No. 21-20671

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J.W.; LORI WASHINGTON, A/N/F J.W.,

Plaintiffs-Appellants,

v.

ELVIN PALEY and KATY INDEPENDENT SCHOOL DISTRICT,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the Southern District of Texas

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

J.W. et al. v. Paley et al., No. 21-20671

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Jevon Washington

Defendants-Appellees:

Elvin Paley
Katy Independent School District

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument in this matter, due to the important and novel questions of law raised by the district court's decisions.

Among other significant legal errors, the district court's subjection of Appellants' ADA and Rehabilitation Act claims to the IDEA's exhaustion requirements conflicts with the Supreme Court's decision in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 (2017), which holds that those requirements apply only to claims seeking relief for the denial of appropriate educational services, not claims seeking monetary damages for injuries arising from disability discrimination.

The district court's denial of Appellants' disability discrimination claims on the merits raises important questions about the required elements of a disability claim, including whether animus is necessary to make out such claims. *See Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011).

Finally, the district court misapplied this Court's decision in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), when it held that Appellants' substantive due process claim cannot proceed, failing to recognize that *Fee* applies only to claims involving corporal punishment, not claims of excessive force unrelated to discipline.

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INTRODUCTION

Jevon Washington has intellectual disabilities that affect his daily functioning, including his ability to communicate and control his emotions. On the day of the incident giving rise to this case, when Jevon was a high school senior, he became upset after being bullied by one of his classmates. As he often did after being mocked or harassed at school, Jevon sought to remove himself from the upsetting situation so he could "walk off" his negative emotions. Jevon approached an exit to the school, where he was intercepted by numerous school officials, including school police officer Elvin Paley. After Jevon explained the circumstances and repeatedly told staff that they were "making it worse" by keeping him enclosed in a small entryway, he attempted to open the door and leave the building. In response, Paley charged toward Jevon, first putting him in a chokehold and then tasing him. Jevon immediately screamed and fell to his knees, but Paley continued to deploy his taser well after Jevon was prone on the ground, unable to move. There is no meaningful dispute about what happened, as almost all of the assault was captured by video.

In short, this is a case is about an intellectually disabled minor who was unnecessarily tased by a school police officer—even after he was incapacitated on the ground and had defecated and urinated on himself—because he was in the middle of a mental health episode brought on by his disabilities. Yet Plaintiffs' claims that the use of force against Jevon was excessive and constituted disability discrimination have never been examined by any court. Instead, at each turn, Defendants have relied on

inapposite procedural bars to try to avoid having to defend against Plaintiffs' claims on the merits, including making an exhaustion argument in this litigation that directly conflicts with the position they previously took before a hearing officer.

The district court erred in accepting Defendants' procedural machinations, in particular their arguments that Plaintiffs' disability discrimination claims ought to have been exhausted under the Individuals with Disabilities Education Act and that Plaintiffs' substantive due process claim is categorically barred by Fifth Circuit precedent. If the district court's decision is permitted to stand, Jevon will have no remedy, constitutional or statutory, for the harm that was inflicted on him and captured on video. This Court should reverse and remand for further proceedings.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this civil rights lawsuit pursuant to 28 U.S.C. §§ 1331, 1343, and 20 U.S.C. § 1415(*l*). On June 5, 2019, the district court issued an order granting in part and denying in part Defendants' motion for summary judgment. ROA.2116-53. Specifically, the district court granted summary judgment to Defendants on all of Plaintiffs' claims, except that it denied summary judgment on qualified immunity grounds to Defendant Elvin Paley.[1]

On June 20, 2019, Paley filed an interlocutory appeal from that order. ROA.2154; Fed. R. App. P. 4(a). This Court reversed the district court's decision

[1] On September 4, 2019, the district court denied Plaintiffs' motion for reconsideration. ROA.2227.

denying qualified immunity in an unpublished opinion dated June 23, 2021. *See* Opinion, *J.W. v. Paley*, 5th Cir. Appeal No. 19-20429 (June 23, 2021). It denied Plaintiffs' petitions for rehearing and rehearing en banc on November 18, 2021. *See* Order, *J.W. v. Paley*, 5th Cir. Appeal No. 19-20429 (Nov. 18, 2021).

Plaintiffs timely filed a notice of appeal on December 15, 2021. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in concluding that Defendants are not judicially estopped from asserting an exhaustion defense that directly conflicts with the position they took in the hearings before the IDEA officer.

2. Whether the district court erred in concluding that Plaintiffs' disability discrimination claims under the Americans with Disabilities Act and the Rehabilitation Act require exhaustion.

3. Whether the district court erred in concluding that exhaustion of Plaintiffs' disability discrimination claims would not have been futile.

4. Whether the district court erred in concluding that Plaintiffs' disability discrimination claims are not viable on the merits.

5. Whether the district court erred in barring Plaintiffs' substantive due process claim based on precedent from this Court that applies only in instances of corporal punishment.

STATEMENT OF THE CASE

This case arises from an incident that occurred in November 2016, when Jevon Washington was a senior at Mayde Creek High School in the Katy Independent School District. ROA.1530.[2] Jevon, who was 17 at the time, had been diagnosed with intellectual disabilities and emotional disturbance that impact "his daily functioning, including his ability to communicate [and] control his emotions." ROA.1551-52. Although Jevon "communicates well when he is calm," he "often becomes upset and is unable to effectively communicate his needs when harassed by other students." ROA.1552. He has been bullied by his peers throughout his life because of his disabilities. *Id.*

On the day of the incident, one of Jevon's classmates began mocking him, calling him "stupid" and "retarded." ROA.1553, 1559. Jevon became agitated and sought to remove himself from the upsetting situation. As was his practice and in compliance with his academic accommodations, Jevon went to what he called his "chill out" classroom to calm down; finding it occupied, he proceeded toward a door that led to a breezeway between school buildings on the campus. ROA.1559; ROA.2117-18. Before he could leave the building, Jevon was stopped in a small entryway by a security guard, a school police officer, an athletic coach, and a school

[2] Because this case turns on events that occurred when Jevon was a minor, the case caption and initial district court filings referred to him by his initials, J.W., to protect his identity. Now that his name has been disclosed in subsequent filings and media coverage of this case, this brief refers to him by his full name.

assistant principal. ROA.636, 1472, 1484. Shortly thereafter, they were joined by the individual defendant, school police officer Elvin Paley, who had heard a request for assistance over the school radio. ROA.636, 2118. Paley had never interacted with Jevon before but knew him to be a student who received special education services and who was therefore "probably a special needs student." ROA.636.

Paley's body camera captured most of the subsequent events.[3] Jevon's anxiety worsened, and he began pacing, telling the school officials that their behavior was "making it worse," and asking if he could leave the building to "cool down." ROA.1559; Video 12:44:59-12:45:02. Instead of acceding to his request, the officials interrogated Jevon about why he wanted to leave the building and declined to let him out. ROA.1559. Eventually Jevon pushed on the door in an attempt to exit the school, and the nearest staff member pushed back against the door to keep Jevon inside; the district court observed from the body camera footage that "it does not appear that [Jevon] pushe[d] the staff member." ROA.2118.

Within five seconds, Paley surged toward Jevon; his bodycam went dark as he pressed against Jevon's body. ROA.2119. In his declaration, Jevon stated that, in the period in which no video footage is available, Paley put him in a chokehold.

[3] The body camera footage was originally submitted to the district court as Exhibit G to Defendants' summary judgment motion. *See* ROA.1485 (original cover page for Exhibit G). This brief cites the footage simply as "Video," followed by a pincite to the relevant timestamps in the recording. Although the recording does not appear to be accessible via the CM/ECF system, copies of the recording are being provided to the Court via thumb drive.

ROA.1560. The bodycam audio recording reflects Paley and another school employee repeatedly shouting at Jevon to "calm down" and someone threatening to tase him. ROA.2119. Less than a minute later, Paley backed up and fired his taser; Jevon "immediately scream[ed] and f[ell] to his knees." *Id.*; Video 12:46:37. Despite Jevon's incapacitation and lack of resistance, Paley began "drive stunning" Jevon, causing him to fall fully to the ground. ROA.2119; Video 12:46:41–:56.[4] Paley yelled at Jevon to put his hands behind his back; Jevon responded, "I can't," but Paley continued to tase him. Video 12:46:45–:56.

The district court found that the "use of the taser on [Jevon's] upper back continue[d] after [Jevon] [was] lying face down on the ground and not struggling." ROA.2119. While Jevon lay on the ground unmoving and breathing heavily, Paley pointed his taser at Jevon's head and yelled, "I did not want to tase you, but you do not run shit around here." *Id.*; Video 12:47:50. Paley and another officer handcuffed Jevon, despite his cries that he was unable to breathe and feared that he was going to die. ROA.637. Subsequent bodycam footage showed Paley describing his behavior: "He still tried to get out the door. I got tired of wrestling with him so I popped him." Video 13:10:30–:32. The tasing caused Jevon to urinate, defecate, and vomit on himself and to fear that he was going to die. ROA.637; ROA.2120. Paramedics later removed a taser prong embedded in his chest. ROA.2120. Jevon missed several

[4] Drive stunning involves continually tasing a person without deploying the prongs. ROA.2119.

months of school following the incident: His mother, Lori Washington, kept him home because she "fear[ed] for his safety" at school and because the tasing caused Jevon "intense anxiety and PTSD." ROA.2121.

Over the subsequent months, Jevon's mother, Lori Washington, attempted to persuade the school district to meet with her to discuss the tasing incident. ROA.1555. No meeting was scheduled until the end of April 2017, nearly five months after Jevon was tased, and the school district abruptly canceled that first meeting because Ms. Washington arrived with a lawyer. ROA.1555-56. The requested meeting did not ultimately take place until late May, and even then, district staff refused to discuss the tasing. ROA.1556.

On December 4, 2017, Plaintiffs filed a petition with the Texas Education Agency, requesting the appointment of a hearing officer. ROA.154. The petition included claims under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA), as well as constitutional claims pursuant to 42 U.S.C. § 1983. *Id.* Defendants filed a response to the petition on December 15, 2017; among other things, they argued that all the non-IDEA claims should be dismissed because a Texas Education Agency hearing officer does not have jurisdiction over such claims. ROA.464. On February 16, 2018, the hearing officer issued an order dismissing all non-IDEA claims for want of jurisdiction. ROA.406. And on March 21, 2018, the hearing officer dismissed the IDEA claim on timeliness grounds. ROA.356.

Plaintiffs sued Paley and Katy Independent School District, asserting in relevant part a § 1983 claim for excessive force under the Fourth Amendment as to both the initial and the continued use of the taser; a § 1983 claim for violation of Jevon's right to bodily integrity under the Fourteenth Amendment; and claims under the ADA and Rehabilitation Act.[5] Defendants moved jointly for summary judgment. They argued that Paley was entitled to qualified immunity for the Fourth Amendment claim; that this Court's decision in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), precluded Plaintiffs' Fourteenth Amendment claim; and that Plaintiffs had failed to properly exhaust the ADA and Rehabilitation Act claims under the IDEA.

The district court denied the motion with respect to the Fourth Amendment excessive force claim against Paley, holding that genuine disputes of fact—including whether Jevon initially pushed a staff member to get outside—were material to determining whether the tasing was objectively unreasonable and, thus, whether qualified immunity applied. ROA.2144-46. It granted the motion to dismiss with respect to Plaintiffs' other claims: It rejected Plaintiffs' argument that Defendants should be judicially estopped from asserting an exhaustion defense against the ADA

[5] Jevon's loss of academic and non-academic educational benefits during the six-month delay between the tasing incident and the meeting between Ms. Washington and school district officials is the subject of a separate lawsuit under the IDEA. The district court in that lawsuit concluded that the hearing officer incorrectly dismissed all of Jevon's IDEA claims as time-barred and remanded to the hearing officer to determine which of his IDEA claims could proceed. *See* Mem. & Op., ECF No. 21, *Washington v. Katy Indep. Sch. Dist.*, No. 18-CV-2752 (S.D. Tex. Mar. 20, 2020).

and Rehabilitation Act claims and held that those claims had not been exhausted as required under the IDEA; and it agreed with Defendants that *Fee* precluded the Fourteenth Amendment claim against Paley. ROA.2130, 2149.

Plaintiffs moved for reconsideration as to the ADA and Rehabilitation Act claims, arguing that those claims were not the sort to require exhaustion under the IDEA. ROA.2163-86. The district court denied the motion, reiterating its conclusion that the ADA and Rehabilitation Act claims ought to have been exhausted and were not. ROA.2227-38. In the alternative, it also rejected Plaintiffs' ADA and Rehabilitation Act claims on the merits. ROA.2239-45.

Defendants filed an interlocutory appeal from the district court's denial of qualified immunity on Plaintiffs' Fourth Amendment claim. A panel of this Court reversed in an unpublished decision, holding that it was not clearly established whether the Fourth Amendment applies to force used against students in schools. *See* Opinion, *J.W. v. Paley*, 5th Cir. Appeal No. 19-20429 (June 23, 2021). Plaintiffs' petitions for panel rehearing and rehearing en banc were denied on November 18, 2021. *See* Order, *J.W. v. Paley*, 5th Cir. Appeal No. 19-20429 (Nov. 18, 2021).

Because all of Plaintiffs' claims had been rejected, either by the district court or by this Court, Plaintiffs filed a timely notice of appeal on December 16, 2021, from the district court's orders granting in part and denying in part Defendants' motion for summary judgment and denying Plaintiffs' motion for reconsideration. ROA.2319.

SUMMARY OF ARGUMENT

I. The district court made three independent reversible errors in dismissing Plaintiffs' ADA and Rehabilitation Act claims for failure to exhaust, and it misunderstood the elements of those claims when it held that they also fail on the merits.

A. First, the district court should have refused on judicial estoppel grounds to entertain Defendants' exhaustion defense. Before the IDEA hearing officer, Defendants objected to "the inclusion of any legal issues that are not specifically within the jurisdiction of a Special Education Due Process Hearing Officer," specifically including claims brought under the ADA and the Rehabilitation Act. ROA.464. The hearing officer accepted Defendants' arguments that he lacked jurisdiction to resolve claims under the ADA and the Rehabilitation Act, and accordingly issued an order dismissing those claims. Defendants then did an about-face and told the district court in this case that it lacked jurisdiction over Plaintiffs' ADA and Rehabilitation Act claims because Plaintiffs did not properly exhaust those claims in the IDEA administrative hearings. The district court abused its discretion in failing to recognize that Defendants were judicially estopped from asserting this exhaustion defense because it was fundamentally incompatible with the argument they previously made before the IDEA hearing officer.

B. Second, even putting aside judicial estoppel, Defendants' exhaustion defense fails because Plaintiffs' ADA and Rehabilitation Act claims were not subject

to the IDEA's exhaustion requirements. As the Supreme Court explained in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 (2017), the IDEA requires exhaustion only where the suit seeks "relief for the denial of a [free appropriate public education], because that is the only 'relief' the IDEA makes 'available.'" Plaintiffs' ADA and Rehabilitation Act claims have nothing to do with the denial of a free appropriate public education or any shortcomings in the implementation of Jevon's individualized education program. Plaintiffs seek monetary damages for the injuries inflicted on Jevon when he was tackled and tased by Officer Paley because he was a child with a disability who was in the middle of an episode of emotional disturbance and who was therefore unable to respond as a nondisabled child might have when ordered not to leave the building. ROA.1541-42. Accordingly, the IDEA's exhaustion requirements are inapplicable.

C. Third, even if the IDEA's exhaustion requirements did apply to Plaintiffs' ADA and Rehabilitation Act claims, Plaintiffs would be excused from those requirements on futility grounds. *See Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 111–12 (5th Cir. 1992) ("[P]arents may by-pass the administrative process [of the IDEA] where exhaustion would be futile or inadequate."). The harm Plaintiffs seek to remedy through their disability discrimination claims is purely retrospective: the injury inflicted on Jevon when he was violently tackled and tased because he was in the middle of an episode of emotional disturbance caused by his disabilities. There is no modification Defendants could have made to Jevon's individualized education

program to make up for that single violent incident. Moreover, the tasing occurred midway through Jevon's senior year of high school, and it has now been years since he was a student in the Katy Independent School District system. Accordingly, even if Plaintiffs' disability discrimination claims implicated educational shortfalls, there would no longer be any opportunity to remedy those shortfalls through the administrative system by formulation of a forward-looking educational plan.

D. The district court further erred in denying Plaintiffs' disability discrimination claims on the merits. Plaintiffs assert that Jevon was subjected to disparate treatment because of his disability—specifically, that he was violently tackled and tased because of his intellectual disability and that a nondisabled student would not have been subjected to the same treatment. The district court erroneously concluded that Plaintiffs lacked viable disability discrimination claims because it misapprehended the nature of Plaintiffs' claims, misconstrued the summary judgment record and improperly drew factual inferences against Plaintiffs, and held Plaintiffs to an unduly high intent standard.

II A. The district court misapplied this Court's precedent when it held that Plaintiffs' substantive due process claim could not proceed. In *Fee v. Herndon*, this Court held that injuries resulting from corporal punishment do not violate the Fourteenth Amendment so long as the forum state provides adequate alternative remedies. 900 F.2d 804 (5th Cir. 1990). This Court has repeatedly recognized claims, however, challenging the violation of "a student's liberty interest in maintaining bodily

integrity," so long as the claim did not involve "corporal punishment … intended as a disciplinary measure." *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 875 (5th Cir. 2000). It is undisputed that Paley was simply attempting to "restrain" Jevon when he tackled and tased him, not trying to punish or discipline Jevon for an infraction. Accordingly, the *Fee* bar does not apply.

II B. Even if this Court were to determine that *Fee* applies in this case, it was wrongly decided and should be reconsidered by this Court sitting en banc. *Fee* conflicts with Supreme Court precedent making clear that the substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'" and that such constitutional violations are "complete when the wrongful action is taken," regardless of any "state-tort remedy that might be available" after the fact. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Such post hoc procedures, while potentially precluding *procedural* due process arguments, are irrelevant to substantive due process claims that have already accrued.

Fee's factual premise—that Texas affords adequate post-punishment review of corporal punishment decisions, *see Fee*, 900 F.2d at 808; *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc)—is also incorrect. In civil suits, "Texas school districts generally do have state-law governmental immunity from tort claims brought by injured students," and individual school officials often enjoy recourse to "Texas's common-law official immunity." *Moore*, 233 F.3d at 878 (Wiener, J., specially

concurring). On the criminal side, victims do not "have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge." Tex. Const. art. I, § 30(e). As a result of these restrictions, students in Texas lack the "adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions" that *Fee* held were prerequisites to its bar on substantive due process claims arising out of corporal punishment. *Fee*, 900 F.2d at 808.

STANDARD OF REVIEW

This Court reviews a district court's summary judgment rulings de novo. *Windham v. Harris County*, 875 F.3d 229, 234 (5th Cir. 2017). Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *SEC v. Kahlon*, 873 F.3d 500, 504 (5th Cir. 2017). Determinations regarding judicial estoppel are reviewed for abuse of discretion. *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012).

ARGUMENT

I. The District Court Erred in Dismissing Plaintiffs' ADA and Rehabilitation Act Claims.

A. The district court abused its discretion in concluding that Defendants are not judicially estopped from asserting an exhaustion defense.

The district court abused its discretion in holding that Defendants were not judicially estopped from raising an exhaustion defense that is fundamentally incompatible with arguments they previously made before the IDEA hearing officer. Judicial estoppel "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Reed v. City of Arlington*, 650 F.3d 571, 573–74 (5th Cir. 2011); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Because it is an "equitable doctrine designed to protect the integrity of judicial proceedings by preventing litigants from asserting contradictory positions for tactical gain," *Ecuador v. Connor*, 708 F.3d 651, 654 (5th Cir. 2013), "it should be applied flexibly, with an intent to achieve substantial justice … [and] guided by a sense of fairness," *Reed*, 650 F.3d at 574 (quoting 18 James Moore et al., Moore's Federal Practice § 134.31).

Courts evaluating a judicial estoppel argument determine whether "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Id.* A district court abuses its discretion in declining

to apply judicial estoppel "if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Allen v. C & H Distributors, L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (internal quotation marks omitted).

Before the IDEA hearing officer, Defendants objected to "the inclusion of any legal issues that are not specifically within the jurisdiction of a Special Education Due Process Hearing Officer," specifically including claims brought under the ADA and the Rehabilitation Act. ROA.464. Because "Special Education Due Process hearings are limited to matter[s] relating to … the provision of a [free appropriate public education] to a child with a disability," Defendants argued, hearing officers "do not have jurisdiction to make rulings about whether specific facts may constitute a violation, or not, of … federal laws other than the IDEA." *Id.* They further objected to the hearing officer's review of Plaintiff's "laundry list of monetary injuries which are not within the jurisdiction of the Hearing Officer." ROA.465. Ultimately, Defendants said, "The Hearing Officer's sole jurisdiction in this matter is with regard to claims brought under the IDEA," and other statutory claims "are not properly before this Hearing Officer and must be dismissed." *Id.*

The hearing officer accepted Defendants' arguments that he lacked jurisdiction to resolve claims under the ADA and the Rehabilitation Act. Accordingly, he issued an order dismissing "[a]ll claims brought by Petitioner … other than those under the

Individuals with Disabilities Education Act[] … for want of jurisdiction." ROA.356; *see also* ROA.406.

Defendants then took the opposite position before the district court in this case. In arguing for summary judgment on Plaintiffs' ADA and Rehabilitation Act claims, Defendants wrote, "Plaintiffs fail to establish subject matter jurisdiction in this Court … because they cannot show that they *properly* alleged exhaustion of administrative remedies." ROA.616. Plaintiffs explained in their opposition that Defendants "argued in the due process hearing below that the hearing officer lacked jurisdiction to hear an ADA or a Section 504 claim" and therefore should be estopped from asserting exhaustion as a defense to those same claims before the district court. ROA.2044. But in reply, Defendants doubled down on the notion that Plaintiffs were required, but had failed, to exhaust their disability discrimination claims. Defendants did not respond directly to Plaintiffs' estoppel argument except to make a merits-based argument that *all* of Plaintiffs' disability discrimination claims were ultimately "education-based claims" that "sought education-based relief" and therefore required exhaustion under the IDEA. ROA.2044-45.

The district court concluded that Defendants' "position in the administration [sic] hearing and the current litigation position are not inconsistent." ROA.2130. Specifically, it held that there was no contradiction between Defendants' argument that the IDEA hearing officer "lacked jurisdiction over [Plaintiffs'] ADA and § 504 claims" and their subsequent argument before the district court that "because

[Plaintiffs'] claims under the ADA and § 504 overlap with relief sought under the IDEA, administrative exhaustion was required under the IDEA." *Id.*

This analysis was an abuse of discretion relying on an erroneous application of law to fact: There is simply no way to reconcile Defendants' competing litigation positions. To the hearing officer, Defendants argued that the hearing officer lacked jurisdiction to consider Plaintiffs' ADA and Rehabilitation Act claims because "Special Education Due Process hearings are limited to matter[s] relating to … the provision of a [free appropriate public education] to a child with a disability." ROA.464. Thus, Defendants assert that Plaintiffs' disability discrimination claims did not relate to the provision of a free appropriate public education.

Then, before the district court, Defendants argued that Plaintiffs' failure to obtain a resolution on the merits of their ADA and Rehabilitation Act claims from the hearing officer barred the district court from considering those same claims, despite the fact that Defendants were responsible for the non-merits-based dismissal of those claims from the administrative proceedings. The remaining judicial estoppel factors are undeniably met here: The hearing officer accepted Defendants' initial position by dismissing Plaintiffs' non-IDEA claims from the proceedings, and nothing in the record suggests that Defendants' litigation positions have been anything but intentional. *Reed*, 650 F.3d at 574. The district court therefore should have found that Defendants were judicially estopped from raising an exhaustion defense to Plaintiffs' non-IDEA disability discrimination claims.

The cases cited by the district court support the conclusion that judicial estoppel is warranted here. In *Boggs v. Krum Independent School District*, the defendant school district had stipulated that the plaintiff's allegations "did not raise … concerns that the student did or did not receive a Free Appropriate Public Education." 376 F. Supp. 3d 714, 720–21 (E.D. Tex. 2019). The district court barred the defendant from asserting an exhaustion defense to the plaintiff's ADA and Rehabilitation Act claims because it would be "manifestly unjust" to permit the school district to fault the plaintiff for not obtaining a resolution on the merits on those claims. *Id.* at 721. The same manifest injustice would arise here, where Defendants argued that the administrative proceedings were "limited to matter[s] relating to … the provision of a [free appropriate public education] to a child with a disability" and that therefore the hearing officer lacked jurisdiction over Plaintiffs' ADA and Rehabilitation Act claims. ROA.464.

Similarly, in *C.M. v. Cedar Park Charter Academy PTO*, the defendants argued to the hearing officer that he "only had authority to remedy the denial of a [free appropriate public education] under the IDEA, not any of the other claims," and that "the various types of relief [the plaintiff] requested, such as medical and psychiatric expenses, damages, and equitable relief, could not be ordered by a hearing officer." No. 18-CV-644 (RP), 2019 WL 1856414, at *4 (W.D. Tex. Apr. 24, 2019). The district court concluded that these arguments were "[f]acially … inconsistent" with the defendants' position that plaintiffs had "failed to exhaust their administrative

remedies." *Id.* The court declined to estop defendants from raising that facially inconsistent argument only because "there was no ruling on the Defendants' Plea to the Jurisdiction" and the plaintiffs had "voluntarily dismissed their case." *Id.* Here, Defendants made the exact same facially inconsistent arguments, first contending that the hearing officer lacked jurisdiction over Plaintiffs' disability discrimination claims and could not award many of the remedies Plaintiffs sought for those claims, and later arguing that Plaintiffs failed to exhaust. This Court should bar Defendants from taking advantage of this bait and switch and damaging "the integrity of the judicial process." *Boggs*, 376 F. Supp. 3d at 721.

B. Plaintiffs' ADA and Rehabilitation Act claims are not subject to the IDEA's exhaustion provision.

Even if judicial estoppel did not foreclose Defendants' exhaustion defense, Plaintiffs' ADA and Rehabilitation Act claims are not subject to the IDEA's exhaustion requirements.

1. The IDEA was enacted to ensure that schoolchildren with physical and intellectual disabilities receive a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A). A free appropriate public education includes "special education and related services," comprising "both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748–49 (2017) (quoting 20 U.S.C. §§ 1401(9), (26), (29)).

Under the IDEA, the "primary vehicle" for providing each child with a free appropriate public education is an individualized education program, which is crafted by the student's parents, teachers, and school officials and which "spells out a personalized plan to meet all of the child's 'educational needs.'" *Id.* at 749 (quoting 20 U.S.C. §§ 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B)). A student's individualized education program "documents the child's current 'levels of academic achievement,' specifies 'measurable annual goals' for how she can 'make progress in the general education curriculum,' and lists the 'special education and related services' to be provided so that she can 'advance appropriately toward [those] goals.'" *Id.* (alteration in original) (quoting 20 U.S.C. §§ 1414(d)(1)(A)(i)(I), (II), (IV)(aa)). Students who allege that a school has denied them a free appropriate public education must follow formal procedures for resolving disputes and are required to administratively exhaust those procedures before filing an IDEA claim in state or federal court. *See* 20 U.S.C. § 1415.

The IDEA is not the only federal statute that protects disabled students, however. Both Title II of the ADA and Section 504 of the Rehabilitation Act prohibit discrimination on the basis of disability by any "public entity" or federally funded "program or activity," respectively. 42 U.S.C. §§ 12131–12132; 29 U.S.C.

§ 794(a).[6] Both laws require public entities, including public schools, to make reasonable accommodations to ensure adequate access to people with disabilities. *See, e.g.*, *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). Neither the ADA nor the Rehabilitation Act contains an administrative exhaustion requirement.

Congress intended for these statutory protections to work in tandem to provide an array of overlapping protections to disabled schoolchildren. Accordingly, after the Supreme Court interpreted the original IDEA to serve as the "exclusive avenue" through which a schoolchild could challenge disability discrimination in the education context, *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), Congress promptly enacted the Handicapped Children's Protection Act of 1986 to make clear that the IDEA did not foreclose alternative disability discrimination claims in the school context. It clarified that "[n]othing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under" the Constitution, the ADA, Section 504 of the Rehabilitation Act, or other laws "protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). And it made clear that exhaustion of such claims

[6] Because "[c]laims brought under § 504 or the ADA, or both, are subject to the same analysis," *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 416 (5th Cir. 2021); *see also D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010), this brief refers to both claims as the "disability discrimination claims" and cites the applicable ADA provisions.

was required only "before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]." *Id.*

The Supreme Court in *Fry v. Napoleon Community Schools* identified the circumstances under which non-IDEA claims need to be exhausted under § 1415(*l*) because they "seek[] relief that is also available under" the IDEA. It explained that, to meet the statutory requirement, "a suit must seek relief for the denial of a [free appropriate public education], because that is the only 'relief' the IDEA makes 'available.'" 137 S. Ct. at 752. Accordingly, even in a suit that "arises directly from a school's treatment of a child with a disability" that "could be said to relate in some way to her education," if "the remedy sought is not for the denial of a [free appropriate public education], then exhaustion of the IDEA's procedures is not required." *Id.* at 754.

Next, the Court explained that the way to evaluate whether a complaint "seek[s] relief that is also available" under the IDEA is by looking at "the gravamen" of the disability discrimination claim to determine whether the plaintiff "is in essence contesting the adequacy of a special education program." *Id.* at 755. A major "clue to whether the gravamen of a complaint against a school concerns the denial of a [free appropriate public education], or instead addresses disability-based discrimination" is whether the plaintiff could "have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school" and whether "an *adult*

at the school," such as "an employee or visitor," could "have pressed essentially the same grievance." *Id.* at 756.

The Court adopted one "example illustrating the point," which has marked similarities to the current case. Hypothesizing a situation in which "a teacher, acting out of animus or frustration, strikes a student with a disability, who then sues the school," the Court noted that, although "the suit could be said to relate, in both genesis and effect, to the child's education," "the substance of the plaintiff's claim is unlikely to involve the adequacy of special education—and thus is unlikely to require exhaustion," in part because "a child could file the same kind of suit against an official at another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official." *Id.* n.9.

Finally, the Court identified the history of the proceedings as a "further sign" that could signal that the gravamen of a suit is the denial of a free appropriate public education. *Id.* at 757. It explained that "[p]rior pursuit of the IDEA's administrative remedies" might evince that "the substance of a plaintiff's claim concerns the denial of a [free appropriate public education]," but that a court may conclude otherwise based on specific facts that establish "that the grievance involves something else entirely." *Id.*

2. Under the clear statutory text and the Supreme Court's decision in *Fry*, Plaintiffs' disability discrimination claims do not require exhaustion under the IDEA. The "gravamen" of Plaintiffs' ADA and Rehabilitation Act claims is that Jevon was

subjected to discriminatory treatment on account of his disability, which has nothing to do with the denial of a free appropriate public education or any shortcomings in the implementation of his individualized education program.

A core aspect of Plaintiffs' claims is that Defendants "failed and refused to permit [Jevon] to leave the campus as they would have otherwise permitted a non-disabled student to do." ROA.171. Plaintiffs argued that Paley and others knew that Jevon was a student with a disability and did not permit him to leave the campus "by reason of his disability." ROA.1543. Instead, Defendants violently tackled and tased Jevon because he was a child with a disability who was in the middle of an episode of emotional disturbance and who was therefore unable to respond as a nondisabled child might have when ordered not to leave the building. ROA.1541-42. The remedies Plaintiffs sought for these claims, as well as their § 1983 claims, were "an amount sufficient to fully compensate them for the elements of damages enumerated above," ROA.176, which included physical pain in the past, medical expenses in the past and future, mental anguish in the past and future, mental health expenses in the past and future, physical impairments in the past and future, loss of earnings capabilities, and "[l]oss of educational opportunities to the same extent as a non-disabled student." ROA.174-75.

Nothing about these arguments suggests that Plaintiffs are "in essence contesting the adequacy of a special education program." *Fry*, 137 S. Ct. at 755. Instead, Plaintiffs' disability discrimination claims are straightforward arguments that

Defendants' insistence on keeping Jevon in the building and choice to do so with the unwarranted use of a taser by a school police officer entailed treating him worse than other, nondisabled students because of his disability.

The Supreme Court's "clue" in *Fry* helps to illustrate this distinction. *Id.* at 756. If Jevon had been at a different public facility—for instance, at a library—when he had experienced his emotional disturbance and a staff member or security guard, purporting to be trying to keep him safe, had used violent force to keep him inside the building, his disability discrimination claims would be equally viable. And if Jevon had been an intellectually disabled adult in the school building who began experiencing a mental health episode and he had been tased to prevent him from exiting the building, his claims would look no different. Nothing about Plaintiffs' disability discrimination claims turn on the events having occurred in a school building and the violence used having been inflicted on a student. This is why, as the Supreme Court explained, a student with a disability struck by a teacher motivated by frustration or animus would not be required to exhaust ADA claims under the IDEA: The "substance" of the claim would not "involve the adequacy of special education," even if "the suit could be said to relate, in both genesis and effect, to the child's education." *Id.* n.9; *see also, e.g.*, *Heston ex rel. A.H v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 982 (5th Cir. 2020) (unpublished) ("[C]laims that are solely concerned with physical injury and abuse are not subject to the exhaustion requirements of the IDEA."). The same analysis applies here.

The history of the administrative proceedings also supports this conclusion. *See Fry*, 137 S. Ct. at 757. Throughout the proceedings, Plaintiffs consistently maintained that their ADA and Rehabilitation Act claims were distinct from their IDEA claims. In explaining why Plaintiffs' IDEA claim had been timely filed before the hearing officer, for instance, Plaintiffs wrote, "Jevon has a cause of action against the District for the tasing incident, pursuant to Section[] 504, the ADA and Section 1983[,] which will be litigated in federal court. … Jevon has a separate cause of action for the District's refusal to provide him a *Free Appropriate Public Education*…." ROA.372; *see also* ROA.361 (same). Far from suggesting that Plaintiffs' initiation of IDEA proceedings is evidence that the substance of their ADA and Rehabilitation Act claims concern the denial of a free appropriate public education, Plaintiffs made clear from the very beginning that those claims "involve[] something else entirely," *Fry*, 137 S. Ct. at 757, namely, discriminatory physical abuse because of Jevon's intellectual and emotional disability.

The district court's conclusion that exhaustion was required because Plaintiffs' claims were generally tied to the educational context and "[t]he complaint allegations focus on J.W.'s status as a student," ROA.2237, misconstrues the *Fry* analysis. The mere fact that a complaint "includes allegations related to [the plaintiff's] disabilities and the denial of educational opportunities" is not sufficient to require exhaustion. *Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 227 (5th Cir. 2019). Indeed, the Supreme Court in *Fry* expressly rejected a standard that would require exhaustion for claims

that were merely "'educational' in nature." *Fry*, 137 S. Ct. at 758. Although Plaintiffs' complaint acknowledges that the events on the day of the tasing subsequently affected Jevon's general ability to access his education, Plaintiffs never claimed that the refusal to allow Jevon to leave the school building and the tasing constituted inadequate individualized educational services. Jevon's disability discrimination claims have nothing to do with whether he was denied either "'instruction' tailored to meet [his] 'unique needs'" or "sufficient 'supportive services' to permit [him] to benefit from that instruction," which are the components of a free appropriate public education under the IDEA. *Id.* at 748–49. Proving this point, if Jevon's individualized education program had otherwise been followed to the letter, he would still have exactly the same claims for disability discrimination.

C. Exhaustion would have been futile.

Even if Plaintiffs' ADA claims had been the sort to require exhaustion under the IDEA, exhaustion was still unnecessary here because it would have been futile. "[P]arents may by-pass the administrative process [of the IDEA] where exhaustion would be futile or inadequate." *Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 111–12 (5th Cir. 1992) (quoting *Honig v. Doe*, 484 U.S. 305, 327 (1988)); *see also Papania-Jones v. Dupree*, 275 F. App'x 301, 303 (5th Cir. 2008) (same). "To show futility, a plaintiff must demonstrate that adequate remedies are not reasonably available or that the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process." *M.L. v. Frisco Indep. Sch. Dist.*, 451 F. App'x 424, 428

(5th Cir. 2011) (quoting *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 205 (2d Cir. 2007)).

Here, exhaustion of Plaintiffs' disability discrimination claims would have been futile for two reasons. First, the harm Plaintiffs are seeking to remedy through their disability discrimination claims is purely retrospective: the injury inflicted on Jevon when he was violently tackled and tased because he was in the middle of an episode of emotional disturbance caused by his disabilities. There is no modification Defendants could have made to Jevon's individualized education program to make up for that single violent incident and thus "the wrongs alleged could not … have been corrected by resort to the administrative hearing process." *Id.* That is the reason Jevon seeks compensatory damages for the violent tasing incident rather than some form of prospective equitable damages.

Second, the tasing occurred midway through Jevon's senior year of high school, and it has been years since he was a student in the Katy Independent School District system. This Court has held that the purpose of the exhaustion requirement is to give "educational professionals … at least the first crack at formulating a plan to overcome the consequences of educational shortfalls." *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 648 (5th Cir. 2019) (internal quotation marks omitted); *see also, e.g.*, *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995) (excusing exhaustion where no factual development was needed regarding "evaluation, classification, and placement"), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007).

Even if Plaintiffs' disability discrimination claims implicated "the consequences of educational shortfalls," there would no longer be any opportunity to remedy those shortfalls through the administrative system by formulation of a forward-looking educational plan. *See, e.g.*, *Covington v. Knox Cty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000), *as amended on denial of reh'g* (May 2, 2000) (holding that in a case "in which the injured child has already graduated …, his injuries are wholly in the past, and therefore money damages are the only remedy that can make him whole[,] proceeding through the state's administrative process would be futile and is not required before the plaintiff can file suit in federal court").[7]

The district court concluded that exhaustion of the disability discrimination claims would not have been futile because Jevon "was a student during, and for months after, the tasing" and "could have sought relief while still a student through the administrative process, which could have changed his individualized education plan or resulted in additional services." ROA.2133-34. But—even accepting the district court's erroneous assumption that some change to Jevon's individualized education program could have remedied the purely backward-looking harm he suffered from the tasing—there is no basis from which to conclude that the

[7] To be clear, this is not an argument that exhaustion would have been futile because the relief Plaintiffs seek for their disability discrimination claims is compensatory damages and such relief is not "also available" under the IDEA. 20 U.S.C. § 1415(*l*). Plaintiffs acknowledge that this Court's decision in *McMillen* forecloses that argument, and Plaintiffs reserve the right to challenge that holding en banc or in a petition for certiorari to the Supreme Court.

administrative process could have run its course in time to adjust Jevon's education plan before he finished high school just a few months later.

D. Plaintiffs' ADA and Rehabilitation Act claims are viable on the merits.

The district court further erred in denying Plaintiffs' disability discrimination claims on the merits. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). Accordingly, "[a] plaintiff states a claim for relief under Title II if he alleges: (1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability." *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011) .

As set forth above, *see supra* at pp. 24-25, Plaintiffs asserted claims that Jevon was subjected to disparate treatment because of his disability—specifically, that he was violently tackled and tased because of his intellectual disability and that a nondisabled student would not have been subjected to the same treatment. The district court erroneously concluded that Plaintiffs lacked viable disability discrimination claims because it misapprehended the nature of Plaintiffs' claims,

misconstrued the summary judgment record and improperly drew factual inferences against Plaintiffs, and held Plaintiffs to an unduly high intent standard.

First, in explaining that the "treatment of a disabled student may be different from that of a nondisabled student, but different is not necessarily discriminatory," the district court proceeded as though Plaintiffs claimed that the only disparate treatment Jevon experienced was in Defendants' mere decision to "keep [Jevon] from exiting the building," relying on self-serving testimony from Defendants that they were altruistically "motivated by a desire to keep [Jevon] safe from the vulnerabilities his disabilities caused." ROA.2242; *see also* ROA.2245. The court all but ignored that the method Defendants ultimately chose to prevent Jevon from setting foot outside included charging violently at him, putting him in a chokehold, tasing him into a prone position, and continuing to tase him after he was incapacitated. Plaintiffs' claim was not that Defendants viewed Jevon as different from his nondisabled classmates and requiring special protection but rather that they subjected him to unwarranted violence on account of that difference—a clear claim of discriminatory treatment.

And contrary to the district court's lopsided determination, *see* ROA.2243, there was substantial evidence in the record from which a finder of fact could have concluded that Jevon was in fact treated worse than a nondisabled student would have been under the same circumstances. As Plaintiffs pointed out, the school district disciplinary handbook provides that "[s]tudents who leave campus at any time without parental permission and administrative approval shall be considered truant and will be

subject to disciplinary action." ROA.1670-71; *see also* ROA.158 (First Amended Complaint) (noting that a school district policy is that any student "who leaves campus without parental and administrative permission will be considered truant"). But nothing in the handbook allows a school official to physically bar a student from leaving the building—much less tackle and tase a student—to prevent truancy. And while the handbook allows some use of physical restraint under limited circumstances, nothing in it permits the use of a restraint on a student—much less a violent restraining method such as a taser—simply to prevent the student from exiting a building or leaving campus. ROA.1672. This is evidence from which a finder of fact could conclude that the truancy policies that would ordinarily apply to a nondisabled student attempting to leave campus were not applied to Jevon and that he was instead subjected to a particularly violent form of restraint because he was disabled. And it is consistent with statements from Paley and an assistant school principal, who both said they intentionally acted to keep Jevon within the school building because of his disability. ROA.636, 1472. Paley's method of doing so—tasing Jevon into submission and continuing to tase him well past the point of immobilizing him on the ground—was undoubtedly worse treatment than simply getting written up for truancy. The district court should not have "weigh[ed] the evidence and determine[d] the truth of the matter" but instead should simply have "determine[d] whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Finally, the district court held Plaintiffs to an unduly high standard for proving discriminatory intent, faulting Plaintiffs for failing to show that Defendants' treatment of Jevon was "motivated by ill will, prejudice, or spite, or that the tasering was 'by reason of' an animus toward [Jevon] because of his disabilities." ROA.2242. As even the district court acknowledged, this Court has not required a showing of "prejudice, ill-will, or spite" to prove a claim of disparate treatment. *Id.* (internal quotation marks omitted). Such a requirement is inconsistent with the plain text of the statute, which requires that a plaintiff be "subjected to discrimination" by a public entity but does not suggest that the discrimination must be motivated by animus. 42 U.S.C. § 12132. And it cuts against Congress's core purpose in enacting the ADA, which was to combat not "invidious animus, but rather [] thoughtlessness and indifference," because "discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus." *Alexander v. Choate*, 469 U.S. 287, 295–96 (1985).

The district court's animus requirement also does not comport with other legal standards applicable to an ADA lawsuit. The basic requirements for stating *any* Title II claim are that the plaintiff has a qualifying disability; that he was denied the benefits of a public entity's services, programs, or activities or otherwise discriminated against by the public entity; and that the discrimination was "by reason of his disability." *Hale*, 642 F.3d at 499. To receive compensatory damages in a Title II lawsuit, the plaintiff also has to show that the discrimination was "intentional." *Delano-Pyle v.*

Victoria County, 302 F.3d 567, 575 (5th Cir. 2002). Though this Court has not "delineate[d] the precise contours" of the intentionality requirement, it has generally required some version of "actual notice." *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 575 (5th Cir. 2018); *see, e.g.*, *Delano-Pyle*, 302 F.3d at 575–76 (affirming damages based on defendant's knowledge of a plaintiff's disability and decision not to accommodate them). "Actual notice" of a disability is a far less onerous standard than a showing of animus, which the district court incorporated into the threshold question of whether Plaintiffs had successfully asserted a prima facie Title II claim. It would make no sense for the standard for stating a claim under Title II to be higher than the standard for stating a claim *and* receiving damages for that claim.

Plaintiffs have at the very least created a genuine issue of material fact sufficient to satisfy the "actual notice" standard for securing damages in a Title II claim. As the district court recognized, ROA.2242, Paley stated in his own declaration that he was aware that Jevon participated in special education programming at the school and therefore "knew that he was probably a special needs student," ROA.636. He further stated that he had witnessed Jevon "leave class, curse at teachers, and punch the concrete hallway walls" in the past, though he did not witness the incident that led Jevon to leave class on the day of the tasing. *Id.* And once Paley arrived in the doorway and encountered Jevon, he witnessed Jevon say repeatedly, "This is making it worse" and ask to be let go so he could "cool down." ROA.1559. A fact-finder

could readily conclude from Paley's own acknowledgments, combined with video footage of the events leading up to the tasing, that Paley was aware that Jevon's behavior was attributable to his disability and, therefore, that Paley had actual notice that he was tasing Jevon because the latter was disabled.

Even if the district court were correct that anti-disability animus is required to prove a Title II claim, there is record evidence of such animus here. Video footage in the immediate aftermath of the tasing shows Paley pointing his taser at Jevon's head and yelling, "I did not want to tase you, but you do not run shit around here." ROA.2119; Video 12:47:50. And subsequent footage revealed Paley's actual motivations for resorting to tasing: "I got tired of wrestling with him so I popped him." Video 13:10:30–:32. A fact-finder could reasonably conclude from this evidence that Paley was motivated to violence by animus toward Jevon because of his disability, satisfying even the district court's unnecessarily high standard for proving a disability discrimination claim.

II. The District Court Erred in Barring Plaintiffs' Fourteenth Amendment Claim.

A. Plaintiffs have a viable substantive due process claim because the tasing was not "corporal punishment."

"[T]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981)). More specific to this context, "schoolchildren have a

liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir. 1994).

In this Circuit, however, that liberty interest is significantly curtailed under certain circumstances. In *Fee v. Herndon*, this Court held that injuries resulting from corporal punishment do not violate the Fourteenth Amendment if the forum state provides adequate alternative remedies. 900 F.2d 804 (5th Cir. 1990). As a result, this Court has tended to dismiss substantive due process claims challenging the use of excessive corporal punishment for disciplinary and pedagogical purposes. *See T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 414 (5th Cir. 2021) (citing dismissals of substantive due process claims where students were punished with force for disrupting class or similar misconduct). *But see Fee*, 900 F.2d at 808 ("[C]orporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." (internal quotation marks omitted)).

But conduct that is not "punishment" does not implicate the *Fee* rule. *See, e.g.*, *Jefferson*, 817 F.2d at 305 (because the plaintiff "was not being punished," "the holding of *Ingraham v. Wright* and its progeny are inapposite"). Instead, where the "punitive and disciplinary objectives attendant to corporal punishment" do not exist, "those cases in this circuit that have held that the infliction of excessive corporal punishment does not violate due process are inapposite." *Doe v. Taylor*, 15 F.3d at 452 & n.5

(citing *Fee*, 900 F.3d 804). This Court has repeatedly recognized claims challenging the violation of "a student's liberty interest in maintaining bodily integrity," so long as the claim did not involve "corporal punishment … intended as a disciplinary measure." *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 875 (5th Cir. 2000). Indeed, this Court has stated that "[b]y now, every school teacher and coach must know that inflicting pain on a student … violates that student's constitutional right to bodily integrity by posing a risk of significant injury." *Id.*

Corporal punishment is the use of "reasonable but not excessive force to discipline a child" that a "teacher or administrator 'reasonably believes to be necessary for (the child's) proper control, training, or education.'" *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) (alteration in original); *see also id.* at 663 (citing "the common-law rule permitting teachers to use reasonable force in disciplining children in their charge"). The use of force against schoolchildren is considered "corporal punishment" by this Court where the challenged conduct "occurred in a disciplinary, pedagogical setting." *T.O.*, 2 F.4th at 414. The relevant circumstances for determining whether such "punishment is reasonable in a particular case" include "the seriousness of the offense [of the child], the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline." *Ingraham*, 430 U.S. at 662.

In keeping with this distinction, this Court has precluded substantive due process claims for infringements on students' bodily integrity that arose in the context

of "punishment," but not claims that did not involve discipline. For instance, this Court has barred substantive due process claims by a student who was beaten with a paddle for disrupting class, *Fee*, 900 F.2d at 808–09; a student who was made to do excessive physical exercise after breaking a class rule about speaking during class, *Moore*, 233 F.3d at 874–75; a student who was forcibly removed from a classroom by a school police officer as punishment for having been "disruptive" and "defiant" in class, *Campbell v. McAlister*, 162 F.3d 94 (5th Cir. 1998) (unpublished); a student who was subjected to inappropriate force by a teacher who believed that the student had "been purposefully delaying or avoiding his return to the detention room," *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504, 511 (5th Cir. 2004) (unpublished); and a student whose teacher "overreacted" in "act[ing] to discipline" the student after the student slid the teacher's compact disc across a desk, *Marquez v. Garnett*, 567 F. App'x 214, 217 (5th Cir. 2014) (unpublished). But this Court permitted substantive due process claims by a student who had been tied to a chair over the majority of two school days "not for punishment" but as "part of an instructional technique imposed by school policy," *Jefferson*, 817 F.2d at 304, and by a student who was sexually abused and statutorily raped by her teacher, *Doe v. Taylor*, 15 F.3d at 451–52 (noting that the claim could proceed because the teacher's misconduct was not "analogous to the punitive and disciplinary objectives attendant to corporal punishment").

It is undisputed that Paley was not trying to punish or discipline Jevon for an infraction. Paley himself acknowledged that school resource officers are not tasked

with disciplining students, that tasing is a law enforcement—not a disciplinary or pedagogical—function, and that he was attempting to "restrain" Jevon rather than to punish him for any misconduct. ROA.637.[8] Throughout this litigation, Defendants have echoed those statements, arguing that Paley's purpose in "physically restrain[ing] and tas[ing]" Jevon was assisting a colleague who was "trying to stop J.W. from leaving the building." ROA.608. Defendants have never tried to characterize Paley's conduct as a form of discipline taking place in a pedagogical setting; instead, it is abundantly clear that Paley's purpose in tasing Jevon was simply to keep him inside.

Moreover, the factors for evaluating the reasonableness of corporal punishment, *Ingraham*, 430 U.S. at 662, make clear that Paley's conduct does not fall into that rubric at all, because those factors all center on a deliberative decisionmaking process aimed at producing a pedagogical result. For instance, the factor looking to the seriousness of the offense of the child, *id.*, has no relevance where the child has not been accused of *any* offense and is not being penalized for one. Similarly, the inquiry into whether there were "less severe but equally effective means of discipline" makes no sense in a context in which no one claimed to be trying to discipline Jevon at all, much less looking for "effective" means of discipline. Accordingly, because

[8] This is consistent with the Katy Independent School District discipline management plan, which expressly states that "corporal punishment" is not permitted in Katy schools as a form of discipline management. ROA.1659.

Paley's conduct undisputedly did not constitute "punishment" or "discipline," the *Fee* bar does not apply.

B. *Fee* is wrong and should be overturned.

Even if this Court were to determine that *Fee* applies here, *Fee* was wrongly decided and should be reconsidered by this Court sitting en banc. *Fee* has its roots in *Ingraham v. Wright*, a school paddling case in which this Court held that in-school corporal punishment without prior notice and a hearing could not violate a public school student's procedural or substantive due process rights. *Ingraham v. Wright*, 525 F.2d 909, 915–20 (5th Cir. 1976) (en banc). When the Supreme Court took up *Ingraham*, however, it granted certiorari, as relevant here, only on the procedural question and declined to review this Court's conclusion that corporal punishment cannot violate substantive due process. *Ingraham*, 430 U.S. at 659 & n.12. Despite focusing on the procedural question, the Supreme Court acknowledged that "corporal punishment in public schools implicates a constitutionally protected liberty interest." *Id.* at 672. The Supreme Court did not hold that an adequate state-law remedy would categorically preclude a student's substantive due process claim arising from excessive corporal punishment. *Id.* at 679 n.47 ("We have no occasion in this case … to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause.").

This Court revisited the availability of a substantive due process claim for in-school corporal punishment in *Fee*. It recognized that "corporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Fee*, 900 F.2d at 808 (internal quotation marks omitted) (quoting *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)). Nevertheless, it went on to conclude that "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions." *Id.* This Court's rationale was that "such states have provided all the process constitutionally due" because "states that affirmatively proscribe and remedy mistreatment of students by educators do not, by definition act 'arbitrarily,' a necessary predicate for substantive due process relief." *Id.*

Fee was wrong when it was decided. It ignored Supreme Court precedent making clear that the substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'" and that such constitutional violations are "complete when the wrongful action is taken," regardless of any "state-tort remedy that might be available" after the fact. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Such post hoc procedures, while potentially

precluding *procedural* due process arguments, are irrelevant to substantive due process claims that have already accrued.

It is no surprise, then, that this Court stands alone in its conclusion that the availability of post hoc state-law remedies precludes substantive due process claims for excessive corporal punishment. Every other circuit to reach the question has concluded that a "decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute … a violation of substantive due process." *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518, 520, 521 n.3 (3d Cir. 1988) (acknowledging that the Supreme Court's decision in *Ingraham* foreclosed plaintiffs' procedural due process claim but nonetheless recognizing a substantive due process claim); *see also, e.g.*, *Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 172–73 (2d Cir. 2002); *Hall v. Tawney*, 621 F.2d 607, 614 (4th Cir. 1980); *Saylor v. Bd. of Educ. of Harlan Cty.*, 118 F.3d 507, 514 (6th Cir. 1997); *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 564 (8th Cir. 1988); *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996); *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650, 654 (10th Cir. 1987); *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000). Indeed, several other circuits have identified *Fee* as an outlier in its approach to substantive due process claims. *See P.B.*, 96 F.3d at 1302 n.3; *Neal*, 229 F.3d at 1075 n.2.

Fee is based on an erroneous legal premise, as these circuits have recognized, but its basic factual premise—that Texas affords adequate post-punishment review of corporal punishment decisions, *see Fee*, 900 F.2d at 808; *see also Ingraham*, 525 F.2d at

917—is also incorrect. This Court has "never closely examined the adequacy of th[e] state remedies" that purportedly stand in for substantive due process claims. *Moore,* 233 F.3d at 878 (Wiener, J., specially concurring). But in civil suits, "Texas school districts generally do have state-law governmental immunity from tort claims brought by injured students," and individual school officials often enjoy recourse to "Texas's common-law official immunity." *Id.* (citing *Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978), and *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994)). Beyond those general common-law immunities, Texas has enacted specific restrictions on lawsuits against school officials, including a notice requirement, Tex. Educ. Code § 22.0513; an administrative exhaustion requirement, *id.* § 22.0514; a damages cap, *id.* § 22.0515; alternative dispute resolution procedures, *id.* § 22.0516; and attorney fees for prevailing educators who are "found immune from liability," *id.* § 22.0517. And it has immunized "professional employee[s]" of schools from most disciplinary proceedings involving the use of force. *Id.* § 22.0512.

On the criminal side, Texas school officials are authorized to use force, and therefore not subject to prosecution, if "the actor reasonably believes the force is necessary to further [a] special purpose or to maintain discipline in a group." Tex. Penal Code § 9.62. Even if such criminal prosecutions existed under Texas law, they would still be inadequate to remedy harm to plaintiffs such as Jevon, since victims do not "have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge." Tex. Const. art. I, § 30(e). As a result of these restrictions,

students in Texas lack the "adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions" that this Court previously held were prerequisites to its bar on substantive due process claims arising out of corporal punishment. *Fee*, 900 F.2d at 808.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully ask this Court to reverse and remand to the district court for further proceedings.

Respectfully submitted,

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March 16, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains **11,287 words**, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in **14-point Garamond font**, a proportionally spaced typeface, using **Microsoft Word 2016**.

/s/ Elizabeth R. Cruikshank
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