No. _____

In the Supreme Court of the United States

CLAUDIA ESTRADA, as next friend for J.E.,
Petitioners,

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The various District and Appellate Courts across the United States have established a standard of liability for a school district, pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, that when a student with a disability has been molested by a staff person, there must be an *inference* that the school district has acted in *bad faith* or there has been a *gross misjudgment* of the student's educational plan, such that the professionals given the duty to implement the child's educational plan, grossly deviated from professional standards of care, in doing so. The Fifth Circuit has added an additional "predicate" to the analysis by requiring the student to first show their rights pursuant to the *Individuals With Disabilities Education Act* ("IDEA"), 20 U.S.C. §1401 *et seq.,* have been violated. This requirement can result in a finding, as it has in the instant case, that if a student has received academic benefit from his education, passed his grades and gone on to college, the fact he was molested by one of teachers, is of no matter.

Accordingly, the question presented for this Court is whether courts deciding claims based upon a violation of Section 504 must first consider if the student has received academic benefit from the educational plan pursuant to IDEA.

LIST OF INTERESTED PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Supreme Court Rules, Petitioners hereby certify that they know of no persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case other than the parties noted in the styling and caption above, and their counsel.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, including J.E., a student with a disability and his natural mother and guardian, Claudia Estrada, respectfully petition the Supreme Court for a *Writ of Certiorari* to review the judgment of the Fifth Circuit Court Of Appeals, which affirmed a lower court ruling in the Federal District Court of Texas, Western District- San Antonio Division based upon a *Motion For Summary Judgment*.

OPINIONS BELOW

There are six (6) opinions below, first in the District Court and later culminating in the Court Of Appeals ruling that is the subject of this petition. In chronological order they are as follows; four (4) opinions in this case issued by the United States District Court of Texas, Western District, San Antonio Division. In the first opinion (App. E, 25-40) the District Judge confirmed a previous denial of J.E.'s claims pursuant to Section 1983. That opinion and order is dated August 22, 2011. It is not reported and is included with this Petition in the Appendix. It is not relevant to this petition. The second opinion (App. D, 15-24) was based upon the School District's *Motion For Summary Judgment* and rejected his claims pursuant to Section 504 of the Rehabilitation Acts of 1973 and the Americans With Disabilities Act. That order is dated September 28, 2011, is unreported and it too is included with this Petition in the Appendix. It was the basis of the appeal to the Fifth Circuit. The third opinion (App. C, 13-14) was merely an order for severance and final judgment. That order is dated June 12, 2013, is not reported but is included with this Petition in the Appendix. The fourth opinion (App. B,

11-12) is the "Bill of Costs." It too is dated June 12, 2013 and included with this Petition in the Appendix.

The first opinion from the Fifth Circuit (App. A, 1-10) addresses J.E.'s claims pursuant to Section 504 and the ADA and affirms the District Court's granting of the School District's *Motion For Summary Judgment*. It is considered "unreported" but is otherwise available at 2011 U.S. App. LEXIS 13978, 575 Fed. Appx. 541. That opinion of the Court of Appeals is dated July 23, 2014 and it too is included with this Petition in the Appendix. It is of this opinion that J.E. filed his petition. J.E. filed a *Petition For Rehearing* is not attached but is correctly cited to the appellate record below. The second document from the Fifth Circuit reports a denial of this request (App. F, p. 40-41). That order is dated August 27, 2014 and is not reported.

STATEMENT OF THE JURISDICTION

The is case is a civil rights case. Jurisdiction in the District Court below was originally pursuant to the 14th Amendment to the United States Constitution as contemplated by 42 U.S.C. §1983, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794a ("Rehabilitation Act") and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101. J.E. appealed the Section 504 and ADA claims to the Court of Appeals for the Fifth Circuit, which had jurisdiction for the appeal pursuant to 28 U.S.C. §1291. The panel issued their decision on July 23, 2014. J.E. filed a *Petition For Rehearing* which was rejected on August 27, 2014. Jurisdiction in this Court is pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS AFFECTED

This case arises first arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and how it comports with the *Individuals With Disability Education Act* ("IDEA"), 20 U.S.C. §1400 *et seq*.

Section 504 of the Rehabilitation Act of 1973 states (in part):

> "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

The Individuals With Education Act of 1973, 20 U.S.C. §1400, states (in part):

> (d) Purposes The purposes of this chapter are— (1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected

STATEMENT OF THE CASE

As the District Court dismissed J.E's claim on summary judgment, which was later affirmed by the 5th Circuit Court of Appeals, what follows are "the Plaintiff's version of the facts" Scott v. Harris, 550 U.S. 372, 378 (2007).

A. Factual Resume

In the Spring of 2006 at the San Antonio Independent School District ("SA ISD" or the "School District") a number of the most severely physically and mentally disabled students were molested by their Special Education Aide in the bathroom that is part of the Life Skills classroom. In order to prevent a reoccurrence of such a tragedy the District implemented a practice whereby any disabled student having to use that bathroom would require supervision by two staff members instead of one. The bathroom has a toilet that is made accessible for both male and female students with disabilities who require assistance when both urinating or defecating (App. 3, 19; (DE# 00512427878, p. 8-9) This bathroom does not have a "low-hanging" urinal for males who do not need assistance in urinating (like J.E.).

In the Spring of 2008, the *Admission, Review and Dismissal* ("ARD") Committee met to develop an *Individualized Education Plan* ("IEP") for J.E., a student with multiple physical and cognitive impairments. He uses a wheelchair but it is electronically powered, meaning he does not need assistance getting around school. Importantly, he is able to use a bathroom with an accessible urinal on his own, which is noted on the IEP. The ARD report was

twenty-five pages, of which for the most part, was boiler-plate language exactly the same for all other students receiving special education services. In fact, much of the most relevant and material aspects of the document otherwise related to J.E.'s needs, were left blank. There is absolutely nothing in that document that addresses where J.E. would take care of his personal needs. There is nothing in the document that addresses whether or not anybody was assigned to be with him during the day, whether it be in the classroom, the halls or the bathroom available to the general school population or one available for students who lack self-help skills, in the Life Skills classroom (App. 3, 20; DE# 00512427878, p. 12-13, 14-17).

During the Spring of 2008 J.E. was in a classroom with his Aide, Bret Jernigan, when the teacher observed Jernigan showing a number of boys, including J.E., "soft porn" on a computer and also taking pictures of them. The teacher was very concerned and immediately wrote a detailed letter to the School Principal and that Jernigan had also been admonished previously for distracting students. She also was troubled by the fact that when approaching Jernigan, J.E. attempted to warn him of her approach (App. 3-4; (DE# 00512427878, p. 20-21).

The Principal asked an Administrative Assistant to investigate the complaint. The Assistant never spoke with the teacher making the complaint, never spoke with J.E. about why he attempted to protect Jernigan, nor did he speak with any other students or their parents. He never went to the room where the incident occurred nor looked at the computer for those pictures or for any others. When meeting with

Jernigan the Assistant never showed him the complaint by the teacher, never addressed why J.E. was protecting him or asked to see his phone for the pictures taken. If so, he likely would have found homo-erotic pictures of young males, as the District did later, on a second investigation. The Aide took no notes about his investigation nor wrote anything in Jernigan's employment file about this incident, though he did note his concern that Jernigan seemed to work with little or no supervision. It is noteworthy that there is absolutely nothing in J.E.'s IEP, check-the-box, notes or otherwise, that even comes close to addressing, Jernigan's presence in the classroom, at all (DE# 00512427878, p. 20-21).

In the fall of 2008 J.E. told his mother he had been molested by Jernigan in the Life Skills bathroom on at least three occasions. It is noteworthy, once again, that there is absolutely nothing in J.E.'s IEP, check-the-box, notes or otherwise, that even comes close to addressing, Jernigan's presence in the bathroom with J.E., at all. Nor is there anything in J.E.'s IEP, check-the-box or otherwise, that even comes close to addressing, why he needed to be at the Life Skills bathroom at all, in light of the fact he could urinate independently at the appropriate lower-hanging urinal. Later, when deposing the teacher in charge of supervising the Life Skills Classroom and bathroom, she reported that even though she knew the school policy that two staff were supposed to be with all students using the bathroom, she observed J.E. and Jernigan going into the bathroom alone, on a number of occasions, and did nothing to stop it (DE# 00512427878, p. 22-23).

B. Procedural Resume - The Decisions Below

In his *Original Complaint* J.E. argued that his rights pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 were violated because the SA ISD grossly misjudged his educational plan and in addition, and in the alternative, that the professionals given the duty to implement the plan, grossly deviated from professional standards of care, in doing so. He also argued that the District violated his rights pursuant to the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.* by failing to provide him, among other things, an accessible urinal (App. 15-25).

The SA ISD never responded to J.E.'s argument that the "check-the-box" IEP was deficient but did address the Section 504 and ADA claims. In his *Order* the District Judge also never addressed the "check-the-box" argument or failure of the IEP to be appropriately individualized but nevertheless did grant the School District's *Motion For Summary Judgment* on all grounds. In his appeal to the Fifth Circuit J.E. argued that the District failed to provide him reasonable accommodations for his disability, pursuant to the ADA and grossly mismanaged his educational plan, pursuant to Section 504. The School District argued (DE# 00512500542, p. 18-19) that the District Court's decision should be affirmed. Importantly, Counsel *cited* Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012) for the proposition that when a student receives academic benefit from the program provided by the school, as J.E. had received in the instant case, he cannot later claim that the District has grossly

misjudged his educational plan (DE# 00512500542, p. 19-20).

In his *Reply Brief* J.E. noted that the evidence presented by the School District regarding accessibility issues was inconsistent and contradictory (DE# 0051233089, p. 6). In addition, that the School Principal at her deposition testified that the incident in the classroom where Jernigan showed the students pornography should have been investigated for sexual harassment, an inquiry with much greater scrutiny and accountability than the one actually provided. She later substantively changed her deposition testimony (DE# 0051233089, p. 9). J.E. believes that either one of these problems with the District's contradictory evidence, whether be taken together or each individually, should have been sufficient to defeat the District's *Motion For Summary Judgment.*

Nevertheless, the Fifth Circuit Court of Appeals affirmed the District Court's decision. The panel wrote that J.E. needed help with transfers to and from the bathroom (App. 2), which was not true. In regard to the various problems with J.E.'s IEP, the panel characterized them as procedural defects (App. 7). Most importantly, and in regard to this appeal, the panel noted that J.E.'s *Rehabilitation Claim* failed because "he is unable to make the preliminary showing that the District failed to provide him a *Free Appropriate Public Education,* pursuant to IDEA. Estate of Lance v. Lewisville Independent school District, 743 F.3d 982, 995 (5th Cir. 2014). Specifically, that because of J.E.'s "strong academic performance" he received the "academic benefit" required to receive a *Free Appropriate Public Education* as contemplated by

IDEA, *relying upon* Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012). As such, they reasoned J.E. could not show there was a gross misjudgement of his educational plan under Section 504 (App. 6-8).

J.E. filed a "Petition For Rehearing" (DE# 00512725124, August 6, 2014). It addressed, among other things, the Panel's reliance upon Hovem which specifically dealt with "academic benefit" such reliance was misplaced. J.E. argued then, as he does now, that whether or not he passed all his tests, graduated high school and went on to college, is immaterial in the analysis of whether not he was a victim of discrimination based upon his disability, a molestation which is uncontroverted only occurred because of J.E.'s multiple disabilities. J.E. argued that in any case he had provided sufficient "justifiable inferences in the light most favorable to the non-movant," D.A. ex rel. Natasha A., v. Houston Independent School District, 629 F.3d 450, 453 (5th Cir. 2010), to meet his burden regarding the type of, and quantum of, evidence required to defeat a motion for summary judgment.

REASONS FOR ALLOWANCE OF THIS WRIT

There are a number of reasons why this Petition should be granted. This writer is under no illusion as to the difficulty in having a case like this heard before the Supreme Court. It is not reported below and to the knowledge of this writer, there is no major "split in the circuits" as of yet, on the issue presented. In fact, the Circuits are noticeably silent on the issue because of the paucity of cases, passing though the appellate circuit, that have gone to trial. Rather this type of a case is much more likely to be disposed of and decided by a *Motion To Dismiss* or a *Motion For Summary*

Judgment, meaning students with disabilities like J.E. will never see the light of a courtroom and nor will the Defendant School District feel the heat from that light. In fact, this writer, who significantly works in this area of the law, is only aware of one case that has gone to trial in the United States, on a Section 504 gross misjudgment claim, Rideau v. Keller Indep. Sch. Dist., 978 F. Supp. 2d 678 (N.D. Tex.- FW Div., March 5, 2013). Here a jury, finally getting to hear similar facts, not surprisingly found in favor of the student.

Considered together, the facts as presented below will lead to the inescapable conclusion that the Fifth Circuit credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by J.E., the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," Boag v. MacDougall, 454 U. S. 364, 366, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982) (O'Connor, J., concurring), this Court should now intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of this Court's prior precedents. Brosseau v. Haugen, 543 U.S. 194, 197-198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

I. This Court Should Grant This *Petition* Because To Do Otherwise Would Create A Precedent That Is Morally Repugnant And Offensive

This writer's first appeal is simply based upon fundamental fairness and moral grounds. Surely, for the Fifth Circuit to hold that if a student passes all their grades and goes to college, it is not relevant if

they were molested, is a proposition that this Counsel finds offensive. It should not benefit from future citation and reliance, as already occurred by the San Antonio ISD in their brief, and the Fifth Circuit in their *Order*. On behalf of J.E. and his mother, we hope and pray that this Court, agrees and grants the *writ*. It is the only way this horrendous holding can be eliminated otherwise just about any time of abuse can be obviated as long as the student passed from grade to grade.

Of course, this request is not only made on equitable and moral grounds but has legal merit as well. Second, the *Writ* should be granted because the decision of the Fifth Circuit is clearly erroneous. Third, the *Writ* should be granted because the Fifth Circuit has created an unwarranted impediment requiring a student to first demonstrate his educational plan violated the *Individuals With Disabilities Education Act* (IDEA) before he can bring a claim that he was a victim of discrimination based upon disability. Fourth, and notwithstanding this additional hurdle added by the Fifth Circuit, this *Writ* should be granted because J.E. can demonstrate, in any case, that because the District failed to provide him non-academic benefits, the educational plan provided by the District in any case violated the *Individuals With Disabilities Education Act*.

II. This *Petition* Should Be Granted As The Decision By The Fifth Circuit Is Clearly Erroneous

First and foremost, the Court of Appeals erred by not following well-settled jurisprudence regarding cases based upon a *Motion For Summary Judgment*.

Specifically the panel failed to view the evidence in the light most favorable to J.E., the plaintiff below, with respect to central facts of the case. By failing to credit evidence that contradicted with some of its material factual conclusions, the Fifth Circuit improperly weighed the evidence and resolved factual disputes in favor of the moving party, in this case the San Antonio Independent School District. The Fifth Circuit should have acknowledged and credited Plaintiffs' evidence that the School District grossly misjudged his *Educational Plan*, and that the professionals given the duty to implement his Educational Plan, grossly deviated from professional standards of care in doing so. As such, this Court should reverse the judgment of the courts below and allow a jury to resolve the significant fact issues raised by this case. *See* Tolan v. Cotton, 134 S.Ct. 1861; 188 L.Ed 2d. 895 (2014).

As a starting point, it is well-settled that an *Individualized Educational Plan* (IEP) is the cornerstone of the IDEA, Honig v. Doe,484 U.S. 305, 311(1988); White ex rel. White v. Ascension Parrish School Board, 343 F.3d 373, 378 (5th Cir. 2003), meaning that if a service is to be provided a special education student it must be founded in the IEP. J.E.'s IEP is devoid of the information integral to an appropriate educational plan.

If the evidence in construed in J.E.'s favor, as it must be, a reasonable juror could easily find that the San Antonio Independent School District, grossly misjudged J.E.'s educational plan (or that the professionals given the duty to implement the educational service plan grossly deviated form professional standards of care) when having Jernigan

assist him in the bathroom when there was nothing in his IEP, as required by Honig, specifically addressing why he needed assistance in the bathroom, in the first instance. In fact such a finding by a juror would be reasonable in light of the fact the IEP specifically stated he did not need help toileting. Moreover, the panel failed to address this factual issue.

A reasonable jury could continue with such findings, in light of the fact J.E. had a powered wheelchair and did not assistance in transversing all areas of the school though Jernigan followed him around anyway. Again, there was nothing in J.E.'s IEP or written directive, as required by Honig, addressing this issue. The panel also failed to address this factual issue.

A reasonable juror could also find the District grossly misjudged J.E.'s educational plan as he did not need assistance in the classroom yet Jernigan followed him into class around without a specific IEP, as required by Honig, or written directive. The panel also failed to address this factual issue.

A reasonable juror could also find in favor of J.E. that the district grossly misjudged his educational plan and that his teachers grossly deviated from professional standards of care when he was taken to the Life skills bathroom, which did not have a lower hanging urinal, and was forced to use a toilet where he required assistance, when lower hanging urinals were reportedly available across the campus, that he could use independently. The panel failed to address this issue.

A reasonable juror could also find in favor of J.E. that the district grossly misjudged his educational plan

and that his teachers grossly deviated from professional standards of care, when the teacher at the Life Skills Classroom observed Jernigan taking J.E. to the bathroom alone on a number of occasions, even though she knew that the official school policy was that two staff were to be with each student who went into the Life Skills bathroom. The panel failed to address this issue.

A reasonable juror could also find in favor of J.E. that the district grossly misjudged his educational plan and that his teachers grossly deviated from professional standards of care when the Administrative Aide failed to investigate the allegations against Jernigan, without any sense of diligence or depth. The panel failed to address this issue.

A reasonable juror could also find in favor of J.E. that the district grossly misjudged his educational plan and that his teachers grossly deviated from professional standards of care when the Principal failed to have her Administrative Aide investigate the allegations in the classroom, as sexual harassment. The panel failed to address this issue.

A reasonable juror could also find in favor of J.E. in light of the fact the School Principal changed her deposition testimony after the deposition or that the school official in charge of accessibility wrote an affidavit and attached pictures, that contradicted his testimony. The panel failed to address this factual issue too.

Notably, a juror could also find that the District grossly misjudged J.E.'s educational plan when failing to investigate the incident in the classroom, as one of

sexual harassment, as the School Principal first testified as the correct standard of inquiry. M.P. ex rel. K. v. Indep. Sch. Dist. No. 721, 439 F.3d 865, 868 (8th Cir. 2006) (M.P. II) [school district refuses reasonable accommodations under §504 when it fails to exercise professional judgment in response to changing circumstances or new information]. The panel failed to address this factual as well.

The Opinion of the Fifth Circuit was clearly erroneous as there are a number of material facts, some contested, some not, where a reasonable juror could find an inference that the district grossly misjudged J.E.'s educational plan or that his teachers grossly deviated from professional standards of care in implementing that plan, or both.

In short how can an educational program that provides absolutely no written direction for school personnel, as to the most intimate and integral parts of J.E.'s daily living activities, be considered as appropriate, as the Fifth Circuit found? Surely, if even one juror would agree with J.E., this *Writ* should be granted.

The Supreme Court has long recognized the propensity for the Court's to treat discrimination cases with a higher burden on a Plaintiff. In Roger Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 141; 120 S. Ct. 2097, 2105; 147 L.Ed 2d 105, 116 (2000), the Court noted that the exercise of looking to the facts and the reasonable inferences from those facts is particularly crucial in cases regarding discrimination "as the question facing triers of fact in discrimination cases is both sensitive and difficult." This standard

should be adhered to for J.E., a student with multiple disabilities.

For all these reasons noted above this Court should grant J.E.'s writ.

III. The Requirement That A Student With A Disability First Show His Educational Plan Violated The *Individuals With Disabilities Education Act* Before He Can File A Complaint For Discrimination Based Upon Disability Creates A Barrier Not Warranted By The Law

In their Opinion the Panel cited Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014) for the proposition that a student must show that their educational plan was deficient under IDEA before they could show that the plan was so defective, it could satisfy the more strenuous "gross misjudgment" standard. On first pass, the argument has some sense to it but on further review we see that it conflicts with both well-settled and emerging caselaw.

First and foremost, it is well-settled that Section 504 and IDEA are two different statutes, with differing intent and protections considered. The Rehabilitation Act is a federal anti-discrimination statute designed to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Delano-Pyle v. Victoria County, 302 F.3d 567, 574 (5th Cir. 2002).

The primary difference between the *Individuals With Disabilities Education Act* and Section 504, is that while the IDEA focuses on students' progress in relation to their own potential, Section 504 requires

courts to consider whether students with disabilities are receiving educational services as effective as those made available to their non-disabled peers. As such a claim based upon discrimination based upon disability, need not show a violation of IDEA, K.M. v. Tustin United Sch. Dist., 725 F.3d 1088 (9th Cir. 2013), as the Fifth Circuit, currently demands. As there is a split in the circuits on this issue, this *Writ* should be granted.

IV. Even If A Student With A Disability Must First Show His Educational Plan Violated The *Individuals With Disabilities Education Act* Before He Can File A Complaint For Discrimination Based Upon Disability J.E. Has Met That Burden

The Panel noted that J.E. argued he had a claim that the School District violated his rights pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 ("Rehab Act").

Nevertheless, the Panel rejected J.E.'s claim that the District *grossly mismanaged* his *educational plan* apparently and substantially in part, because J.E. had a sufficient academic experience to graduate the high school successfully and go to college, thus evidencing that the *Individualized Educational Plan* ("IEP") provided him by the School District could not have been a violation of IDEA, a predicate for his gross *misjudgment claim,* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014) *relying upon* Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012).

The Panel misconstrued Hovem and the caselaw upon which it relies upon. In that decision, the Panel

noted that Per Hovem was a student with a learning disability who graduated high school and went on to college, notwithstanding allegations of various inadequacies in his IEP. This decision was clearly based upon whether or not Hovem received academic benefit, not only by looking solely from any benefits derived from his IEP but relative to the entire educational experience provided by the District.

In that case the Fifth Circuit looked at the relevant standards enunciated in Board of Education of Hendrick Hudson Central School District- Westchester County v. Rowley, 458 U.S. 176, 200; 102 S. Ct. 3034, 73 L.Ed 2d 690 (1982) ["Rowley"] and further clarified by the Fifth Circuit in Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir. 1989), *cert denied*, 522 U.S. 1047 (1998) ["Michael F."] and determined Hovem received academic benefit from his IEP and his entire educational experience at the school, sufficient to assure he received a *Free Appropriate Public Education* according to IDEA.

Pursuant to Fifth Circuit caselaw, and used throughout the United States, Michael F. stands for the proposition that to determine whether or not a student received a *Free Appropriate Public Education* as contemplated by IDEA, a Court must determine whether or not the student's IEP was individualized, was developed through collaboration with key stakeholders, was individualized based upon the student's unique and individualized needs and last, whether the IEP provided academic and *non-academic benefit*.

While Hovem relied upon the academic component, its use in the J.E. cause is misplaced. Rather the Panel

should have looked to determine whether or not J.E. received non-academic benefit. It did not. The underlying facts in this case are absolutely different. As we know, J.E. was molested by his aide. Surely, a student who is molested by his aide surely raises a fact issue, at the very least, as to whether or not he received non-academic benefits, from the School District. As noted above, the failure to assure non-academic benefit is also violation of IDEA, notwithstanding the passing grades. Further, the Panel relied too heavily upon grades and academic benefit. Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036, 1047 (5th Cir. 1989).

In short, the caselaw starting with Rowley and moving through the Michael F. decision, and more recently Hovem regarding *academic benefit*, was incorrectly applied in this cause.

As the Fifth Circuit erred when relying too much on J.E.'s grades and by failing to consider that he did not receive *non-academic benefits* from the educational plan offered. As such, his claim based upon a gross misjudgment of his educational plan should have been permitted to proceed and this *Writ* should be now granted.

CONCLUSION

It is of great importance for all disabled children, especially those who are at extremely dependent upon others for their care, and at risk of molestation and abuse, that the Court assure that the God-given impediments they have, requiring them to have special educational services pursuant to IDEA, does not become an additional barrier to seeking justice in our Courts. In recognizing the propensity to treat

discrimination cases with a higher burden on a Plaintiff, the Supreme Court noted in Reeves that the exercise of looking to reasonable inferences from facts is particularly crucial in discrimination cases.

Petitioners ask this Honorable Supreme Court, to be mindful that there is a strong presumption, and strong public policy consideration as well, that statutes of rehabilitation, like *Section 504 of the Rehabilitation Act of 1973 and the Americans With Disabilities Education Act,* should be construed in the best light for the child with a disability and not the school district. This presumption and perspective, is best-noted in the following quotation:

> "Statutes of rehabilitation should be construed in a liberal and humanitarian mode thus effectuating successfully the legislature's objective intentions. Such construction of rehabilitative statutes promote the public interest, public welfare, public health, public state policy and the police powers. Such salutary constructions properly disregard technical and meaningless distinctions but give the enactment (like IDEA in this case) the most comprehensive application of which the enactments are susceptible without violence to the language therein. Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear, 550 S.W.2d 550, 563 (Tex. App. – Beaumont, 1994)." *see also* Tchereepnin v. Knight, 389 U.S. 332, 336 (1967) [remedial legislation should be construed broadly to effectuate its purpose].

Importantly, the Supreme Court underscored in Reeves at p. 148, that lower Courts should not treat discrimination cases with more scrutiny than other cases dealing with ultimate questions of fact, *citing* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 524; 113 S. Ct. 2742; 125 L. Ed. 2d 407 (1993).

For any and all the above noted reasons, Petitioners respectfully request their *Petition For Writ Of Certiorari* be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-50609

[Filed July 23, 2014]

CLAUDIA ESTRADA, As Next Friend of J.E.,	)
Plaintiff – Appellant	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT	)
Defendant – Appellee	)

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:13-CV-513

Before DAVIS, ELROD, and COSTA, Circuit Judges.

PER CURIAM:[*]

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

A San Antonio Independent School District employee molested a special needs high school student, who brought Americans with Disabilities Act and Rehabilitation Act claims against the District. He asserted that the District failed to provide reasonable accommodations for his disability and grossly mismanaged his educational plan. The district court dismissed the claims on summary judgment, and this appeal followed.

I.

Pursuant to the Individuals with Disabilities Education Act (IDEA), schools must design plans, called Individualized Educational Programs (IEPs), which give disabled students "meaningful educational benefit[s]." *Klein v. Indep. Sch. Dist. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013). "IEPs are created and periodically reviewed following meetings at which parents, teachers, other school personnel, and educational experts all participate." *Id.* at 395 (citing 20 U.S.C. § 1414(d)(1)(B)).

J.E., who brings this case through his mother, Claudia Estrada, was a student at Brackenridge High. He graduated and now attends college. J.E. suffers from cerebral palsy, is confined to a wheelchair, and needs help with transfers to and from the bathroom.

The District formulated an IEP for J.E. based on the recommendations of an Admission, Review, and Dismissal panel comprised of J.E., his mother, teachers, administrators, and special education staff. Over the course of J.E.'s pre-K–12 education, that panel met 28 times to formulate and reformulate his

IEP. J.E. now identifies several flaws with the May 2008 IEP that he and his mother signed and agreed to, and which was in effect when the sexual assaults occurred. For instance, a box next to the line "Mobility Needs" was checked but no additional information was provided; a box for Adaptive Equipment was left blank; and the IEP's Narrative Section says nothing about those and other missing or incomplete items. Furthermore, the IEP form contained a checked "NO" box next to the question whether J.E. "requires daily assistance with toileting," despite the fact that J.E.'s physical therapist reported to school officials that he could not move from his wheelchair to the toilet alone.

In early 2006, a number of years before the incidents that gave rise to this lawsuit, a Brackenridge employee sexually abused three disabled students in a school bathroom. After those incidents, Brackenridge enacted a new policy, announced orally but not put in writing: two employees were required to be in a restroom with a disabled child at all times. But one-person transfers still sometimes occurred when other student aides were unavailable. This was consistent with the District's special education handbook, which demonstrates how a single staff member can safely transfer a student from a wheelchair to a toilet without extra assistance.

Later in 2006, the District hired Bret Jernigan, first as a substitute teacher and eventually as one of several support personnel for disabled students. In the spring of 2008, Brackenridge's principal assigned Jernigan to accompany J.E. and assist him during the school day with his mobility needs. Jernigan attended most of J.E.'s restroom visits with a coworker. Sometimes,

however, no other adult was available to assist Jernigan, and he accompanied J.E. alone. Jernigan molested J.E. on three of those occasions. After the third incident, J.E. disclosed to his mother what had happened, and she told Brackenridge officials. Upon learning of the events, the Brackenridge principal filled out a critical incident report and met with Jernigan. He confessed soon afterwards.

J.E. brought suit in the Western District of Texas, alleging claims under Title IX, section 1983, the Rehabilitation Act, and the Americans with Disabilities Act (ADA).[1] The district court first granted summary judgment on the section 1983 claim, and later, in a separate opinion, granted summary judgment on the remaining claims. This appeal involves only the ADA and Rehabilitation Act claims.

II.

The district court's grant of summary judgment is reviewed *de novo*. "Summary judgment is appropriate when, viewing the evidence and all justifiable inferences in the light most favorable to the non-movant, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010). We are "not limited to the district court's conclusions but can affirm a district court's judgment on any grounds supported by the summary judgment record." *Cabrol v. Town of Youngsville*, 106 F.3d 101, 105 (5th Cir. 1997).

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[1] J.E. also brought claims against Jernigan that the parties later settled.

Americans with Disabilities Act Claim

In support of the ADA claim, J.E. alleges that the District: (1) failed to have an accessible, safe bathroom for a wheelchair-bound student; (2) failed to provide him with two-person transfers; (3) did not have accessible doors across the campus that he could utilize; and (4) did not enact an evacuation plan for him in case of an emergency. These failures to accommodate, J.E. contends, constitute intentional discrimination that allows him to recover compensatory damages. *See D.A.*, 629 F.3d at 453–55 (requiring plaintiffs to show intentional discrimination to recover compensatory damages under the ADA).

Undisputed evidence rejects the factual predicate for each of these claims. The bathroom that J.E. utilized had safety devices installed to assist handicapped students. Beyond that, several urinals in Brackenridge's main building were handicapped accessible. Two Brackenridge employees accompanied J.E. for the vast majority of his bathroom visits, and J.E. presents no authority suggesting that the District's failure to provide two-person transfers on every occasion supports a finding of intentional discrimination.[2] As for campus-wide accommodations, Brackenridge employs three automatic door openers, and the District had emergency evacuation plans for "students in wheelchairs" and for J.E. specifically. Based on those accommodations, no reasonable juror could find that the District intentionally discriminated

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[2] We do not decide whether a plaintiff could succeed on a claim for injunctive relief under the ADA based on similar bathroom practices.

against J.E. in violation of the ADA. *See D.A.*, 629 F.3d at 453–55; *see also, e.g.*, *I.A. v. Seguin Indep. Sch. Dist.*, 881 F. Supp. 2d 770, 780 (W.D. Tex. 2012) (noting that attempts to accommodate, "even if imperfect, establish a lack of intentional discrimination").

Rehabilitation Act Claim

J.E. asserted two distinct Rehabilitation Act claims in the district court. One was that the District created a hostile educational environment by failing to protect him from being sexually abused. At the outset of oral argument, however, counsel for J.E. conceded that this claim could not survive our recent decision in *Estate of Lance v. Lewisville Independent School District*, 743 F.3d 982 (5th Cir. 2014). Thus, only the following Rehabilitation Act claim remains: that the District grossly mismanaged his IEP.

Lance thoroughly set forth the framework for evaluating a Rehabilitation Act claim premised on a school district's failure to provide a free appropriate public education. To "establish a claim for disability discrimination, in the education context, something more than a mere failure to provide the 'free appropriate education' required by IDEA must be shown." *Lance*, 743 F.3d at 995 (quoting *D.A.*, 629 F.3d at 454 (internal alterations omitted)). That "something more" is evidence of bad faith or gross mismanagement. *See D.A.*, 629 F.3d at 454 (citing *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982)).

J.E. has not met that threshold; indeed, he is unable to make the preliminary showing that the District failed to provide a free appropriate public education. *Lance*, 743 F.3d at 992 ("At a minimum, then, [a

plaintiff is required] to allege a denial of a FAPE under IDEA to sustain a § 504 claim based on the denial of a § 504 FAPE because '§ 504 regulations distinctly state that adopting a valid IEP is sufficient but not necessary to satisfy the § 504 FAPE requirements.'" (quoting *Mark H. v. Lemahieu*, 513 F.3d 992, 933 (9th Cir. 2008))). The District convened 28 separate panel meetings to formulate J.E.'s specific educational plan. Those efforts clearly had an impact as J.E. graduated high school and is now attending college. Thus, the flaws that J.E. identifies in his IEP—including missing or incomplete items on the IEP form, a failure to specifically denote that he needed two-person transfers, and generally, what he labels a deficient "check-the-box" approach—amount to, at worst, procedural defects. Such procedural defects "alone do not constitute a violation of the right to a [free appropriate public education] unless they result in the loss of an educational opportunity." *Klein*, 690 F.3d at 396. We rejected similar challenges to an IEP in *Klein*, holding that a student had received a free appropriate public education despite assertions that "IEPs were not sufficiently individualized, the collaborative process was thwarted, and [the district] afforded no 'academic benefit' tailored to his disability." 690 F.3d at 396–97. We noted the student's strong academic performance and observed that the school district did far more "than robotic IDEA form-checking to assist his performance in school." *Id.* at 398. The same is true here.

The sexual assault that gave rise to this case was horrible, and we agree with the trial court that the District should consider reexamining its policies in light of these multiple incidents of student sexual abuse. Under our case law, however, there is

insufficient evidence to establish that the District failed to provide J.E. educational opportunities or grossly mismanaged his IEP. Dismissal of the Rehabilitation Act claim was therefore warranted.

III. Conclusion

The district court correctly granted summary judgment on J.E.'s Rehabilitation Act and ADA claims. The judgment below is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-50609
D.C. Docket No. 5:13-CV-513

[Filed July 23, 2014]

CLAUDIA ESTRADA, as Next Friend of J.E.,	)
Plaintiff - Appellant	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,	)
Defendant - Appellee	)

Appeal from the United States District Court for the Western District of Texas, San Antonio

Before DAVIS, ELROD, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
Western District of Texas

Civil Action No. SA13-CV-513-OLG

[Filed June 12, 2013]

J.E., N/B/F Claudia Estrada)
Plaintiff)
v.)
San Antonio Independent School District)
Defendant)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($_____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)*_____.

☑ other: Judgment is entered in favor of Defendant as to all claims.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Orlando L. Garcia on a motion for Summary Judgment.

Date: 06/12/2013 *CLERK OF COURT*

/s/Robert F. Flaig
Signature of Clerk or Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

Cause No. 5:10-CV-00436-OLG

[Filed June 12, 2013]

J.E., N/B/F CLAUDIA ESTRADA, Plaintiff,

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT and BRET JERNIGAN, individually, Defendants.

ORDER FOR SEVERANCE AND ENTRY OF FINAL JUDGMENT

On August 22, 2011, the Court entered judgment for defendant SAISD as to plaintiff's causes of action brought under 42 U.S.C. § 1983. On September 28, 2012, the Court dismissed the remaining claims against SAISD. Following that order, defendant SAISD moved for severance of the claims against it and entry of final judgment (docket no. 109). The federal rules permit the Court to sever any claim or party in a suit when justice would be served by the severance. *See* FED. R. CIV. P. 21; *Allied Elevator, Inc. v. E. Tex. State*

Bank, 965 F.2d 34, 36 (5th Cir. 1992). Finding that the interests of justice are served by the severance the Court finds that defendant's motion to sever (docket no. 109) should be GRANTED.

Accordingly it is hereby ORDERED that the claims against defendant SAISD are severed from the case against the remaining defendant, Bret Jernigan. The Clerk of the Court shall assign a new cause number to the severed case against SAISD. Following the severance, the Clerk shall enter final judgment in favor of Defendant SAISD as to all claims.

SIGNED this 12 day of June, 2013.

/s/Orlando L. Garcia
United States District Judge
Orlando L. Garcia

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

Cause No. SA-10-CA-00436-OLG

[Filed September 28, 2012]

J.E., B/N/F CLAUDIA ESTRADA, Plaintiff,

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, and BRET JERNIGAN, INDIVIDUALLY, Defendants.

ORDER

On this date came on to be considered defendant San Antonio Independent School District's motion for summary judgment (docket no. 68). This case arises out of alleged sexual abuse of plaintiff, J.E., committed by the defendant Bret Jernigan during his employment with the district. The Court previously granted the district's motion for partial summary judgment on plaintiff's § 1983 claims finding that "plaintiff has not raised a fact question that Jernigan's training or supervision was inadequate, and even if they were, that there is no showing of deliberate indifference . . . ."

See Order of August 22, 2011, docket no. 58. The district now seeks summary judgment on the remaining claims alleged against it. Because the Court has previously discussed the facts of this case in detail, it need not do so again here. Plaintiff's remaining causes of action are alleged under (1) § 504 of the Rehabilitation Act (the "RA"); (2) the Americans with Disabilities Act (the "ADA"); and (3) Title IX.[1]

I. Legal Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Gates v. Tex. Dep't of Protective &*

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[1] Defendant additionally moves for summary judgment on Plaintiff's "common law causes of action." As the plaintiff points out in the response, however, "J.E. did not assert any such claims against the District. J.E. asserted common law causes of action solely against Defendant Bret Jernigan." Accordingly, the district's request for summary judgment on those claims is moot and will not be addressed further in this order.

Additionally, plaintiff contends that "it is unclear whether a section 1983 claim[] based on *Monell v. New York City Dep't of Soc. Servs* ., 436 U.S. 65 8 (1978), was addressed by the Court." Though the Court may not have cited this case in its order granting summary judgment on the section 1983 claims, the order is clear that it forecloses all of plaintiff's section 1983 claims and thoroughly discusses the reasons for so doing; accordingly, plaintiff's section 1983 arguments will not be addressed further in this order.

Regulatory Servs., 537 F.3d 404, 417 (5th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). All facts and inferences are viewed in the light most favorable to the party opposing summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). However, conclusory statements, speculation, and unsubstantiated assertions cannot defeat a motion for summary judgment. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Rather, the party opposing the summary judgment is required to identify specific evidence in the record and to articulate precisely how this evidence supports his or her claim. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. "[T]he nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim." *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (citation omitted). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by 'only a "scintilla" of evidence.'" *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (internal citations omitted).

II. Discussion

A. The Rehabilitation Act and the ADA

"The ADA is a federal anti-discrimination statute designed '[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 574 (5th Cir. 2002) (quoting *Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254, 261 (5th Cir. 1999)). "The RA was enacted 'to ensure that handicapped individuals are not denied jobs or other benefits because of prejudiced attitudes or ignorance of others.'" *Delano-Pyle*, 302 F.3d at 574 (footnote omitted) (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir.1988)). The language in the ADA generally tracks the language set forth in the RA such that the same remedies are available under either act. *Delano-Pyle*, 302 F.3d at 574 (citing 42 U.S.C. § 12133 (1995)). Accordingly, "[j]urisprudence interpreting either section is applicable to both." *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination or deliberate indifference on the basis of the disability. *D.A. v. Houston Ind. Sch. Dist.*, 629 F.3d 450, 454-55 (5th Cir. 2010). This showing may be made by showing that a defendant acted based on professional bad faith, gross misjudgment, or refused to provide reasonable accommodations. *Id.*; *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983).

1. Claims under Rehabilitation Act

In plaintiff's effort to prove intentional discrimination or deliberate indifference, as required under the RA, the complaint alleges that the district: (1) failed to keep J.E. safe; (2) failed to provide a non-hostile environment; (3) failed to fulfill J.E.'s individualized education plan ("IEP") under the IDEA; (4) failed to individualize J.E.'s IEP to address his unique needs; and failed to follow J.E.'s IEP.

Plaintiff's first two allegations amount to no evidence of the district's alleged deliberate indifference because these allegations are retrospective; in hindsight, it is clear that the district did not protect J.E. from the harm that befell him, but the question is not whether such a failure indeed occurred, but rather, whether the district had knowledge of the failure and refused to correct it. *D.A. v. Houston Ind. Sch. Dist.*, 629 F.3d 450, 454-55 (5th Cir. 2010). There is no evidence that the district had such knowledge that is prerequisite to acting with deliberate indifference.

Plaintiff's third and fourth allegations allege, in sum, that "J.E. was not provided with a proper plan for toileting and that the district violated its own toileting policies." Specifically, Plaintiff contends that the district's verbal policy that "two people should always be used to assist children in the restroom *when available*" was violated when Jernigan took J.E. to the restroom by himself on 10-15 separate occasions of which others at the school were well aware. By plaintiff's own admission, Jernigan took J.E. to the restroom on about 200 occasions, almost always with a second person assisting. The policy, by plaintiff's own iteration, was that a second person should assist with

toileting *when a second person is available to assist.* The Court finds no evidence in the summary judgment record that indicates that on any of the 10-15 occasions that Jernigan took J.E. to the restroom by himself that another person was available to assist. Therefore, the record is silent as to whether this "policy" was violated at all. Regardless, the Court is not convinced that any evidence of deliberate indifference would be in the record even if the evidence did show such a violation of the district's own policy because, as the Court stated in the context of the § 1983 summary judgment, "[t]here is simply no evidence that the [district] . . . should have known that assigning only one SPP to a disabled student created a high probability that the student would be sexually molested."

Plaintiff also points to the fact that J.E.'s Individual Education Plan ("IEP") did not include the requirement that he be assisted in toileting despite several recommendations that this be included in the plan. Here, plaintiff does not allege that J.E. was not, in fact, *always* assisted in toileting, but rather, that failure to include the instruction in his IEP constitutes evidence of deliberate indifference. This contention is a logical fallacy; if a school district does not physically write down a student's necessary accommodations in the IEP, but nevertheless provides all of the necessary accommodations as if they had been perfectly provided for in the IEP, the failure to change the IEP cannot possibly constitute evidence of deliberate indifference.

The Court finds no evidence in the record that the district was deliberately indifferent to discrimination against J.E. on the basis of his disability. Accordingly, summary judgment is proper on the claims under the

RA.[2] *See D.A. v. Houston Ind Sch. Dist.*, 629 F.3d at 454-55; FED. R. CIV. P. 56(c).

2. Claims under the ADA

Specific to the ADA, the plaintiff additionally alleges that the district (1) failed to have an accessible bathroom with doors accessible to a wheelchair-bound student; (2) failed to have a bathroom for J.E. in a safe environment, (3) failed to provide two-person transfers for J.E., and (4) failed to have a safe evacuation plan for J.E. in case of an emergency.

There is absolutely zero evidence in the record to support plaintiff's allegations under the ADA. The testimony and photos of the bathroom indicate that it was accessible, and that safety devices were installed to assist handicapped students. The deposition testimony also indicates without contradiction that the restroom used by J.E. was the most appropriate for J.E.'s needs. Additionally, defendant includes in evidence emergency evacuation plans from 2006, 2009 and 2010 issued generally for "students in wheelchairs" and for J.E. specifically.

While simultaneously pointing out to the Court that J.E.'s physical therapist had repeatedly instructed the school that J.E. needs assistance in toileting and in

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[2] Defendant additionally contends that plaintiff's RA claims are barred by a settlement agreement entered into between the parties concerning plaintiff's claims under the IDEA. Finding summary judgment proper on other grounds, the Court need not address the argument. However, as plaintiff notes in the response, the section 504 claims were explicitly excluded from the settlement. The Court finds defendant's arguments on this point unconvincing and denies summary judgment on this basis.

opening doors, Plaintiff contends that the ADA requires the district to "foster independence" by allowing J.E. to use the restroom independently. This contention—if not a sanctionable violation of Rule 11—is at least an acknowledgment that there are no damages under the ADA because the district could not be expected to do more than that which was recommended for J.E.'s personal situation; the district was clearly not deliberately indifferent to J.E.'s toileting needs in *actually following* the individual recommendations of J.E.'s physical therapist rather than simply providing the "low-hanging urinals," and automatic doors that plaintiff contends would have prevented J.E.'s molestation. Moreover, plaintiff offers no evidence that the district was made aware of the deficiencies it claims evidenced a deliberate indifference. The Court finds that summary judgment is proper on plaintiff's ADA claims. *See D.A. v. Houston Ind. Sch. Dist.*, 629 F.3d at 454-55; FED. R. CIV. P. 56(c).

B. Title IX

Plaintiff additionally alleges damages recoverable under Title IX based on the allegation that "the [d]istrict had actual knowledge of a violation of [J.E.'s] rights under [the Act]." Title IX prohibits discrimination based on gender in programs that receive federal funds and creates a private cause of action for monetary damages. 20 U.S.C. § 1681 et seq.; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 73, 75 (1992) ("Unquestionably, Title IX placed on the [school district] the duty not to discriminate on the basis of sex . . . . "). In the context of the facts of this case, there is no question that Title IX is applicable. *See id.* (quoting *Meritor Sav. Bank, FBS v. Vinson*, 477

U.S. 57, 64 (1986) ("'[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminates" on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student."). However, "the express remedial scheme under Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation." *Gebser v. Lago Vista Indep. Sch. Dist.*, 534 U.S. 274, 290 (1998). Plaintiff carries the burden on its Title IX claim to show that the district had notice of the discrimination and then, by deliberate indifference, failed or refused to remedy it. *Id.* at 290-91. The evidence is clear in this case that upon J.E.'s outcry, the school administration immediately issued a "critical incident report," and took Jernigan's confession and resignation, thereby immediately terminating him. Again, as noted above, the Court has previously discussed the district's lack of deliberate indifference in the § 1983 context (specifically pointing out the lack of evidence in this case that the district was or should have been aware of a substantial risk that Jernigan would harm a student), and that analysis is equally applicable here. Plaintiff presents no evidence whatsoever for the proposition that the district had notice of the abuse in this case prior to J.E.'s outcry or that the situation was not remedied once notice was given. Accordingly, summary judgment is proper on J.E.'s Title IX claims.

III. Conclusion and Additional Orders

For the foregoing reasons, and incorporating herein the Court's analysis in the August 22, 2011 order granting summary judgment on plaintiff's § 1983 claims, defendant's motion for summary judgment

(docket no. 68) on the remaining claims alleged against it is hereby GRANTED. Accordingly, defendant's other pending motions to be excused from mediation (docket no. 69), to compel the mental examination of J.E. (docket no. 76), and its motion in limine (docket no. 102) are hereby DENIED AS MOOT. This case will remain on the Court's docket pending resolution of the claims against defendant Bret Jernigan. Because Jernigan is currently serving a 10-year prison sentence, plaintiff will file with this Court, within eleven (11) days of this order, either a proposed amended scheduling order advising the Court of the timeline upon which the claims against Jernigan should be pursed, or if those claims are otherwise resolved, an advisory indicating as much.

IT IS SO ORDERED

SIGNED this 28 day of Sept., 2012.

/s/Orlando L. Garcia
United States District Judge
Orlando L. Garcia

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

CAUSE NO. SA-10-CA-436-OG

[Filed August 22, 2011]

J.E., b/n/f CLAUDIA ESTRADA, Plaintiff,	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, and BRET JERNIGAN, Individually, Defendants.	)

ORDER

Bret Jernigan, an employee of San Antonio Independent School District ("SAISD"), confessed to sexually molesting a disabled student in a school restroom. The student, J.E., by and thorough Claudia Estrada, his next friend, mother, and legal guardian, sued Jernigan and SAISD claiming violations of 42 U.S.C. § 1983 and other federal statutes, as well as common law and state claims. Plaintiff has filed a motion for partial summary judgment against SAISD (docket no. 23) seeking judgment on her § 1983 claims. SAISD responded and filed a cross-motion for partial

summary judgment (docket no. 26) in which it seeks judgment on plaintiff's § 1983 claims. This order disposes of those motions. For the reasons set forth below, the Court will deny plaintiff's motion and grant defendant's motion.

At all times relevant, J.E. was a special education student at Brackenridge High School in the SAISD. J.E. suffers from a form of cerebral palsy that confines him to a wheelchair, and he required individual assistance on campus with wheelchair mobility and with transfers to and from the wheelchair for toileting.

SAISD hired Jernigan in the Fall of 2006 as a part-time substitute teacher. The following Fall Linda Marsh, the principal at Brackenridge High School, hired Jernigan as a special education paraprofessional, also referred to as an SSP (Student Support Personnel). (Marsh aff. ¶ 9; Aiken aff. ¶ 4.) Marsh assigned Jernigan to accompany J.E. throughout the campus during the school day in order to assist with his mobility needs. (Marsh aff. ¶ 9.)

On three separate occasions, Jernigan sexually molested J.E. in the LifeStrides restroom. The restroom is located behind the two LifeStrides classrooms and is only accessed through those classrooms. (Jernigan aff. ¶12.) After the third incident, J.E. disclosed that he had been molested. The District was unaware of any inappropriate contact between Jernigan and J.E. until J.E. told of the incidents. (Marsh aff. ¶17; Plaintiff's Response to Request for Admission 3). Upon learning of the inappropriate contact on October 6, 2008, Marsh spoke with Jernigan, filled out a critical incident report, and obtained Jernigan's signed confession and resignation.

(Marsh aff. ¶ 14-16). Jernigan has since been convicted of a second-degree felony for the sexual assaults and is presently serving a ten-year prison sentence.

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). The burden is on the moving party to show that "there is an absence of evidence to support the nonmoving party's case." Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 860 (5th Cir.2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party does so, the opposing party must go beyond its pleadings and designate specific facts showing there is a genuine issue for trial. Celotex Corp., 477 U.S. at 324; Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (*per curiam*). An issue is genuine if the evidence is such that a reasonable jury could return a verdict in the opposing party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court reviews all facts in the light most favorable to the nonmoving party. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 181 (5th Cir. 2009).

No municipal liability exists under the doctrine of *respondeat superior* in § 1983 actions. Sanders-Bums v. City of Plano, 578 F.3d 279, 290 (5th Cir. 2009). Therefore, to hold SAISD liable under § 1983 for Jernigan's actions, plaintiff must demonstrate: (1) a policymaker; (2) an official policy; (3) and a violation of constitutional rights whose "moving force" is the policy or custom. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001) (citing Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978)). Under Texas law,

a school district's board of trustees, not the board in combination with any subordinate school district officials, is the "official policymaker" for purposes of § 1983 liability. Rivera v. Houston Indep. Sch. Dist., 349 F.3d 244, 247-48 (5th Cir. 2003); see also TEX. EDUC. CODE § 11.151 (school district trustees shall have "the exclusive power to manage and govern" public schools, and may "adopt such rules, regulations, and by-laws as they may deem proper"). Although teachers, principals, and superintendents might have "decision-making authority" under the Texas Education Code, they do not have "the policymaking authority required to sustain liability under § 1983." Rivera, 349 F.3d at 248.

School children have a liberty interest in their bodily integrity protected by the Due Process Clause of the Fourteenth Amendment, and physical sexual abuse by a school employee violates this right. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451-52 (5th Cir. 1994).

For purposes of the section 1983 claim against the District, "official policy" is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be

> attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). Plaintiff has not identified a formal "policy statement" of ignoring or condoning sexual harassment or abuse of students that was "officially adopted and promulgated" by the Board of Trustees of the SAISD. On the contrary, the summary judgment evidence establishes that the Board had promulgated official policies designed to prevent sexual harassment and abuse of students by teachers.

Nor has plaintiff shown a "persistent, widespread practice" of District employees that "is so common and well settled as to constitute a custom." In narrow circumstances, even a single incident can establish an official policy "where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train." Burge v. St. Tammany Parish, 336 F.3d 363, 373 (5th Cir. 2003) (this rule is considered an "exception," and is referred to as the "single incident exception;" the Fifth Circuit is reluctant to expand application of this exception and only applies it in limited circumstances).

Plaintiff has produced evidence of a previous case of sexual abuse of students by a Brackenridge High School SPP employee. This happened in January and February of 2006, not quite three years prior to the incidents involving Jernigan and J.E. The employee confessed to three incidents of sexual abuse of students. Two of the incidents occurred in "the

restroom that is located in the classroom," presumably the same LifeStrides restroom where Jernigan abused J.E. Following his confession, the employee was promptly terminated.

A pattern is tantamount to official policy when it is "so common and well-settled as to constitute a custom that fairly represents municipal policy." Piotrowski, 237 F.3d at 579 (quoting Webster, 735 F.2d at 841. A pattern requires "sufficiently numerous prior incidents," as opposed to "isolated instances." McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir.1989); see, e.g., Pineda v. City of Houston, 291 F.2d 325, 329 (5th Cir. 2002) (finding eleven previous incidents of warrantless searches of residences insufficient to establish a pattern of unconstitutional events). "Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability." Bennett v. City of Slidell, 728 F.2d 762, 768 n. 3 (5th Cir. 1984). When prior incidents are used to prove a pattern, they "must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." Webster, 735 F.2d at 842. The Court finds that the previous case cited by plaintiff, even when considered together with the present incidents involving J.E., does not constitute a persistent pattern of constitutional violations that is so common and

widespread as to constitute a custom or policy of the Board of Trustees.[1]

While, municipalities are not liable for constitutional violations committed by their employees unless those violations result directly from a municipal custom or policy, see, e.g., City of Canton v. Harris, 489 U.S. 378, 385 (1989), it is, however, "clear that a municipality's policy of failure to train its [employees] can rise to § 1983 liability." Brown v. Bryan County, 219 F.3d 450, 456 (5th Cir. 2000).

Plaintiffs § 1983 complaint against SAISD is based on the District's alleged deliberate indifference in its training and supervision of Jernigan. In order to hold a municipality liable under § 1983 for its employees' acts, a plaintiff must show that a policy of training or supervision caused those acts. Such a showing requires proof that (1) the training or supervision procedures of the District's policymaker were inadequate, (2) the District's policymaker was deliberately indifferent in adopting the training or supervision policy, and (3) the inadequate training or supervision policy directly

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[1] Even a single incident of child sexual abuse is a tragedy, a tragedy no one wishes to see repeated. Here, the SAISD Board of Trustees is presented with two such cases committed by SPPs at Brackenridge High School within three years. The two cases involved six separate incidents of abuse, *five* of which occurred in the LifeStrides restroom when an employee was alone with a student. As the Court understands the law on municipal liability, these incidents do not establish a widespread, persistent pattern that constitutes a policy attributable to the Board. Nevertheless these incidents are troubling to this Court and should trouble the Board as well. The Board may find it prudent to revisit the manner in which it hires, trains, and supervises the employees it assigns to assist the District's disabled students.

caused the plaintiff's injury. City of Canton, 489 U.S. at 385-87; Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir. 1992).

Plaintiff has failed to raise a fact issue that Jernigan's training was inadequate. Plaintiff's arguments in this regard are set out in paragraph 9 of her motion for partial summary judgment:

> Jernigan admits he was never provided *written* training on the issues most relevant to these proceedings; i.e., how to deal with a student who receives special education services; or how to correctly take a student like J.E. to the toilet; or how to correctly move a student like J.E. around in a wheel-chair or how to correctly move a student like J.E. from one spot to another.

Docket no. 23 at 4 (emphasis added; citations to Jernigan's deposition omitted).

The assaults occurred on three occasions while Jernigan locked himself in the LifeStrides restroom with J.E. Therefore, the only training issue plaintiff raises that is relevant is Jernigan's testimony that he received no written training dealing with assisting a special education student in using the toilet. Jernigan testified that he was not aware of receiving written policies with respect to toileting special education or handicapped students. (Jernigan depo. 146/9-14). He did, however, testify that he received verbal on-the-job training. (Id. 146/15-19; 102/22-25.)[2] Janet Moeller, a

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[2] Jernigan was not able to attend the Special Education Department's training of SSPs on August 17-21, 2007 because he

Physical Therapist, trained Jernigan on how to assist J.E. in his day-to-day needs, how to assist J.E. with his wheelchair, loading and unloading J.E. from the school bus, pressure relief techniques, driving the wheelchair in hallways, manipulation of doors, using the elevator in emergency evacuation, use of tray and headrest on the wheelchair, assistance with lunch tray, positioning of J.E. in the classroom, and transfers from wheelchair to toilet. (Moeller aff. ¶¶ 4-5; see also Aguilera aff. ¶7 (Jernigan was trained by SAISD in how to assist with J.E.'s mobility needs including transferring him from wheelchair to toilet)). Jernigan testified that he was trained by SAISD in how to perform the two-person lift when transferring J.E. from his wheelchair to the toilet, and how to assist J.E. in using the restroom. (Jernigan aff. ¶11.) Roberta Aiken, a Compliance Officer for the Special Education Department, also provided Jernigan with information regarding the extent of J.E.'s disability, J.E.'s personal hygiene needs, and J.E.'s needs in the classroom. (Aiken aff. ¶ 5.)

Jernigan also received basic employee training. He received training in SAISD's policies for newly hired employees including a session on SAISD's policies regarding sexual harassment. (Jernigan aff. ¶¶ 3, 4; Marsh aff. ¶ 6.) He was given an employee handbook and also signed off on receipt of SAISD's policies, including code of conduct, discrimination, harassment and retaliation of students, drug-free workplace requirements, and other policies. (Marsh aff. ¶¶ 6-7, 19 & ex. G to Marsh aff.) At least one pamphlet Jernigan

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had not yet been hired as an SSP, so instead he was given on-the-job training. (Marsh aff. ¶ 10).

received contained a section dealing with sexual harassment between coworkers and between teachers and students. (Jernigan depo. 100/18-23.) Ms. Marsh attached to her affidavit the SAISD board policy which prohibits harassment of students by employees, and stated that Jernigan was made aware of that policy when he attended employee orientation. (Marsh aff. ¶18, and Exhibit F to Marsh aff.). Jernigan testified that he knew when he molested J.E., he was violating school policies and the training he had received as an employee of SAISD and a paraprofessional. (Jernigan aff. ¶13.)

It appears that plaintiff's sole complaint is that Jernigan did not receive *written* training materials relating to assisting handicapped students in using the restroom and in other activities. It is undisputed, including by Jernigan himself, that he received extensive verbal and on-the-job training in all aspects of J.E.'s care. In addition, it is undisputed that SAISD trained Jernigan in its policies regarding sexual harassment of students.[3] Other than the lack of written materials, plaintiff fails to explain how the training Jernigan actually received was inadequate. See Roberts v. City of Shreveport, 397 F.3d 287, 293 (5th Cir. 2005) (in order for "liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective."). The

[3] It cannot reasonably be argued that the sexual assaults were due to inadequately training Jernigan in attending to J.E.'s mobility needs, including how to lift J.E. from his wheelchair to the toilet and back again. The more relevant training in preventing the assaults was the sexual harassment training that it is undisputed Jernigan received.

lack of written materials alone is insufficient to raise a fact issue that Jernigan's training was inadequate.

Nor has plaintiff raised a fact question that Jernigan's supervision was inadequate. Plaintiff's primary argument is that there was not enough staff to supervise and assist Jernigan when J .E. had to use the restroom, and the lack of staff provided Jernigan the opportunities to molest J.E. (Plaintiffs Motion for Partial Summary Judgment at 7.) Plaintiff also argues that a teacher, Ms. Davila, was in the LifeStrides classroom and saw Jernigan enter the bathroom alone with J.E. on a number of occasions but did nothing about it.[4] Id.

When Jernigan entered any teacher's classroom, that teacher then became his supervisor for that class period. (Aiken aff. ¶6). Plaintiff, however, does not cite any requirement that an SPP could not be alone in a restroom with a student. Jernigan testified that he had been instructed that the proper way to lift J.E. from his wheelchair to the toilet was the "two-man lift" and that he was supposed to have assistance "if it was available." (Jernigan depo. 33/13-19, 115/14-23; see also Aguilera aff. ¶13 & Moeller aff. ¶ 13 (while a two-man lift is preferred, an one-man lift may be utilized pursuant to SAISD's guidelines if a second person is unavailable)). Thus, plaintiff has not raised a fact question that Ms. Davila, or any other teacher or administrator had a duty to ensure that Jernigan and

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[4] Jernigan testified that his supervisors gave him specific instructions to take J.E. to the LifeStrides restroom. (Jernigan aff. ¶12.) The only way to enter the LifeStrides restroom was through the classroom of Ms. Davila or that of another teacher. Id.

J.E. were accompanied by another staff member when J.E. used the restroom. Moreover, Jernigan testified that of the approximately 200 times he took J.E. to the restroom there was another employee to help transfer J.E. to the toilet in all but 10 to 15 of those times. (Jernigan depo. at 138-39.) Therefore, SAISD had staff available for two-man transfers for the remaining 185 to 190 toileting events.

Plaintiff also argues that Jernigan "only molested J.E. when he was impaired by drugs but no one ever checked him to see if he was impaired even though he came to school almost every day impaired." (Plaintiff's Motion for Partial Summary Judgment at 7.) The Court does not view Jernigan's use of drugs as raising an issue of inadequate supervision. Jernigan testified that he used drugs on a daily basis so it is possible that he was on drugs during the assaults. (Jernigan depo. 201/7-19.) He thinks his use of marijuana contributed to his abuse of J.E. because it impaired his judgment. Id. 77/18 - 78/11.) SAISD has policies and procedures designed to thwart the use of drugs on its campuses. Jernigan received training and materials relating to SAISD's drug-free workplace policy. (Marsh aff. ¶ 19 & ex. G.) Marsh testified that SAISD's police officers patrol the campus for drugs and use drug sniffing dogs to detect drugs, that she never observed Jernigan on drugs, and that no one reported to her that he appeared to be on drugs. (Marsh aff. ¶ 19.) Jeff Ward is the chief of the SAISD Police Department. He testified that SAISD has two full-time police officers assigned to Brackenridge High School to patrol the campus and enforce laws against drug use and possession. (Ward aff. ¶ 5.) SAISD uses a Canine Team to detect drugs at Brackenridge High School. (Ward aff. ¶ 6.) SAISD

takes very seriously its policy of Drug-Free Workplace Requirement for employees, and District policy prohibits unlawful use of drugs in the workplace. (Ward aff. ¶ 6.) At no time prior to Jernigan's arrest on October 6, 2008 did SAISD have any Police incident reports involving Jernigan or his use of illegal drugs. (Ward aff. ¶ 7.) Moreover, Jernigan's' opinion that his marijuana use impaired his judgment and contributed to the assaults is just that— his opinion— and is unsupported by any competent summary judgment evidence.

Even if it could be argued that plaintiff has raised a fact issue that Jernigan's training or supervision were lacking, she has failed to show the Board was deliberately indifferent in adopting training and supervision policies. A municipality acts with "deliberate indifference" in adopting an otherwise constitutional policy if:

> in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

City of Canton, 489 U.S. 390. Mere negligence falls short of the "deliberate indifference" standard; for governmental liability to attach, the plaintiff must offer evidence of not simply a decision, but a deliberate or conscious decision by SAISD itself to endanger constitutional rights. Snyder v. Trepagnier, 142 F.3d 791, 796, 799 (5th Cir. 1998). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a

municipal actor disregarded a known or obvious consequence of his action." Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 410 (1997). To establish that a municipal actor acted with deliberate indifference, a plaintiff must establish "more than negligence or even gross negligence." Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005).

Proof of a single instance, rather than a pattern of similar violations, normally will not sustain a plaintiff's claim that a lack of training or supervision caused a violation of his constitutional rights. Snyder, 142 F.3d at 798. In failure-to-train cases, "isolated violations are not the persistent, often repeated constant violations that constitute custom and policy." Fraire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir. 1992). A pattern of frequent violations of constitutional rights is necessary to illustrate that the need for further discipline, training, or supervision was so obvious and the violation of constitutional rights so predictable that the District's failure to provide it rose to the level of deliberate indifference. Brown, 520 U.S. at 410-11; Piotrowski, 237 F.3d at 582; Snyder, 142 F.3d at 798. As already discussed above, the previous incident of sexual abuse at Brackenridge High School does not establish a pattern of frequent violations that would demonstrate that the need for further training or supervision was so obvious, and the constitutional violations so predictable, that the District's failure to provide the training or supervision rose to the level of deliberate indifference. There is simply no evidence that the Trustees were aware or should have known that assigning only one SPP to a disabled student created a high probability that the student would be

sexually molested. See City of Canton, 489 U.S. at 309 & n. 10 (inadequacy of training or supervision must be obvious and obviously likely to result in a constitutional violation).

Because the Court has found that plaintiff has not raised a fact question that Jernigan's training or supervision was inadequate, and even if they were, that there is no showing of deliberate indifference on the part of the Board, the Court does not reach the final element—whether the inadequate training or supervision directly caused plaintiff's injury.

Plaintiff's motion for partial summary judgment on her § 1983 claims (docket no. 23) is DENIED, and SAISD's cross-motion for partial summary judgment on those claims (docket no. 26) is GRANTED. Plaintiff's § 1983 claims are DISMISSED. This order does not close this case because plaintiff's other statutory and common law claims remain pending.

SIGNED this 22 day of August, 2011.

/s/Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-50609

[Filed August 27, 2014]

CLAUDIA ESTRADA, as Next Friend of J.E.,	)
Plaintiff - Appellant	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT	)
Defendant - Appellee	)

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before DAVIS, ELROD, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/Gregg Costa
UNITED STATES CIRCUIT JUDGE