

IN THE UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-8861  
Summary Calendar

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DAVID G., by and with his next  
friends David Michael and Barbara G.,  
Plaintiffs-Appellants,

versus

THE AUSTIN INDEPENDENT SCHOOL  
DISTRICT, ET AL.,  
Defendants-Appellees.

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Appeal from United States District Court  
for the Western District of Texas

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(A-92-CA-581-SS)  
(November 10, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Plaintiffs, David G., Jr. (hereinafter, David) and his  
parents, David G. (hereinafter Mr. G.) and Barbara G.,  
(hereinafter Mrs. G.) filed suit for damages arising from the  
injuries David G. sustained while a student in the Austin  
Independent School District (A.I.S.D.) program for the  
handicapped. Plaintiffs alleged that the defendants  
discriminated against David G., in violation of Section 504 of

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\* Local Rule 47.5 provides:  
"The publication of opinions that have no precedential value and  
merely decide particular cases on the basis of well-settled  
principles of law imposes needless expense on the public and  
burdens on the legal profession." Pursuant to that Rule, the  
Court has determined that this opinion should not be published.

the Rehabilitation Act of 1973, 29 U.S.C. §§ 794 and 794a, and under the Civil Rights Act of 1871, 42 U.S.C § 1983. For these violations, plaintiffs sought monetary damages, as well as injunctive and declaratory relief. The district court denied plaintiffs claims. Plaintiffs appeal, asserting that the district court erred in denying their claim under § 504 of the Rehabilitation Act and in denying their § 1983 claim.

For the reasons which follow, we affirm.

#### FACTS

David G. was born with spina bifida, a spine which formed outside his body before birth and closed after birth. The spina bifida resulted in mental retardation, speech, and orthopedic handicaps. He wears below-the-knee braces on both legs and is unable to bend his knees. When David was 17, his parents moved from Arizona to Texas. David was placed in a special education curriculum at Bowie High, a school in the Austin Independent School District (A.I.S.D.). His teacher was Laura Apparicio, and her aide was Marie Thompson. On October 24, 1991, two students without physical handicaps were assigned the task of mopping the floor on one side of the room. David was assigned the task of cleaning glue off a table on the other side of the room. Apparicio told David and the other students that the floor was wet, that they should stay off of it, and that she would let them know when it was dry. David walked across the floor. He slipped and fell on the wet floor and broke his knee. He returned to school on December 2, 1991 and appeared to recover from this fall.

On February 25, 1992, substitute teacher Arthur Teed was in the room and involved with other students when David somehow ended up on the floor and tried to pull himself up by using the leg of another student, Heather. The teacher's aide, Thompson, was in the library at that time. A student reported to her that David had fallen, and she telephoned Mrs. G. and Heather's mom. Thompson was later informed that David did not fall. David testified that his chair had "scoted" out from under him.

Mrs. G. had given her permission for David to participate in a program which required that he be transported once a week to the University of Texas (UT) campus and back to the Bowie campus. On February 26, 1992, the bus returned to the Bowie campus from UT approximately half an hour earlier than scheduled. The bus driver, Marilyn Harris, saw a number of people in the bus loading area. Harris assumed that one of the people was the teacher or a teacher's aide because, in the past, someone had always met the bus. She allowed the students to exit the bus. Harris had previously transported David and had seen him board and exit the bus without incident. David was the last to get off the bus. David slipped and fell on the ground while de-boarding the bus, and broke the same knee again. This time, he underwent surgery the next day. David was placed on homebound study in which he received instruction at home.

David returned to school in April. It was determined that modifications were necessary to David's individualized education program (IEP) because of his dependence on his wheelchair due the

second fall and its resultant surgery. A special-transportation request form was completed. This form specified that David required a wheelchair bus, needed a bus monitor, and required assistance getting on and off the bus for his regular school transportation. However, Mrs. G. was to transport him to the UT mentor program. On May 20, 1992, Mrs. G. formally requested that David be transferred to Austin High School, another A.I.S.D. school, for the 1992-1993 school year. AISD accommodated the request.

Mr. and Mrs. G. filed suit against the AISD, Laura Apparicio, and Marie Thompson. At the October 18-20, 1993 trial, plaintiffs argued that the defendants failed to provide the safe and suitable environment required in the Admission, Review, and Dismissal (ARD) committee reports, and that the defendants failed to reasonably accommodate David "either on paper or in accordance with what was on paper".

#### FINDINGS OF THE DISTRICT COURT

The district court determined that plaintiffs have no claim under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485 because David has been afforded a free and appropriate education. The district court observed that plaintiffs seek damages for physical and mental injuries, pain and suffering, mental anguish, inconvenience, and medical expenses and determined that these remedies would not be available under the IDEA even if David had been denied educational benefits. The district court also pointed out that

plaintiffs did not exhaust administrative remedies for their complaints about David's IEP.<sup>1</sup>

With regard to § 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, 794a, the district court noted that this court has held that a private right of action for monetary damages requires a showing of intentional discrimination. The district court made the factual determination that David's falls were unrelated accidents and were not the result of intentional discrimination, or even negligence or neglect, on anyone's part. Accordingly, the district court found that plaintiffs have no claim for monetary damages under § 504.

The district court addressed plaintiff's claim for damages under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq., and determined that David was not the victim of any discriminatory act, as defined in 42 U.S.C. §

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<sup>1</sup> In general, administrative remedies must be exhausted before the filing of a civil action under the IDEA or § 504 of the Rehabilitation Act. 20 U.S.C. § 1415(f). The district court found that plaintiffs' claims about AISD's development of the IEP, composition of the ARD committee, and homebound services that were not provided after the first fall were "alleged procedural irregularities [which] should have been addressed in an administrative proceeding before this civil suit was brought and, therefore, are not before the court. See 20 U.S.C. § 1415; Gardner v. School Bd. Caddo Parish, 958 F.2d 108, 111-112 (5th Cir. 1992)." However, the district court also found that, regarding allegations of improper *implementation* of the ARD report, it would have been futile for plaintiffs to exhaust their administrative remedies because "the relief they seek is not contemplated by the statute and raises legal questions that require judicial determination." Therefore, the district court stated that it "has jurisdiction to consider the G.'s claims to the extent they are limited to improper implementation of the ARD report. See Honig v. Doe, 484 U.S. 305, 327, 108 S.Ct. 592, 606 (1988)." These determinations are not challenged on appeal, and are not addressed herein.

12182(b)(2)(A).<sup>2</sup> The court also found that the relief plaintiffs sought was not cognizable under the ADA.<sup>3</sup>

The district court next determined that the evidence did not support plaintiffs 42 U.S.C. § 1983 claim because there was no showing of a violation of any right protected by federal statute or the U.S. Constitution. The district court concluded that, even if a constitutional violation had occurred, the evidence was not consistent with judgment in favor of plaintiffs under the doctrine of qualified immunity.

The district court also denied plaintiffs' claims for "unspecified injunctive relief", and plaintiff's claim that Texas Education Code § 21.912 and Tex. Civ. Prac. & Rem. Code §§ 107.001-.005 are unconstitutional.<sup>4</sup>

Plaintiffs appeal, asserting that the district court erred "when it found (1) that intent to harm was the standard of care required for plaintiffs to make out a claim under § 504 of the

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<sup>2</sup> § 12182(b)(2)(A) provides that "discrimination includes--

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods services, facilities, privileges, advantages, or accommodations to individuals with disabilities, . . .

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, . . .

<sup>3</sup> Plaintiffs do not appeal this determination, except insofar as their ADA claim could be asserted under 42 U.S.C. § 1983.

<sup>4</sup> Plaintiffs do not appeal this determination.

Rehabilitation Act and (2) that in any case there was no showing of negligence on the defendants' part." Plaintiffs also assert that they have a remedy under 42 U.S.C. § 1983. We disagree.

#### DISCUSSION

##### Standard of Care Under § 504 of the Rehabilitation Act

Appellants argue that the facts as determined by the district court make it unmistakably obvious that the circumstances attendant to David's injuries rise to the level of discriminatory intent. Appellants state that, given that all plaintiffs must establish is disparate treatment in order to prove intentional discrimination, plaintiffs have more than adequately met their burden.

The district court's factual determination --that David's falls were unrelated accidents which were not the result of intentional discrimination, or even negligence or neglect, on anyone's part-- is amply supported by the evidence. The testimony and documentary evidence show that there were both formal and informal meetings between David's parents and the AISD personnel responsible for his care. The evidence shows Mrs. G's desire for David to interact with children who were not disabled, and to allow David to have experiences beyond that to which he had become accustomed. Apparicio and others attempted to address these concerns. The record reflects the tension between, on the one hand, teaching David the skills necessary for him to live independently and, on the other hand, adequately restraining him so that he would not hurt himself. Contrary to appellants'

assertions in brief, David was not "required" to walk across a wet floor on October 24, 1991. When he did so, he acted against Apparicio's oral warnings during a life skills experiential learning setting. The second "fall", February 25, 1992, may or may not have been a fall, and apparently did not give rise to injury to David. The third fall, February 26, 1992, occurred as David got off a bus which he had boarded and exited "without incident" on previous occasions. The record supports the district court's factual determination that the falls were unrelated to action or inaction on the part of the defendants. Thus, we find no clear error in this district court determination. Accordingly, we find that appellant's argument that we should apply the standard of care used in common law negligence, even if true,<sup>5</sup> would provide no basis for relief. Likewise, we find no merit to appellant's assertion that

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<sup>5</sup> Appellants argue that we should apply the standard of care used in common law negligence. This court has determined that Guardians Association v. Civil Service Comm. of City of N.Y., 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) precludes the recovery of damages for an educational placement that violates § 504 unless the misplacement was intentional or manifested some discriminatory animus. Marvin H. v. Austin Independent School District, 714 F.2d 1348, 1356-57 (5th Cir. 1983); Carter v. Orleans Parish Public Schools, 725 F.2d 261, 264 (5th Cir. 1984). As a general matter, good faith attempts to pursue legitimate ends are not sufficient to support an award for compensatory damages under § 504. Wood v. Pres. & Trustees of Spring Hill College, 978 F.2d 1214, 1219 (11th Cir. 1992). We note that the instant plaintiffs' allegations of failure to provide a safe environment do not eliminate negligence or inadvertence as sources of error and, therefore, do not suffice as allegations of intentional discrimination. See and compare Carter. However, because we decide this case on other grounds, we do not address the question of whether plaintiffs' ability to recover monetary damages under § 504 was affected by Alexander v. Choates, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).



intentional discrimination has been shown by a showing of disparate treatment.

Appellants assert that, as a matter of law, David G. is "otherwise qualified" to participate in A.I.S.D.'s program. They contend that the question of whether he has been "excluded from participation in", "denied the benefits of", or "subjected to discrimination" by A.I.S.D. turns on whether A.I.S.D. reasonably accommodated David. Although the question of who is "otherwise qualified" and what actions constitute "discrimination" under § 504 would seem to be two sides of a single coin, Alexander v. Choates, n. 19\*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), we do not reach this question because the district court properly found that there has been no showing of intentional discrimination.

Finding no error of law or fact, the district court determination regarding plaintiffs § 504 claims is affirmed.

Does 42 U.S.C. § 1983 Provide Relief?

Appellants contend that they have an actionable claim under § 1983 (1) for violations of their substantive due process rights, (2) because § 1983 is the only avenue open to protect their liberty interests in a reasonably safe physical environment, their property interests in David's education, and their chose in action, and (3) for violations of their rights under the IDEA, the Rehabilitation Act, and the ADA.

Appellants argue that a person has a right to be free from state-occasioned damage to his bodily integrity, and that the

plaintiff must show that the defendants were reckless in depriving him of his constitutionally protected property or liberty interest. Next, appellants argue that they have no state law remedy.<sup>6</sup> Appellants assert that the procedures followed by the defendants were inadequate and constituted denial of a safe and suitable environment for David. They argue that no supervisory action and no disciplinary action was taken after either the October 1991 injury or the February 1992 injury. Appellants further assert that the state had a special duty to protect David from known or reasonably foreseeable harm, and that public school teachers and other officials have an affirmative duty to protect children in their charge from tortious conduct. Finally, appellants contend that "while happily taking federal funds," the AISD has shunned its duty to comply with the IDEA, the Rehabilitation Act, and the ADA.<sup>7</sup>

Section 1983 addresses the deprivation of any rights, privileges, or immunities secured by the Constitution and laws as follows:

**§ 1983. Civil action for deprivation of rights**

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<sup>6</sup> Among the claims before the district court was plaintiffs' contention that the state statute, which grants immunity to the defendants, was unconstitutional. The district court determined that the statute was constitutional, and plaintiffs do not appeal that determination.

<sup>7</sup> As noted above, the district court specifically found that plaintiffs failed to show violations of these statutes. However, plaintiffs only appeal the district court's finding regarding 42 U.S.C. § 1983 and § 504 of the Rehabilitation Act. Plaintiffs do not argue that the district court erred in its disposition of their IDEA and ADA claims, except insofar as these claims may be asserted through § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Apparently it is appellant's contention that (1) the injuries which resulted from the falls have limited David's mobility such that his post-injury independence and participation is less than his pre-injury behavior, (2) the modifications to his educational program due to the injuries would not be necessary if the defendants had protected him from injury, and (3) therefore, the defendants have deprived him of access to his pre-injury (or pre-AISD) educational program.

The district court found that there had been no showing that David had been deprived of any right protected by federal statute or the Constitution. The record reveals that, upon entering the AISD program at Bowie, the IEP from David's previous program in Arizona was provided and used by Apparicio until the ARD committee met and made its own recommendations. Both formal ARD committee meetings, and informal meetings between various members of the committee, reflect the tension between providing David with the least restrictive setting to accommodate his needs and maintaining his safety. During the time period prior to the accidents, David actively participated in the program at Bowie. After the first injury David recovered, and Mrs. G. gave permission for David to participate in a mentor program at the

University of Texas. The UT program allowed college students who were considering a career which involved the disabled to interact with the disabled. The benefit to David and his peers was exposure to older non-disabled students and an opportunity to experience or adapt to new people and an unfamiliar environment. David attended dance class, played sports, interacted with his disabled and non-disabled peers, and was taught independent living skills. The record contains evidence that David was provided an appropriate education, as required by 34 C.F.R. 104.33(b),<sup>8</sup> before, during, and after each injury. The record supports the trial court's determination that there has been no deprivation of David's constitutionally protected rights and therefore no actionable claim under § 1983.

#### CONCLUSION

The district court's factual findings, regarding the accidental nature of David's falls and the deprivation of constitutionally protected rights, are supported by the record. We find no error of law in the district court's conclusions which arise from these findings. Accordingly, the judgment of the district court is **AFFIRMED**.

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<sup>8</sup> To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. 34 C.F.R. Part 104, Appendix A.