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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STEPHEN L. and LAVERNE L.,)	CIVIL NO. 00-00338 DAE
individually and as Guardians)		
Ad Litem of AARON L., an)		
incompetent adult,)	
)	UNITED STATES'
)	MEMORANDUM OF LAW AS
)	<u>AMICUS CURIAE</u>
Plaintiffs,)	
)	
v.)	
)	
PAUL LEMAHIEU, in his official)		
capacity as Superintendent of)		
the Hawaii Public Schools;)	
WILLIAM C. RHYNE, in his)		
capacity as former Principal of)		
Molokai High and Intermediate)		
School; SARAH KALANI, in her)		
capacity as former Principal)		
of Molokai High and Intermediate)		
School; LINDA PULELOA, in her)		

official capacity as Principal)
of Molokai High and Intermediate)
School; and DEPARTMENT OF)
EDUCATION, STATE OF HAWAII,)
)
Defendants.)
_____)

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UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE

INTRODUCTION AND INTEREST OF THE UNITED STATES

In this action, Stephen L. and LaVerne L., individually and as Guardians Ad Litem of Aaron L. (collectively, "plaintiffs"), have brought suit against the Department of Education of the State of Hawaii, as well as various state officials (collectively, "defendants" or "the State") for alleged violations of Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, and the Individuals with Disabilities

Education Act ("IDEA"), 20 U.S.C. § 1401 et seq. The plaintiffs seek compensatory damages as part of their relief for the alleged violations of Section 504. See Amended Complaint at 11 ¶ 2.

Section 504 prohibits the exclusion of persons with disabilities from participating in any program or activity receiving federal financial assistance. 29 U.S.C. § 794. Under Executive Order No. 12250, 45 Fed. Reg. 72,995 (1980), the Attorney General has the responsibility to oversee and coordinate the implementation and enforcement responsibilities of all federal agencies under Section 504. As the federal government's chief litigator, the Attorney General, through the Department of Justice, is also responsible for Section 504 litigation for the United States, both as a plaintiff and a defendant. It is critical to the Department of Justice's enforcement of Section 504 that proper legal standards be applied consistently in all Section 504 litigation.

STATEMENT OF THE CASE

On May 10, 2000, the plaintiffs commenced this action against the defendants, alleging (among other things) that the defendants intentionally discriminated against Aaron L. because of his disability (Down Syndrome), and thereby violated Section 504. See Amended Complaint ¶¶ 36, 45-46. Specifically, the plaintiffs assert that the defendants failed to provide Aaron L.

with appropriate special education services, and thus denied him a free appropriate public education. See id. ¶ 36.

On March 8, 2001, the plaintiffs filed a motion for partial summary judgment. In their motion, the plaintiffs argued, inter alia, that they should be permitted to establish discriminatory intent, for purposes of compensatory damages under Section 504, with evidence that the defendants acted with deliberate indifference or conscious disregard of their federally protected rights. See Plaintiffs' Partial Summary Judgment Memorandum at 18, 22-25.

STATEMENT OF THE ISSUE¹

Whether a plaintiff seeking compensatory relief under Section 504 may establish discriminatory intent by demonstrating that the defendant acted with deliberate indifference to the plaintiff's federally protected rights.

SUMMARY OF ARGUMENT

For purposes of obtaining compensatory relief under Section 504, a plaintiff may demonstrate a defendant's discriminatory intent by showing that the defendant acted with deliberate

¹ The United States does not take a position on any other issue in this action, except for the positions it has expressed in its brief as proposed plaintiff-intervenor regarding the constitutionality of Section 504 and the IDEA.

indifference to the plaintiff's federally protected rights. The deliberate indifference standard has been applied by the Supreme Court and lower federal courts as a valid method for proving discriminatory intent under Section 504 and analogous statutes. This standard is appropriate, moreover, because it incorporates the established principle that an entity acts with discriminatory intent when, despite being aware of discrimination in its programs or activities, it fails to act to address the problem. Accordingly, this Court should allow the plaintiffs to prove discriminatory intent (as the Ninth Circuit requires for compensatory relief under Section 504) by presenting evidence showing that the defendants acted with deliberate indifference to their rights under Section 504.

ARGUMENT

A Plaintiff Seeking Compensatory Relief Under Section 504 Of The Rehabilitation Act May Establish The Requisite Discriminatory Intent For Such Relief By Demonstrating That The Defendant Acted With Deliberate Indifference To His Federally Protected Rights.

In Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998), the Ninth Circuit held that, to obtain compensatory damages under Section 504 of the Rehabilitation Act, a plaintiff must demonstrate that the defendant acted with discriminatory intent. In so ruling, the Ninth Circuit declined to state whether a plaintiff seeking to establish the requisite intent must show that the defendant acted with discriminatory animus or, alternatively, deliberate indifference to the plaintiff's federally protected rights. Id. at 675 (declining to resolve the issue because the plaintiff could not prevail under either standard).

There is no dispute that the discriminatory animus standard is a valid method for establishing intentional discrimination. See, e.g., Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582, 584 (1983) (indicating, in a Title VI case, that a plaintiff may establish discriminatory intent by presenting evidence of discriminatory animus) (White, J.). The discriminatory animus standard is not, however, the exclusive method for establishing discriminatory intent under Section 504 (and indeed no court has so suggested). As other federal courts have recognized, the deliberate indifference standard is also a

valid method for proving discriminatory intent under Section 504 and analogous statutes.

The Supreme Court's decision in Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), is instructive. In Gebser, a case brought under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq. ("Title IX"),² the Supreme Court was presented with a high school student's claim that she had been subjected to sexual harassment by a teacher. See Gebser, 524 U.S. at 277-78. Although the Court in Gebser held that the defendant school district could not be held liable for damages under Title IX for actions about which it lacked knowledge (such as the teacher-student sexual harassment alleged by the plaintiff in that case), the Court recognized that a plaintiff may establish intentional discrimination through proof of "deliberate indifference." 524 U.S. at 290-91. Specifically, the Court explained that a damages remedy may be available to a plaintiff where "an official who at a minimum has authority to

² Both Section 504 and Title IX borrow from aspects of the remedial scheme of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. See 29 U.S.C. § 794(a)(2) (extending to Section 504 plaintiffs the "remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964"); Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (holding that "Congress intended to create Title IX remedies comparable to those available under Title VI"). Because of the similar remedial schemes available under Section 504, Title VI and Title IX, the reasoning in a decision regarding damages under one of the statutes may be applied to all three statutes. See, e.g., Alexander v. Choate, 469 U.S. 287, 293-94 (1985) (relying Title VI case law to interpret Section 504).

address the alleged discrimination and to institute corrective measures on the [federal funding] recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond." Id. at 290. See also Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 643 (1999) ("Gebser thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination."); id. at 646-47 (extending the deliberate indifference standard to student-on-student sexual harassment in violation of Title IX).

Consistent with the reasoning in Gebser, several courts have held that a plaintiff may establish discriminatory intent for purposes of compensatory relief under Section 504 by showing that officials failed to adequately respond to complaints of disability discrimination. For example, in Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999), the Tenth Circuit held that, for purposes of compensatory damages under Section 504, "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."

Similarly, in Bartlett v. New York State Board of Law Examiners, the Second Circuit upheld a compensatory damages award

in a reasonable accommodation case, and explained that “[i]n the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will.” 156 F.3d 321, 331 (2d Cir. 1998), rev’d on other grounds, 527 U.S. 1031 (1999). The court explained that intentional discrimination may be inferred when the defendant acts “with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result” from the implementation of the challenged policy. Id. (noting that the defendants’ implementation of a flawed policy that improperly led it to deny accommodations to certain individuals with learning disabilities constituted deliberate indifference). See also Access Living of Metro. Chicago v. Chicago Transit Auth., No. 00-C-0770, 2001 WL 492473 at *6-7 (N.D. Ill. May 9, 2001) (plaintiffs may use deliberate indifference standard to prove discriminatory intent under Section 504 and Title II of the ADA); Davis v. Flexman, 109 F. Supp.2d 776, 790 n.14 (S.D. Ohio) (noting the recent case law endorsing the deliberate indifference standard); Proctor v. Prince George’s Hosp. Ctr., 32 F. Supp.2d 820, 829 (D. Md. 1998) (holding that compensatory damages were available to the plaintiff based on evidence that the defendant provided a lesser accommodation despite being on notice that doing so might violate Section 504, and noting that proof of discriminatory animus was not necessary); Ferguson v. City of

Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996) (intentional discrimination in violation of Section 504 may be established with proof of deliberate indifference), aff'd, 157 F.3d 668 (9th Cir. 1998); cf. Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 825-826, 829-830 & n.9, 832-833 (4th Cir. 1994) (holding that damages were available in failure-to-accommodate case and stating that "'intentional discrimination' suffices to recover compensatory damages," without expressly deciding that intent is necessary).

Indeed, in a case similar to the present one, the court applied the deliberate indifference standard to a claim for compensatory damages under Section 504 based on a school district's failure to provide special education services. See Butler v. South Glens Falls Cent. Sch. Dist., 106 F. Supp.2d 414, 420-21 (N.D.N.Y. 2000). In Butler, the plaintiff "presented evidence that the defendant school officials failed to develop IEP's [Individualized Education Programs] for the plaintiff, developed several IEP's that were determined to be inappropriate for his educational needs, and failed to provide him with certain special education services." Id. at 421. The court, applying the Second Circuit's holding in Bartlett, held that the school district's conduct, if proven, could "constitute deliberate indifference to the strong likelihood that plaintiff's rights [under Section 504] were being violated." Butler, 106 F. Supp.2d at 420-21 (citing Bartlett, 156 F.3d at 331).

Here, the plaintiffs have asserted that the defendants engaged in similar misconduct, and thus should be permitted to establish discriminatory intent under the deliberate indifference standard. See Amended Complaint ¶ 36 (alleging, inter alia, that from 1994-2000, the defendants failed to provide Aaron with adequate transition or mental health services, failed to modify Aaron's IEPs during the school year to adjust for his performance, and generally failed to provide him with a free appropriate public education); id. ¶ 45 (alleging that the defendants acted with gross disregard to the plaintiffs' federal rights).

Furthermore, the deliberate indifference standard is appropriate because it incorporates the principle, recognized in other contexts, that an entity acts with discriminatory intent when, despite being aware of discrimination in its programs or activities, it fails to act to address the problem. Indeed, the Supreme Court recognized this in Gebser, 524 U.S. at 290, when it explained that, under Title IX, a damages remedy will be available where a federal funding recipient, though aware of teacher-student sexual harassment, fails to respond and thus makes "an official decision . . . not to remedy the violation." Courts have applied a similar standard for discriminatory intent in claims against municipalities for damages under 42 U.S.C. § 1983. See, e.g., Board of Comm'rs of Bryan County v. Brown,

520 U.S. 397, 407 (1997) (municipal liability possible under § 1983 where the municipality is aware that its existing training is not preventing constitutional violations, and yet continues to adhere to the same, unsuccessful, approach); City of Canton, Ohio v. Harris, 489 U.S. 378, 390-92 & n.10 (1989) (same); see also Gebser, 524 U.S. at 290-91 (citing these cases to support its application of the deliberate indifference standard to Title IX). Accordingly, a plaintiff seeking compensatory damages under Section 504 may prove discriminatory intent under the same deliberate indifference standard because, not only does the standard have ample support in the case law, it appropriately permits a finding of discriminatory intent where a federal funding recipient deliberately fails to respond adequately to discrimination in its programs or activities.³

CONCLUSION

For the foregoing reasons, this Court should hold that a plaintiff may establish the requisite intent for compensatory damages under Section 504 by establishing that the defendant

³ The United States notes that the plaintiffs allegations in their complaint, if proven, would support a finding of deliberate indifference. Specifically, insofar as the plaintiffs claim that the defendants deliberately violated Aaron's federally protected rights by, among other things, failing to provide Aaron with a free appropriate public education, proof of such misconduct would support a finding of deliberate indifference to Aaron's rights under Section 504, and would entitle the plaintiffs to compensatory relief. See Amended Complaint ¶¶ 36(k), 45).

discriminated against him with deliberate indifference to his statutory rights.

Respectfully submitted,

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DATED: May 31, 2001, at Honolulu, Hawaii.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was duly mailed, on this date, addressed to the following:

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