipate the situation of S.H., an African-American student upon whom the District has visited the stigma of disability, that would raise no barrier to S.H.'s protection under either statute. See PGA Tours v. Martin, 532 U.S. 661, 689 (2001) (ADA decision stating that "the fact that a statute can be applied in situations not expressly anticipated by

Congress does not demonstrate ambiguity. It demonstrates breadth." (quotation marks and citation omitted)).

The only Third Circuit case to address an intentionality requirement under Section 504 and the ADA in a public school setting is Ridgewood Board of Education v. N.E., 172 F.3d 238 (3d Cir. 1999), superseded by statute on other grounds as recognized in P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 730 (3d Cir. 2009). In Ridgewood, a case concerning the alleged denial of a free appropriate public education, this Court remarked that "a plaintiff need not prove that defendants' discrimination was intentional" under Section 504. 172 F.3d at 253. Indeed, in cases following Ridgewood, this Court has not taken the opportunity to require intentionality as an element to establish a wrongful exclusion from regular education programming. Cf. D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488 (3d Cir. 2012); Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012); Chambers v. Sch. Dist. of Phila., 587 F.3d 176 (3d Cir. 2009). Only district courts within the Third Circuit have assumed such an intentionality requirement, and they have done so only recently. See, e.g., Brown ex rel. R.P. v. Sch. Dist. of Phila., No. 11-cv-6019, 2012 U.S. Dist. LEXIS 104855, at *19-21 (E.D. Pa. July 26, 2012) (collecting cases).

Further, if any intentionality standard is applied, then to be faithful to the standard set forth in Choate, it should be one that does not require "invidious

animus." Liese v. Indian River Cnty. Hosp. Dist., No. 10-15968, 2012 U.S. App. LEXIS 23345, at *37 (11th Cir. Nov. 13, 2012).

The District has claimed that intentionality is required because Appellants seek monetary damages. But Appellants sought all appropriate relief, including both compensatory education and monetary damages. App. 50-51; see also App. 14. Under Section 504, such relief can include non-monetary relief, e.g., compensatory education, evaluations, or correction of school records. See generally A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 804 (3d Cir. 2007) (en banc) (noting that the remedies available under Section 504 "include compensatory damages, injunctive relief, and other forms of relief traditionally available in suits for breach of contract").

This Court has consistently rejected a "bad faith" or "gross [or] egregious . . . conduct" standard in comparable IDEA compensatory remedy cases. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 537 (3d Cir. 1995); M.C. ex rel J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3rd Cir. 1996). Instead, the Third Circuit has required parents to prove only that the program of education was simply "inappropriate." M.C., 81 F.3d at 397. This Court has also rejected as a defense a claim of "parent blame" or the failure of parents to be vigilant. See id. ("[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the

problem)."); see also Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir. 2012) ("[E]ducational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents.").

In order that students who, like S.H., have been misidentified as disabled and have been left to languish needlessly in special education are not without any avenue for legal relief, the Court must reverse and remand so that the legislative intent expressed in Choate can be fulfilled: to prohibit discrimination that is the result most often not of "invidious animus, but rather of thoughtlessness and indifference—of benign neglect."

3. EVEN IF INTENTIONALITY WERE REQUIRED, APPELLANTS PRODUCED ENOUGH EVIDENCE ON THEIR ADA AND SECTION 504 CLAIMS FOR THE CASE TO PROCEED TO A JURY.

Even if intentional discrimination were required, Appellants provided sufficient evidence that their ADA and Section 504 claims should have been permitted to go to a jury. A jury may conclude that a district intentionally discriminated if it can infer that the district acted with "deliberate indifference." See Brown ex rel. R.P. v. Sch. Dist. of Phila., No. 11-cv-6019, 2012 U.S. Dist. LEXIS 104855, at *22-23 (E.D. Pa. July 26, 2012) (collecting cases on the intentionality standard); see also App. 29 (citing Chambers, 827 F. Supp. 2d at 425). A showing of deliberate indifference requires: (1) knowledge that a harm to a federally protected right is substantially likely; and (2) a failure to act upon that

likelihood. Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001). "The 'knowledge' element is satisfied where the public entity has notice of the plaintiff's need for accommodation, and the 'failure to act' element is satisfied by conduct that is 'more than negligent, and involves an element of deliberateness.'" Chambers, 827 F. Supp. 2d at 425 (quoting Duvall, 260 F.3d at 1139). In this instance, the District had knowledge and failed to act, and S.H. proffered significant evidence of both.

A. LMSD Had Knowledge that Harm to S.H.'s Federally Protected Rights Was Substantially Likely.

LMSD had actual notice that S.H. was not disabled and that it was substantially likely that the failure to ensure her inclusion in regular education classes might result in the violation of S.H.'s federally protected rights under the ADA and the Rehabilitation Act. As a rising fifth-grade student, S.H. told her special education evaluator that she did not believe that she belonged in special education, and she repeated this concern to teachers in middle school. App. 928-30. This fact—combined with LMSD's lack of a thorough initial evaluation, the thin quantitative ground for LMSD's first diagnoses of S.H. as learning disabled, S.H.'s subsequent scores on various tests of reading and math as well as state standards tests, and LMSD's flagrantly careless approach to discrepancy-based diagnoses—placed LMSD on notice about a likely violation of S.H.'s educational needs. If there was any doubt, within three months of S.H.'s misidentification as a

student with a disability, in the middle of her fifth-grade year, S.H.'s reading scores surpassed the fifth-grade level. She continued to do well, including making Honor Roll in seventh and eighth grades. Later, in tenth grade, when S.H. formally protested by refusing to attend speech therapy, the District was again put on notice. Furthermore, Dr. Abdullah-Johnson's 2010 Independent Educational Evaluation explicitly informed LMSD that S.H. had been miscategorized as learning disabled and improperly placed in special education. App. 1029; 987-89.

Before the District Court, while conceding that it "regarded" S.H. as disabled, see App. 28, the District claimed that whether or not S.H. was "disabled" was irrelevant for purposes of its motion for summary judgment, contending that "misidentification of a student as disabled under the IDEA would not be a violation of Section 504 unless the student was denied access to programming or discriminated against based upon the believed disability," App. 1261. It urged the Court to find that it did not violate Section 504 or the ADA or discriminate against S.H., primarily because her mother had a choice in whether S.H. was evaluated and then placed into special education programs and classes, and because it claimed S.H. had not proved her exclusion from any regular education "content" versus "classes." App. 1261-62; 144-45, 149.

In response to this argument, the District Court then completely ignored the contradictory evidence that Appellants proferred that S.H. was not

disabled, including evaluations from three separate psychologists. App. 1017-32; 1034-46; 1048-57. Because Appellants offered substantial contradictory evidence that S.H. is not and never has been disabled, the Court should have allowed the case to go to a jury. A jury could have inferred that the District violated Section 504 and the ADA when it excluded S.H. from regular education programming on the basis that she was disabled if, in fact, the jury concluded that S.H. had been incorrectly determined to be disabled. Similarly, a jury could have inferred that the District had acted with deliberate indifference when it continued to insist—even to the District Court—that S.H. was disabled, in contradiction of the testimony of three separate psychologists. The District argued that whether or not S.H. was disabled was "irrelevant" to the dispositive motion; but it should be up to a jury to make a determination first as to whether S.H. was disabled. The jury's opportunity to weigh the District's "regarding" of S.H. as disabled implicates a question of intent that cannot be resolved by the District's merely conceding the fact of its "regarding as." See, e.g., Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 131, 134 (2d Cir. 2008) (jury could find that employer's demotion of plaintiff, an experienced pharmacy worker, from pharmacy department to position in parking lot collecting shopping carts and garbage, on the impression that he was "slow" and had "'something wrong' with him," amounted to actionable discrimination on the basis of a disability he was regarded as having). The question remained

whether S.H. was in fact disabled. If the jury were to conclude that S.H. was not disabled, then the jury could correctly infer that the District acted with deliberate indifference and that its actions, not the mother's ill-informed consent, led to S.H.'s placement in Title I and special education classes, denying her participation in and the benefit of the District's regular education and honors programming.

Moreover, it is not even clear that proof of actual notice of a particular discriminatory act is required when an official policy is the basis of the deliberate indifference. Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 967 (9th Cir. 2010) (intentional discrimination not required when female wrestlers sued university for access to men's program); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007) (finding that college had policy of using sex to lure football candidates creating potential opportunities for sexual harassment for female college students). The Supreme Court's analysis of funding recipients' liability under Title IX for sexual harassment provides guidance on the question of knowledge when a plaintiff must show deliberate indifference. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (specifying that "in cases like this one that do not involve official policy of the recipient entity, . . . a damages remedy will not lie under Title IX unless an official who . . . has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination . . . and fails adequately to respond") (emphasis

added). When the official policy itself is deliberately indifferent to known risks, notice of a particular situation and the opportunity to cure is not necessary. Mansourian, 602 F.3d at 967.

Here, the District was on notice because of the IDEA's statutory warnings about over-identification as well as its own self-assessment in 2006 that it was over-identifying African-American children as needing special education. S.H. was misidentified in 2004. App. 954-55. The District acknowledged that its psychologists had complete freedom to decide who had a disability and who did not in this environment of over-identification. Despite this information, the District did not act to protect S.H. by providing a comprehensive review of African-American students like S.H. placed in learning support to ensure that they were not incorrectly identified, or by requiring specific standards be met to reduce or stop over-identification. Cf., e.g., Lee v. Lee Cnty. Bd. of Educ., 476 F. Supp. 2d 1356 (M.D. Ala. 2007) (describing numerous actions taken by state in response to over-identification of African-American students for special education). Overall, no mechanisms were in place to protect against misidentification despite the known risk. By itself, the failure of this official policy to address a known risk—inappropriately identifying African-American students as having learning disabilities—makes it unnecessary for Appellants to show that the school had knowledge of a particular instance of misidentification specific to S.H.

B. LMSD Failed to Act On Its Knowledge that S.H. Was Not Disabled.

Appellants also satisfied the "failure to act" element of deliberate indifference. They have proffered evidence showing that LMSD failed to act on its knowledge of probable harm to S.H.'s federally protected rights and did so in a way that was "more than negligent" and that involved "an element of deliberateness." Chambers, 827 F. Supp. 2d at 425 (quoting Duvall, 260 F. 3d at 1139).

LMSD was "more than negligent" because, as has been shown above, it acted with gross misjudgment in its handling of S.H.'s evaluations and education. That LMSD acted with "an element of deliberateness" is clear. LMSD continually insisted upon the correctness of its diagnosis of S.H. as learning disabled despite numerous problems and failings with District evaluations and despite mounting evidence to the contrary. Indeed, Appellants established that LMSD was engaged in a campaign to confine S.H. in special education and exclude her from the regular curriculum to as great an extent as possible.

This evidence of LMSD's deliberate indifference toward likely violations of S.H.'s federally protected rights is sufficient to raise a triable issue of fact regarding intentional discrimination. Therefore this Court should reverse the District Court's entry of summary judgment for the District.

In its decision, the District Court collapsed three potentially different standards for intentional discrimination, determining that Appellants had failed to show "bad faith" or "gross misjudgment" or "deliberate indifference." See App. 29 (citing Chambers, 827 F. Supp. 2d at 425). As noted supra, this Court has rejected any such intentionality requirement for IDEA cases. M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996). But even if the Court determines it must apply a "bad faith" or "gross misjudgment" standard under Section 504, Appellants have proffered evidence sufficient for a reasonable jury to find that LMSD engaged in intentional discrimination by acting with bad faith or gross misjudgment toward S.H. "Bad faith" means dishonesty of belief or purpose. See BLACK'S LAW DICTIONARY (9th ed. 2009).[10] As with "bad faith," this Court has not specifically defined gross misjudgment in the context of ADA/Section 504 disability-discrimination claims. However, in disability-discrimination cases, other courts have equated "gross misjudgment" with "gross negligence." See Henneghan v. D.C. Pub. Sch., 597 F. Supp. 2d 34, 37 (D.D.C. 2009); Gabel ex rel. L.G. v. Bd. of Educ., 368 F. Supp. 2d 313, 336 (S.D.N.Y. 2005).

[10]See also Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982) ("[E]ither bad faith or gross misjudgment should be shown before a § 504 violation can be made out . . . ."); D. A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 455 (5th Cir. 2010) (same); Sellers by Sellers v. Sch. Bd. of City of Mannassas, Va., 141 F.3d 524, 529 (4th Cir. 1998) (same).

The concept of gross negligence has been well developed in the context of tort law and is generally taken to refer to a higher degree of negligence or flagrant deviations from the ordinary standard of care. See generally Prosser and Keeton on the Law of Torts § 34, at 211-12 (W. Page Keeton ed., 5th ed. 1984) (discussing gross negligence); see also, e.g., Cohen v. Kids Peace Nat. Centers, Inc., 256 F. App'x 490, 492 (3d Cir. 2007) (applying Pennsylvania law and defining gross negligence as "'a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.'" (quoting Albright v. Abington Mem'l Hosp., 696 A.2d 1159, 1164 (Pa. 1997))). In the context of special education, then, a showing of gross negligence requires something more than mere disagreement with the correctness of an educational service or proof of a violation of IDEA. See Gabel ex rel. L.G., 368 F. Supp. 2d at 334; I.A. v. Seguin Indep. Sch. Dist., No. SA-10-CA-866, 2012 U.S. Dist. LEXIS 102845, at *30-31 (W.D. Tex. July 24, 2012). Instead, a showing of gross negligence—at this stage—requires evidence sufficient to permit a reasonable jury to conclude that LMSD departed grossly from accepted standards among education professionals. See I.A., 2012 U.S. Dist. LEXIS 102845, at *30.

Because there can be no bright-line legal rule for determining when regular negligence crosses into gross negligence, "[g]ross negligence is generally a question of fact for the jury to decide." Cohen, 256 F. App'x at 492. See generally Bronze Shields, Inc. v. N.J. Dep't of Civil Serv., 667 F.2d 1074, 1087 (3d Cir. 1981) ("Because this claim requires proof of intent, an element difficult to establish, summary judgment should be granted with caution."). For this reason, a court should grant summary judgment on the question of gross negligence only when "the case is entirely free from doubt, and no reasonable jury could find gross negligence." Cohen, 256 F. App'x at 492. The same principles should apply also to gross misjudgment and therefore to this case.

Here, Appellants have proffered evidence sufficient for a reasonable jury to find that LMSD flagrantly deviated from a normal standard of care and therefore acted with gross misjudgment in its treatment of S.H. See Gabel ex rel. L.G., 368 F. Supp. 2d at 336 (school district's IEP recommendation "may in itself constitute the type of gross negligence or reckless indifference Section 504 is meant to address") (citing B.D. v. DeBuono, 130 F. Supp. 2d 401, 439-40 (S.D.N.Y. 2000).

LMSD's deviations from a normal standard of care are numerous. Its bad-faith actions included: (1) deliberating misleading Ms. Durrell into believing that Title I offered enrichment, rather than remedial, instruction, App. 1098, 1105-

06; (2) Dr. Cosden's deliberate lie that he had destroyed testing protocols which could have and should have been made promptly availableduring the November, 2009 IEP meeting, App. 961-63[11]; and (3) deliberately leaving out the results of Dr. Johnson's independent testing—which found S.H. was not disabled—in a 2010 school reevaluation report.

Gross misjudgment actions included the above, plus: (1) diagnosing S.H. with a learning disability despite failing to perform a classroom observation, as required by Pennsylvania regulations, App. 1087; (2) basing the diagnosis of S.H. on extremely thin quantitative grounds and failing to supply any training, policy, or guidance about diagnosing a learning disability based on discrepancies between a student's intellectual ability and achievement levels, App. 1167, 967, 1088, 1203-04, 1193-95; (3) ignoring S.H.'s fifth-grade reading scores demonstrating above-grade-level reading skills, App. 1240-46, 990-92, 1001; (4) ignoring S.H.'s own view that she should not go into special education, App. 950, (5) ignoring S.H.'s pleas in middle school that she should be out of special education, App. 928-30; (6) ignoring S.H.'s unilateral decision that she would no longer be attending speech therapy in tenth grade, App. 929-31; (7) failing to

[11]This flagrantly violates IDEA regulations, which guarantee parents "an opportunity to inspect and review all education records with respect to . . . [t]he identification . . . of the child." 34 C.F.R. § 300.501.

consider significant personal circumstances that may have affected S.H.'s performance in her evaluations, App. 949-956; 987-89; 1018; 1053; (8) failing to recognize S.H.'s satisfactory performance at school and on standardized tests as counter-evidence of its diagnosis, App. 1240-46; 990-92; 995-96; 1019-20; and (9) ignoring or minimizing the finding from Dr. Abdullah-Johnson's IEE that S.H. was not and never had been disabled, App. 1029.

All of these actions by the District went beyond a "mere disagreement" or dispute about whether S.H. had a disability. These actions, particularly in the context of a district that knew at least as early as 2006 of the over-identification of its African-American students, reflected "more than" simple error. Furthermore, Appellants submitted testimony from three separate expert witnesses supporting their allegations that LMSD's diagnosis was erroneous: information a reasonable jury could have considered in determining that the District was deliberately indifferent, and information that was clearly contradictory to the District's experts. See App. 1029; 1037; 1230-31; 1054; 1249-50.

When examining the sufficiency of the evidence upon review of a grant of summary judgment, courts are to consider the totality of the evidence and draw all available inferences in favor of the non-moving party. See C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 162 (3d Cir. 2005); Hood v. Pfizer, Inc., 322 F. App'x 124, 130 (3d Cir. 2009). Furthermore, in an ADA/Section 504

discrimination case in particular, "[a] defendant's intent can be inferred from the totality of the circumstances." T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist., No. 08-CV-28, 2012 U.S. Dist. LEXIS 64563, at *26 (S.D. Cal. May 8, 2012). Given the breadth and diversity of evidence described above, it is certainly possible that a reasonable jury might infer, taking into account the totality of the circumstances, including S.H.'s contradictory evidence that she is not and never was disabled, that LMSD acted with bad faith, gross misjudgment, deliberate indifference, or some combination thereof. For this reason as well, Appellants have offered evidence sufficient to place the fact-laden issue of intentional discrimination issue before a jury. See, e.g., Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 191 (3d Cir. 1999); Eshelman v. Agere Sys., 554 F.3d 426, 434 (3d Cir. 2009).

CONCLUSION

The District Court erred in granting Appellee's Motion to Dismiss Appellants' IDEA claim, because it incorrectly concluded that the IDEA does not allow an administrative hearing for a child misidentified as disabled. This was error. Even children who are not disabled may be subject to the identification and evaluation procedures required of school districts under the IDEA's "Child Find" provisions. When these identification and evaluation procedures are performed in a manner that is improper and injurious, nondisabled children who have been improperly placed in special education should have access to an IDEA administrative hearing before a trained special education Hearing Officer. This conclusion is further supported by the Congressional findings and history of the IDEA as well as by important policy considerations. For these reasons, this Court should reverse the District Court's decision and allow S.H. to take her IDEA claim before a Hearing Officer.

The District Court also erred in granting summary judgment to the Appellee on S.H.'s ADA and Section 504 claims, because it improperly drew inferences in LMSD's favor, overlooked evidence, and failed to consider the totality of the circumstances regarding LMSD's actions. No court has held that intentionality is required to prove a "regarded as" claim, and such a requirement would be contrary to Alexander v. Choate's concept of "thoughtlessness."

Even if intentional discrimination were required, then no matter what standard this Court may use to determine "intentional discrimination" (bad faith, gross misjudgment, deliberate indifference, or some combination thereof), Appellants have proffered evidence sufficient to permit a reasonable jury to find that LMSD engaged in intentional discrimination against S.H. For this reason, and because intentional discrimination is a very fact-intensive question that is best reserved for a jury, this court should reverse the grant of summary judgment below and allow the case to go before a jury.

Respectfully submitted,

/s/ Sonja D. Kerr
Sonja D. Kerr (Pa. Bar No. 95137)
Benjamin D. Geffen (Pa. Bar No. 310134)
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Pkwy., 2nd Floor
Philadelphia, PA 19103
Phone: 215-627-7100
Fax: 215-627-3183

Dated: December 19, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)-(C) because this brief contains 10,804 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2007 word-processing software.

3. This brief complies with L.A.R. 31(c) because the text of the electronic brief is identical to the text in the paper copies, and a virus detection program, Microsoft Security Essentials version 4.1.0522.0, has been run on the electronic file and no virus or risk was detected.

Respectfully submitted,

/s/ Sonja D. Kerr

Sonja D. Kerr (Pa. Bar No. 95137)
Benjamin D. Geffen (Pa. Bar No. 310134)
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Pkwy., 2nd Floor
Philadelphia, PA 19103
Phone: 215-627-7100
Fax: 215-627-3183

Dated: December 19, 2012

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

/s/ Sonja D. Kerr

Sonja D. Kerr (Pa. Bar No. 95137)
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Pkwy., 2nd Floor
Philadelphia, PA 19103
Phone: 215-627-7100
Fax: 215-627-3183

Dated: December 19, 2012

CERTIFICATE OF SERVICE

I, Sonja D. Kerr, hereby certify that on this date, I caused a true and correct copy of Appellants Brief to be served via the Court's Electronic Case Filing system, on December 4, 2012, I caused a true and correct Joint Appendix (Volumes I through XI) to be sent via regular mail, and on December 13, 2012 a Corrected copy of Volume XI with updates to the Joint Appendices were sent regular mail to the following:

Jenna B. Berman
Michael Kristofco
Wisler Pearlstine
460 Norristown Road, Suite 110
Blue Bell, PA 19422-0000

Also, I hereby certify that on this date, I caused ten true and correct copies of the Brief of Appellants and four copies of the Joint Appendix (Volumes I through XI) to be hand-delivered to the following:

Marcia M. Waldron, Clerk
Office of the Clerk
United States Court of Appeals
For the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, Pa 19106

Dated: December 19, 2012

/s/ Sonja D. Kerr
Sonja D. Kerr (Pa. Bar No. 95137)
Benjamin D. Geffen (Pa. Bar No. 310134)
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Pkwy., 2nd Floor
Philadelphia, PA 19103