



2008

# Judicially Reducing the Standard of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination

Drew Miller  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Education Law Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Miller, Drew (2008) "Judicially Reducing the Standard of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination," *Kentucky Law Journal*: Vol. 96 : Iss. 4 , Article 7.  
Available at: <https://uknowledge.uky.edu/klj/vol96/iss4/7>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# Judicially Reducing the Standard of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination

*Drew Millar*<sup>1</sup>

## INTRODUCTION

FOURTEEN percent of elementary and secondary education students in public schools were served by disability programs in 2003–2004.<sup>2</sup> More than eleven percent of undergraduates at American colleges reported having a disability.<sup>3</sup> Each disabled student, to some degree, requires special attention and programs to allow them the opportunity to receive an adequate education. Congress has recognized this need and has enacted legislation requiring schools to provide these students with the services they need.<sup>4</sup> However, several courts have applied standards that have all but destroyed the teeth of these statutes and left disabled students practically without a remedy.<sup>5</sup>

Education law—like most other legal subjects—is a complex field that cannot be summed up in a single standard or set of rules. Laws passed by Congress in this area range from statutes proscribing the handling, and inherent privacy, of student records,<sup>6</sup> to statutes forbidding discrimination based on a child's disability.<sup>7</sup>

In an effort to simplify the law (or possibly due to a misunderstanding of the law) some courts have employed standards created for one purpose to an entirely different set of circumstances. More specifically, standards that were put forth to evaluate decisions of educational professionals when choosing from a set of possible alternatives have been adapted to evaluate the general treatment of handicapped students in entirely different sets of

---

1 B.A. History, 2005, Brigham Young University; J.D. expected 2008 University of Kentucky College of Law. The Author would like to thank his wife Ashlee and son Mac for their support during this process.

2 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2005, at 81 (2006), *available at* [http://nces.ed.gov/pubs2006/2006030\\_2a.pdf](http://nces.ed.gov/pubs2006/2006030_2a.pdf).

3 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PROFILE OF UNDERGRADUATES IN U.S. POSTSECONDARY EDUCATION INSTITUTIONS: 2003–04, at 133–34 (2006), *available at* <http://nces.ed.gov/pubs2006/2006184.pdf>.

4 *See infra* notes 23–38 and accompanying text.

5 *See infra* notes 127–51 and accompanying text.

6 20 U.S.C. § 1232g (2000).

7 *See* 42 U.S.C. § 12132 (2000); 29 U.S.C. § 794 (2000).

circumstances. These developments have confused the law and created an uncertain environment for future litigants because of the unstable nature of judicial opinions. Thus, parents of disabled students are left little in the way of recourse or remedy in these circumstances. An increasing number of courts are providing great—and sometimes absolute—deference to state officials in making decisions regarding the educating of disabled students.<sup>8</sup> This Note will examine a new trend among some circuits to heighten the standard of liability of educational professionals and make the road steeper and more complicated for America's disabled students who feel they are not being given an appropriate education by their local school board.

After an illustration, Part I of this Note will examine congressional legislation that has been enacted to provide disabled students access to free appropriate public education. Part II will follow the evolution of the law in this area, and the bad faith/gross misjudgment standard from the case of *Monahan v. Nebraska*<sup>9</sup> will be discussed in detail. Next, Part II.C & D will examine the treatment of this standard in other circuits with special emphasis on how the Sixth Circuit has applied *Monahan*, and how this standard has provided extra-statutory protection for educational professionals. Last, Part III will examine alternatives to using the bad faith/gross misjudgment standard, and the merits of each alternative.

## I. BACKGROUND

### A. An Illustration

The difficulty of succeeding in special education discrimination cases can be shown by the results of two very similar cases.<sup>10</sup> In these cases, schools refused to administer prescribed dosages of Ritalin to students with Attention Deficit Hyperactive Disorder (ADHD) because it was contrary to policies adopted by their respective schools. The schools' employees were not allowed to administer dosages of Ritalin in excess of maximum suggested amounts put forth in the Physician's Desk Reference, whether or not the student had a prescription for such an amount and whether or not the parents had consented to the administration of the drug.<sup>11</sup>

Kelly DeBord was an eight-year-old elementary student with ADHD.<sup>12</sup> She was given one hundred milligrams of Ritalin each morning before she

---

<sup>8</sup> See *infra* notes 39–126 and accompanying text.

<sup>9</sup> *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982).

<sup>10</sup> *Davis v. Francis Howell Sch. Dist.*, 104 F.3d 204 (8th Cir. 1997). See generally Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47 *DRAKE L. REV.* 761 (1999) (citing these cases to demonstrate a similar point).

<sup>11</sup> See *DeBord v. Board of Educ. of Ferguson-Florissant School Dist.*, 126 F.3d 1102, 1104 (8th Cir. 1997); *Davis v. Francis Howell School Dist.*, 104 F.3d 204, 205 (8th Cir. 1997).

<sup>12</sup> *DeBord*, 126 F.3d at 1103–04.

left for school, but required a second dose of forty milligrams at 3:00 pm while still in school.<sup>13</sup> The school nurse refused to administer the drug because of the school's policy regarding the Physician's Desk Reference.<sup>14</sup> Shane Davis also has ADHD and in 1996 required 360 milligrams of Ritalin per day to enable him to participate in school activities and to prevent his disorder from causing a significant problem.<sup>15</sup> After two years, the nurse at the school noticed that the dose was well above the recommended amount put forth in the Physician's Desk Reference and expressed her concern to Shane's mother.<sup>16</sup> At the suggestion of the nurse, Mrs. Davis got a second opinion about the dosage, and the second doctor confirmed that 360 milligrams was an appropriate dosage for Shane.<sup>17</sup> The nurse nonetheless decided to stop assisting in the administration of the drug, and Shane's mother was forced to come to the school once or twice a day to help Shane take his medication.<sup>18</sup>

Because of the schools' refusal to administer the drug in the prescribed amount after being presented with a letter from a doctor, other medical literature, and an offer to sign a waiver of liability, the parents of both students brought claims under the Americans with Disabilities Act (ADA) and Rehabilitation Act (RHA).<sup>19</sup> In both cases the Eighth Circuit sided with the schools stating that the discrimination was not based on the students' disabilities.<sup>20</sup> The court noted in the *DeBord* case that Kelly could have come home early from school, and so the parents' decision to allow her to stay at school came with its consequences.<sup>21</sup> Thus, complaining about having to go to the school to administer the student's medication was inappropriate. This illustration is not meant to suggest that the schools in each of these cases are at fault for discriminating against disabled students. Whether or not the Eighth Circuit's analysis is appropriate is debatable, but it is not the subject of this article. Because of the nature of public education and funding issues already facing our nation's schools, such high standards are often necessary because the alternatives are too costly. These cases demonstrate the difficult and task that disabled children face in fighting against the status quo and what kind of affects these small educational decisions have on the lives of these kids and their parents.

The problem in these cases is the inflexible nature of the schools' policies and not the bad intent of the school officials. The policies inhibit

---

13 *Id.* at 1104.

14 *Id.*

15 *Davis*, 104 F.3d at 205.

16 *Id.*

17 *Id.*

18 *Id.*

19 *DeBord*, 126 F.3d at 1104; *Davis*, 104 F.3d at 205.

20 *DeBord*, 126 F.3d at 1105; *Davis*, 104 F.3d at 206.

21 *DeBord*, 126 F.3d at 1104, 1106.

students from participating with their peers in various sorts of school projects and activities, unless parents are willing and able to make the necessary sacrifices. The solution left to the parents is to go to the schools themselves and administer the drug to their children.<sup>22</sup> The inconvenience and embarrassment caused to the child and the parents is outweighed by the schools' prerogative to do as they wish. Such deference is usually given to school officials in these and other contexts because allowing parents to second guess every decision of school officials would be costly and inefficient. Thus, the task for Congress is to enact legislation that protects the rights of disabled individuals while allowing school officials to have the freedom that they need to operate in their positions.

### *B. Congressional Legislation*

The first effort by Congress to address the rights of handicapped children to receive an education was in 1966 when it established a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children."<sup>23</sup> That Act was later repealed in 1970 by the Education of the Handicapped Act.<sup>24</sup> Both Acts contained specific guidelines regarding the use of grant money, and were aimed at encouraging states to train officials and develop resources for educating the handicapped.<sup>25</sup>

In 1973 Congress enacted the Rehabilitation Act (RHA).<sup>26</sup> This Act—while geared primarily towards preventing disability discrimination in the work place—provided that services should be provided to handicapped students to prepare them for gainful employment.<sup>27</sup> In order to conform more closely to the congressional intent and to correct any misunderstandings that may have arisen, numerous amendments have been adopted, but the purpose of the Act remains the same.<sup>28</sup>

In 1975 Congress enacted the Education of All Handicapped Children Act (EAHCA).<sup>29</sup> For years this law provided the basis for most lawsuits

---

<sup>22</sup> See *Davis*, 104 F.3d at 205.

<sup>23</sup> Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204 (1966).

<sup>24</sup> Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 91-230, 84 Stat. 121, 175 (1970).

<sup>25</sup> See *id.*; Amendments to the Elementary and Secondary Education Act of 1965, § 161, 80 Stat. at 1204.

<sup>26</sup> Act of Sept. 26, 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

<sup>27</sup> *Id.* at § 2(1).

<sup>28</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, Title X, § 1076(u)(2), 115 Stat. 1425 (2001).

<sup>29</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(c), 89 Stat. 773, 775 (1975) ("It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special

regarding the discrimination of disabled students in schools. Congress later renamed the law the Individuals with Disabilities Education Act (IDEA),<sup>30</sup> which superseded the EAHCA, and provided for greater protection and more extensive awards in these cases.<sup>31</sup> This law was passed to further “ensure that all children with disabilities have available to them a free appropriate public education,” and that each student’s educational program be “designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>32</sup> The IDEA is different from the RHA and ADA (to be discussed subsequently) in that it provides more detailed guidelines for what processes school officials should use to assure that handicapped individuals are accommodated before they begin school. For example, the statute requires that school officials make an Individual Education Plan (IEP) for each disabled student who meets the requirements to be deemed disabled.<sup>33</sup> This IEP outlines the detailed steps that the school will take to accommodate the disabled student.

In 1990, Congress provided further safeguards to disabled individuals in school and in the work place by enacting the Americans with Disabilities Act (ADA). This law was viewed as necessary “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>34</sup>

To succeed in a discrimination case under the RHA and ADA, a student must prove that (1) the plaintiff is a person with a disability under the statute; (2) the plaintiff is otherwise qualified for participation in the program; and (3) the plaintiff is being excluded from participation in or being denied the benefits of a program, or being subjected to discrimination by reason of his disability under the ADA, and “solely” by reason of his disability under the RHA.<sup>35</sup> The RHA requires an additional element, that the defendant be an entity that receives federal funds.<sup>36</sup>

---

education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children”).

<sup>30</sup> 20 U.S.C. § 1400(a) (1997).

<sup>31</sup> See *Smith v. Robinson*, 468 U.S. 992 (1984).

<sup>32</sup> 20 U.S.C. § 1400(d)(1)(A) (2006).

<sup>33</sup> 20 U.S.C. § 1414(d) (2006).

<sup>34</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101–336 § 2(b)(1)–(2), 104 Stat. 327, 329 (1990).

<sup>35</sup> See *Mattox v. Univ. of Tennessee*, 62 F.3d 843, 846 (6th Cir. 1995); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1177–78 (6th Cir. 1996).

<sup>36</sup> 29 U.S.C. 794(a) (2000). This element of the RHA is not contested in any of the cases analyzed in this Note.

Since the enactment of the RHA and ADA these laws have been invoked by disabled students in a variety of circumstances. Because of the similarities in the laws, the Sixth Circuit has said that “the purpose, scope, and governing standards of the acts are largely the same, cases construing one statute are instructive in construing the other.”<sup>37</sup> The result of construing these cases similarly has resulted in the importation of the “solely” requirement into claims involving the ADA. Cases where school officials may have had mixed motives (where the decision regarding the disabled student was only partially based on the student’s disability) would be dismissed because the discrimination was not “solely” based on the student’s disability. While this is contrary to the statutory language, the Sixth Circuit has recognized the issue and recent cases seem to indicate that an *en banc* decision could change how the court analyses the ADA and RHA.<sup>38</sup>

## II. THE EVOLUTION OF THE LAW

### A. Monahan v. Nebraska

In the late 1970s, the parents of two handicapped children, Daniel Monahan and Marla Rose, became upset over the inadequate education that they thought their children were receiving. The parents then brought a discrimination action on their behalf under Section 504 of the RHA and the EAHCA. Marla Rose had been attending Beveridge Junior High School in Omaha, Nebraska, where she spent half of her time in special education classes, and the other half in regular classes with her non-handicapped peers.<sup>39</sup> The school board decided that Marla’s placement at Beveridge was not helping her progress, and that she would receive a more “appropriate education” if transferred to the Nebraska School for the Deaf.<sup>40</sup> Marla’s parents disagreed with the decision of the board and instigated a proceeding to have the board’s suggestion evaluated by a hearing officer.<sup>41</sup> The hearing officer found that the board’s suggested placement was appropriate, and

---

<sup>37</sup> *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 925 (6th Cir. 2000) (internal citations omitted).

<sup>38</sup> *See Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 364 n.2 (6th Cir. 2007) (here the court recognized the differing language but stated that it was bound by precedent); *Salmi v. Sec. of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (“A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision”).

<sup>39</sup> *Monahan v. Nebraska*, 491 F. Supp. 1074, 1081 (D.Neb. 1980).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

the Nebraska Commissioner of Education “adopted verbatim the report of the hearing officer.”<sup>42</sup> Marla’s parents then filed suit in federal court.

“Daniel [Monahan] attended the Madonna School, a private elementary school for the mentally retarded,” also located in Omaha, Nebraska.<sup>43</sup> The Omaha School District had paid for his education for the previous three years, but when Daniel was placed in a wheelchair and the Madonna School could no longer accommodate his needs, a disagreement about his placement arose.<sup>44</sup> His parents and the nearby Millard School District suggested George Norris Elementary School—located in the Millard District—as an appropriate placement.<sup>45</sup> Omaha School District officials agreed that George Norris would be an appropriate placement, but they refused to pay for Daniel’s education there, and suggested their own Hartman Elementary as a substitute.<sup>46</sup> Daniel’s parents chose to send him to George Norris at their own expense, and brought an action in court choosing to forego the hearing process because they believed that Daniel “could not receive an impartial hearing under Nebraska Law.”<sup>47</sup>

The main issue on appeal dealt with the administrative appeal procedure that had been implemented by statute in Nebraska. The statute gave the Nebraska Commissioner of Education authority to review decisions made by hearing officers on appeals filed by parents.<sup>48</sup> The plaintiffs claimed that this provision was in conflict with the statement in the EAHCA which said that a decision made by an impartial hearing officer was final.<sup>49</sup> However, the Nebraska legislature amended the provision to take away such power from the Commissioner.<sup>50</sup> The district court therefore held that the case was moot.<sup>51</sup> The Eighth Circuit dismissed the case without prejudice, but because the case could be re-litigated the court offered a few words of dicta “for the guidance of the District Court and the parties” if they were to pursue claims again under the RHA and EAHCA.<sup>52</sup>

The court warned the lower court against substituting its own judgment for the judgment of educational professionals when evaluating “educational decisions.”<sup>53</sup> The court suggested that if the school officials involved

---

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1082.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1082–83.

<sup>48</sup> NEB. REV. STAT. § 43–662 (1978).

<sup>49</sup> 20 U.S.C. § 1415(b) (2006).

<sup>50</sup> NEB. REV. STAT. § 43–662 (Cum. Supp. 1980) (current code section—Neb. Rev. St. § 79–1163).

<sup>51</sup> *Rose v. Nebraska*, 530 F. Supp. 295, 301–02 (D. Neb. 1981).

<sup>52</sup> *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982).

<sup>53</sup> *Id.* at 1171.



“exercised professional judgment,” a plaintiff would need to prove “bad faith or gross misjudgment” to overcome the deference that should be given to school officials.<sup>54</sup> “An evaluation, in other words, is not discriminatory merely because a court would have evaluated the child differently.”<sup>55</sup>

The Eighth Circuit saw it as its “duty to harmonize the [RHA] and the EAHCA to the fullest extent possible,”<sup>56</sup> the court saw the new standard as striking the “proper balance between the rights of handicapped children, the responsibilities of state educational officials, and the competence of courts to make judgments in technical fields.”<sup>57</sup> While the court was merely giving instruction to the lower court if the case was brought again, the instruction has been used by many courts in a wide variety of circumstances and has led to the spreading of the suggested bad faith/gross misjudgment standard.

### *B. The Eighth Circuit Continues to Affirm Monahan*

The Eighth Circuit has continued to uphold the bad faith/gross misjudgment standard. After enduring some criticism, the court held its ground in 1996 in *Heidemann v. Rother*.<sup>58</sup> In that case, Cherry Heidemann was severely mentally retarded, and had several other serious disabilities.<sup>59</sup> A physical therapist associated with the school district had suggested a blanket wrapping technique to calm and comfort Cherry when she would get physically out of control at school.<sup>60</sup> The claim arose because at two different times the plaintiff’s mother had found her on the floor wrapped so tightly that she had to recruit help to free her daughter.<sup>61</sup> The mother asserted that she never agreed to allow such wrapping and that allowing the school to do so was a violation of her rights under the RHA.<sup>62</sup> The district court denied the school’s motion for summary judgment, but on appeal the Eighth Circuit reversed and remanded finding insufficient proof of bad faith or gross misjudgment, and thus grounds for summary judgment.<sup>63</sup>

The Eighth Circuit no longer limited the phrase to dicta but showed its commitment to the standard by using it to dispose of several cases thereafter.<sup>64</sup> In the *Hoekstra* case the plaintiff, a student with a disability

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1170.

<sup>56</sup> *Id.* at 1171.

<sup>57</sup> *Id.*

<sup>58</sup> *Heidemann v. Rother*, 84 F.3d 1021, 1032 (8th Cir. 1996).

<sup>59</sup> *Id.* at 1025.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1026.

<sup>62</sup> *Id.* at 1032.

<sup>63</sup> *Id.*

<sup>64</sup> *See Hoekstra ex rel. Hoekstra v. Indep. Sch. Dist. No. 283*, 103 F.3d 624, 626–27 (8th Cir.

that made it difficult to go up and down stairs, had asked for a key to the elevator in the school.<sup>65</sup> The school recognized the validity of the request and allowed her to use the elevator with an adult while the school developed procedures for safe operation.<sup>66</sup> Nearly two months after the request was made, the school finally said that the procedures had been established; however, the school waited another six weeks to give the plaintiff a key.<sup>67</sup> The district court found no bad faith or gross misjudgment on the part of the school and granted the school's motion for summary judgment, which the Eighth Circuit affirmed.<sup>68</sup>

The Minnesota District Court in *Moubry v. Independent School District 696*, stated that "No amount of claimed violation of the Federal regulations will relieve the plaintiff from his burden to show bad faith or gross misjudgment."<sup>69</sup> Joe Moubry and his mother had disputed the appropriateness of the reading program provided to Joe by the school district and whether or not his Individual Education Plan was established in accord with the IDEA.<sup>70</sup> The school district argued that the alleged violations of the IDEA's procedural requirements were not prejudicial and that the reading program they provided was adequate.<sup>71</sup> The school district won at each level of the administrative process and the district court agreed with the hearing officers granting summary judgment using the standard of *Monahan* as controlling.<sup>72</sup>

### C. Acceptance by Other Circuits

In 1984 the D.C. Circuit cited *Monahan* with approval and appeared to adopt the bad faith/gross misjudgment standard.<sup>73</sup> Pierce Lunceford was a severally handicapped student who had been placed in a hospital that provided medical as well as educational services.<sup>74</sup> After a time, the hospital decided that Pierce could be discharged because they felt that he no longer needed the medical services of the hospital.<sup>75</sup> Pierce's surrogate parent asked that Pierce not be moved until his parent's consent for the change in placement could be obtained, and the district court agreed, enjoining the

---

1996); *Todd v. Elkins Sch. Dist. No. 10*, 149 F.3d 1188 (8th Cir. 1998) (unpublished decision).

65 *Hoekstra*, 103 F.3d at 626.

66 *Id.*

67 *Id.*

68 *Id.* at 626–27.

69 *Moubry v. Indep. Sch. Dist. 696*, 9 F. Supp. 2d 1086, 1111 (D. Minn. 1998).

70 *Id.* at 1092–94.

71 *See generally* *Moubry*, 9 F. Supp. 2d 1086.

72 *Id.* at 1110, 1113.

73 *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1580 (D.C. Cir. 1984).

74 *Id.* at 1579.

75 *Id.*

hospital from discharging him.<sup>76</sup> The court of appeals disagreed with the lower court and stated its agreement with the *Monahan* court. The court held that the hospital was not an agency for purposes of the act and that Lunceford had not provided adequate evidence of discrimination.<sup>77</sup>

Although waiting sixteen years after the Eighth Circuit's decision in *Monahan*, the Fourth Circuit adopted the bad faith/gross misjudgment standard in *Sellers v. School Board of City of Manassas*.<sup>78</sup> Kristopher Sellers's parents claimed that their son's poor standardized test scores should have alerted school officials of the need to evaluate him for possible learning disabilities . . .<sup>79</sup> Because he was not evaluated, his parents claimed that he was denied a free appropriate public education under the IDEA, and discriminated against under the RHA.<sup>80</sup> Sellers was only seeking compensatory and punitive damages because the educational issues had already been resolved with the school in a settlement.<sup>81</sup> The district court dismissed the suit for failure to state a claim, and the Fourth Circuit affirmed that holding.<sup>82</sup> The court stated its agreement with the bad faith/gross misjudgment standard in its analysis and dismissal of Sellers' discrimination claim under the RHA.<sup>83</sup>

In 1999 the Eastern District of Virginia handed down a decision in *Doe v. Arlington County School Board*, citing *Monahan* and asserting that to prove discrimination "[s]omething far more than a mere denial of free appropriate education is required."<sup>84</sup> Jane Doe suffered from mental retardation and ADHD, and her parents were disputing the placement decision of the board to provide fewer services than they believed their daughter was entitled to receive.<sup>85</sup> At each stage of the administrative proceeding the officers sided with the school board, and Doe did not receive any more sympathy from the Eastern District of Virginia.<sup>86</sup> The court cited the standard as authoritative and was not dissuaded by its acknowledgment that "[t]he bad faith/gross misjudgment standard is extremely difficult to meet, especially given the great deference to which local school officials' educational judgments are entitled."<sup>87</sup>

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1579–80.

<sup>78</sup> *Sellers v. Sch. Bd. of City of Manassas, Va.*, 141 F.3d 524, 529 (4th Cir. 1998).

<sup>79</sup> *Id.* at 525–26.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 525.

<sup>83</sup> *Id.* at 529.

<sup>84</sup> *Doe v. Arlington County Sch. Board*, 41 F. Supp.2d 599, 609 (E.D. Va. 1999).

<sup>85</sup> *Id.* at 601–02.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 609.

In 2006 the Fourth Circuit confirmed its continuing acceptance of the *Monahan* standard in the case of *County School Board of York County, Virginia v. A.L.*<sup>88</sup> A.L. had Down Syndrome and other disabilities, and there was a disagreement between experts about his need for a particular type of physical therapy.<sup>89</sup> The school's expert had evaluated him in 2001 and decided that the therapy was not necessary, but an expert hired by the student's family had concluded in 2003 that the therapy was necessary.<sup>90</sup> The court actually sided with the student in this case, upholding the decision of the hearing officer and trial court that A.L.'s Individual Education Plan was deficient.<sup>91</sup> However, the court based its decision on procedural requirements of the IDEA and did not reach A.L.'s claim under the RHA, but in a footnote the court stated its continuing adherence to the *Monahan* standard in RHA cases.<sup>92</sup> The court apparently recognized that even though it agreed with the student, it could not overcome the bad faith/gross misjudgment standard and thus had to base its decision on procedural violations of the IDEA.

#### *D. Treatment by the Sixth Circuit*

For years the standard put forth in *Monahan* had rarely, if ever, been used in the Sixth Circuit. The case history in the Sixth Circuit reveals a few recent cases that have used the bad faith/gross misjudgment standard in a much more significant way. Whether these decisions are a mere aberration or an indication of a shift in the circuit will only be revealed with time.

In 2003, the Sixth Circuit handed down a decision in *N.L. ex rel. Mrs. C. v. Knox County Schools*, stating that “[t]o prove discrimination in the education context, courts have held that something more than a simple failure to provide a free appropriate public education must be shown.”<sup>93</sup> The court cited to the *Monahan* case as directly supporting its argument.<sup>94</sup> The Sixth Circuit remanded for other reasons,<sup>95</sup> and thus the language of the *Monahan* standard was not dispositive of the case. In the case, Mrs. C. had disagreed with the school's finding that her daughter was not entitled to any special education services.<sup>96</sup> The administrative officers agreed with the school district, but the district court sent the matter back to the school

---

88 *County School Board v. A.L.*, 194 F. App'x 173 (4th Cir. 2006).

89 *Id.* at 174–75.

90 *Id.*

91 *Id.* at 182.

92 *Id.* at 182 n.10.

93 *N.L. ex rel. Mrs. C. v. Knox County Sch.*, 315 F.3d 688, 695 (6th Cir. 2003).

94 *Id.*

95 *Id.* at 696.

96 *Id.* at 689.

because it found that proper procedures had not been followed.<sup>97</sup> The Sixth Circuit remanded for other reasons, but stated that the plaintiff's argument would not satisfy the bad faith/gross misjudgment standard because no substantive harm was demonstrated.<sup>98</sup>

In another unpublished case from 2003,<sup>99</sup> the Sixth Circuit concluded that a Michigan school district's decision as to which reading program to provide a dyslexic student did not violate the RHA and ADA.<sup>100</sup> Douglas Campbell suffered from dyslexia and had been assigned to the district's standard remedial reading program over his parent's objection and suggestion that he be placed in a private tutoring program.<sup>101</sup> The court cited *Monahan* in its discussion of what must be proven by a plaintiff in order for the claim of discrimination to be presented to the jury.<sup>102</sup> The court said that the plaintiff needed to show that the program was not a "reasonable accommodation" and that the RHA "further requires...that either bad faith or gross misjudgment must be shown...."<sup>103</sup> The court garnered support for its decision because earlier that same year it had cited *Monahan* "with approval."<sup>104</sup>

After years of using a totally different standard, switching to this standard in the summer of 2003 is a perplexing occurrence. An examination of these two cases reveals that Judge Eric L. Clay sat on both panels.<sup>105</sup> Also, the cases were published just four weeks apart.<sup>106</sup> Greater access to the process behind these two decisions may provide some insight as to why the *Monahan* standard was used in such a way during this brief time.

These cases seem to be but a blip on the radar in the Sixth Circuit case history. However, recently the *Monahan* standard has made a comeback, and this time the standard is much more in the forefront and is winning the support of new judges and lawmakers. An addition to Ohio Education Law suggests that *Monahan* provides authority for heightening the standard to prove educational professionals were guilty of discrimination against disabled students.<sup>107</sup>

---

97 *Id.*

98 *Id.* at 695.

99 *Campbell v. Board of Educ.*, 58 F. App'x 162 (6th Cir. 2003).

100 *Id.* at 168.

101 *Id.* at 163.

102 *Id.* at 167.

103 *Id.* (internal citations omitted).

104 *Id.* (citing *N.L. ex rel. Mrs. C. v. Knox County Sch.*, 315 F.3d 688, 695 (6th Cir. 2003)).

105 In *N.L.*, Clay sat along with Judge Norris and District Judge O'Meara from the Eastern District of Michigan who sat by designation. In *Campbell*, Judge Clay sat with Judges Keith and Krupansky. In neither case did Clay write an opinion.

106 *N.L.* was published January 16, 2003, and *Campbell* February 13 of that same year.

107 *Oh. Sch. L. § 28:34* (2007).

An even more sweeping attempt to insulate educational professionals occurred in the 2006 case of *S.S. v. Eastern Kentucky University*,<sup>108</sup> decided in the Eastern District of Kentucky. In this case the court stated the *Monahan* standard<sup>109</sup> even though there was no professional judgment involved. “[T]he core of all of Plaintiff’s allegations is the failure of [the Defendants] to adequately respond to [certain] incidents and maintain a safe educational environment for Plaintiff.”<sup>110</sup> No program or educational decision was involved. The plaintiff claimed to have been assaulted by his classmates and that defendants were guilty of discrimination by inadequately responding and failing to stop the harassment.<sup>111</sup> The court gave other grounds for dismissing the case on summary judgment but stated its agreement with the standard for use in future cases.

Prior to this case, the *Monahan* standard had only been applied when an educational professional had actually made a judgment, such as deciding between remedial reading programs<sup>112</sup> or when a tutor would be provided.<sup>113</sup> This case was of a much different variety. However, the court attempted to establish *Monahan* as an even broader standard. The court stated that the bad faith/gross misjudgment standard had been applied “uniformly” by courts, “finding its origin in the statutory language.”<sup>114</sup> The court then cited the unpublished *Campbell* case and an Eighth Circuit case from 1999<sup>115</sup> to apparently show how “uniform” the applications had been. Further questioning the court’s discussion of *Monahan* in the *S.S.* case is the case of *Buck v. Thomas M. Cooley Law School* decided soon after by the Michigan Court of Appeals.<sup>116</sup> While the court in *S.S.* referred to the standard as being “uniformly” applied, the *Buck* court saw the standard as “clearly dicta” thirty–two days later.<sup>117</sup>

It appears that there may still be some debate regarding the appropriate standard in ADA/RHA discrimination cases. The bad faith/gross misjudgment standard admittedly has its merits, such as eliminating the chance that opposing parties will call numerous experts to testify regarding the advantages of one program over another. There is also something to be said for the importance of giving deference to the judgments of academic professionals and showing “great respect for the faculty’s professional

---

108 *S.S. v. E. Ky. Univ.*, 431 F. Supp. 2d 718 (E.D. Ky. 2006).

109 *Id.* at 729.

110 *Id.* at 722–23.

111 *Id.* at 723, 724, 730–31.

112 *Campbell v. Board of Educ.*, 58 F. App’x 162 (6th Cir. 2003).

113 *Hoekstra ex rel. Hoekstra v. Indep. Sch. Dist. No. 283*, 103 F.3d 624 (8th Cir. 1996).

114 *S.S.*, 431 F.Supp.2d at 730.

115 *Smith ex rel. Townsend v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999).

116 *Buck v. Thomas M. Cooley Law School*, 725 N.W.2d 485 (Mich. Ct. App. 2006).

117 *Id.* at 489.

judgment.”<sup>118</sup> However, allowing educational professionals to do nothing when they hear reports of discrimination would be a great extension of an already non–statutorily supported standard.

### *E. Insulating Educational Professionals*

The standard enunciated in *Monahan* insulates educational professionals by requiring “extreme fault.”<sup>119</sup> “The effect of the bad faith/gross misjudgment threshold is to deny students with disabilities relief under the ADA unless their schools have acted egregiously.”<sup>120</sup> Even if a plaintiff were to establish that the school had failed to provide a free appropriate public education, a court applying the *Monahan* standard would ask for more. “A mere failure to provide” such services is not enough in the words of the *Monahan* court, even acknowledging that such services are “required” by the EACHA (now IDEA).<sup>121</sup> This cannot be seen as being consistent with the congressional “mandate for the elimination of discrimination against individuals with disabilities.”<sup>122</sup> Although hypothetically possible, proving that state officials acted in such a way as to satisfy this standard has proved to be an impossible task for those who have run up against it.<sup>123</sup>

As one can see from an examination of these cases, a remarkable number are dismissed on motions for summary judgment.<sup>124</sup> The bad faith/gross misjudgment standard is so high, not only are these cases remarkably difficult to win, but they are just as difficult to get to a jury. This gives school officials all the power in deciding what constitutes a free appropriate public education for disabled students.

As if the imposition of the *Monahan* standard were not enough, courts have expanded the standard to include cases that do not even deal with placement decisions in the education context, but just refer to the acts of educational professionals.<sup>125</sup> “This judicially–imposed liability buffer, although it is firmly ensconced in the case law, lacks any statutory basis and goes against the grain of the ADA.”<sup>126</sup>

---

<sup>118</sup> *Kaltenburger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

<sup>119</sup> *Simmons*, *supra* note 10, at 823.

<sup>120</sup> *Id.* at 822.

<sup>121</sup> *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982).

<sup>122</sup> 42 U.S.C. § 12101(b)(1) (2000).

<sup>123</sup> After extensive research, the Author can find no case in which a court ruled that the “bad faith or gross misjudgment” standard had been satisfied. *See supra* notes 58–118 and accompanying text for analysis of cases that did not satisfy the standard according to the reviewing court.

<sup>124</sup> *See supra* notes 58–118 and accompanying text.

<sup>125</sup> *S.S. v. E. Ky. Univ.*, 431 F. Supp.2d 718 (E.D. Ky. 2006).

<sup>126</sup> *Simmons*, *supra* note 10, at 822.

## III. THE STATUTORY ALTERNATIVE

Contrary to the belief of some courts, the standards under the ADA and RHA as outlined in the respective statutes still require a pretty high standard to implicate educational professionals. The plaintiff's prima facie case does not necessarily include a showing of discriminatory intent,<sup>127</sup> but the statutes state that the discrimination must be "by reason of her or his disability."<sup>128</sup> According to Black's Law Dictionary, discrimination means "[d]ifferential treatment...a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."<sup>129</sup> Both the ADA and RHA state that disability is not a reasonable distinction, and that any differential treatment of a handicapped individual must be based on some other distinction.<sup>130</sup> The following two cases from the Sixth Circuit illustrate this point.

Instances of discrimination against disabled individuals have been upheld by the Sixth Circuit because the discrimination was not based "solely" on the disability.<sup>131</sup> In one case, a student was not allowed to play basketball after participating for eight semesters because of a rule promulgated by the state athletic association which stated that no student may play beyond the eight semester mark.<sup>132</sup> The court held that this "neutral rule" was appropriate because it treated all students the same, and therefore while it may have stopped the student from participating further in high school athletics, he was not being discriminated against because of his disability, but rather because of his age.<sup>133</sup>

In another case, a student at an optometry school was required to pass a proficiency exam which required the use of four instruments which the student had trouble using because of a "neurological condition."<sup>134</sup> The student argued that the requirement was not necessary to being an optometrist because the requirement was only a year old and the four instruments were not even used at the school's optometry clinic.<sup>135</sup> The district court disagreed in light of the fact that the instruments were seeing

---

<sup>127</sup> *See id.*

<sup>128</sup> 29 U.S.C. § 794 (2000), 42 U.S.C. § 12132 (2000).

<sup>129</sup> BLACK'S LAW DICTIONARY 500 (8th ed. 2004).

<sup>130</sup> 29 U.S.C. § 794 (2000); 42 U.S.C. § 12132 (2000).

<sup>131</sup> *See Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 574 (6th Cir. 1988); *Tuck v. HCA Health Servs. of Tennessee, Inc.*, 7 F.3d 465, 473–74 (6th Cir. 1993); *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988); *Sandison v. Michigan High Sch. Athletic Assoc.*, 64 F.3d 1026, 1033 (6th Cir. 1995); *McPherson v. Michigan High Sch. Athletic Assoc.*, 119 F.3d 453, 460–461 (6th Cir. 1997).

<sup>132</sup> *McPherson*, 119 F.3d at 455.

<sup>133</sup> *Id.* at 463.

<sup>134</sup> *Doherty*, 862 F.2d at 574.

<sup>135</sup> *Id.*



more common usage and the school should be allowed to set minimum standards of competency for its students in particular areas and the Sixth Circuit affirmed.<sup>136</sup>

Proving that there is no bad faith/gross misjudgment in these cases is not needed because they can be dismissed by relying on the statutory language. courts' reliance on the clear language of the statute provides another avenue for courts to decline relief to disabled students. The interpretation of the word "solely" in the RHA's requirement of discrimination based on disability<sup>137</sup> is something that should be watched carefully to prevent injustice. All a court would have to find to deny relief to a disabled child is any other reason—in addition to the child's disability—for the discrimination. This could be something like age or minimum competency requirements, as outlined above. It would be a mistake for a court to deny relief when discrimination is based "mostly" but not "solely" on disability, but the statute seems to provide support for the statement.<sup>138</sup>

In order to grant relief, courts are required to find that educational professionals failed to accommodate an individual because that individual had a disability. The Supreme Court—in the same year that *Monahan* was decided—provided some help to courts in determining whether discrimination has occurred, and whether a cause of action should lie in the case of *Board of Education of Hendrick Hudson Central School District v. Rowley*.<sup>139</sup> The court had been called upon to interpret and to clarify the EAHCA's requirement to provide a "free appropriate public education."<sup>140</sup> The court developed a two step process to determine if the statute had been satisfied. First, the educational professionals must have followed the procedures outlined by the statute, and second, the decision must have been "reasonably calculated to enable the child to receive educational benefits."<sup>141</sup>

The Supreme Court has acknowledged that courts should show "great respect for the faculty's professional judgment."<sup>142</sup> The Court approved of the "widest discretion in making judgments as to academic performance,"<sup>143</sup> to prevent courts from second guessing educational professionals. The Supreme Court, however, has never suggested that deference should be absolute or require bad faith. Further, "neither the language, purpose, nor

---

<sup>136</sup> *Id.*

<sup>137</sup> 29 U.S.C. § 794(a) (2000).

<sup>138</sup> See *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 364 n.2 (6th Cir. 2007) (The court recognized the differing language but stated that the court was bound by the precedents).

<sup>139</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

<sup>140</sup> 20 U.S.C. § 1412(1) (2000).

<sup>141</sup> *Rowley*, 458 U.S. at 206–207.

<sup>142</sup> *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

<sup>143</sup> *Id.*

history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.”<sup>144</sup>

Thomas Simmons, in his article “The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law,” suggested that a discriminatory impact theory or an accommodation discrimination theory would be appropriate because the students are being denied treatment that is usually viewed as a reasonable accommodation.<sup>145</sup> In his article, Professor Simmons analyzes the developments within the Eighth Circuit that have greatly narrowed a plaintiff’s chances for success in these cases, with one of them being the bad faith/gross misjudgment standard.

Simmons also suggested that plaintiffs could “turn to the implementing regulations which impose an affirmative duty on public entities to make reasonable policy modifications when necessary to avoid discrimination on the basis of disability.”<sup>146</sup> Simmons has noted however that “without fail . . . the Eighth Circuit has denied them relief,”<sup>147</sup> and with the developments in the Sixth Circuit, one could conclude that relief would be similarly denied.

The IDEA charges each state with “acquiring and disseminating to teachers and administrators . . . information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials.”<sup>148</sup> Each court must, therefore, “be careful to avoid imposing their view of preferable educational methods upon the States.”<sup>149</sup> The statutes provide clear language, and the Supreme Court has added some necessary guidance to allow courts to give deference to state officials, while accomplishing the “goal of providing full educational opportunities to all handicapped children.”<sup>150</sup>

Courts have never read the requirements to prove discrimination under the ADA and RHA to be an easy task. Disabled students have been denied relief in all but the extraordinary set of circumstances. This is no doubt in line with the intent of Congress to allow educational professionals to do their jobs and make appropriate decisions. The statute is difficult to satisfy, but it is not impossible. However, every decision that cites *Monahan*, and further entrenches the heightened standard, demonstrates how far some courts have strayed from the clear dictates of the statutes. The fact that the phrase “bad faith/gross misjudgment” is not anywhere in the relevant

---

144 Se. Cmty. Coll. v. Davis, 442 U.S. 397, 411 (1979).

145 Simmons, *supra* note 10, at 824 (internal citations omitted).

146 *Id.* (citing 28 C.F.R. § 35.130(b)(7) (1998)).

147 Simmons, *supra* note 10, at 824.

148 20 U.S.C. § 1413(a)(3) (2000).

149 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982).

150 20 U.S.C. § 1400(d) (2000).

statute should not be overlooked, and at least as one court has noted “such a requirement should not be imputed into the language.”<sup>151</sup>

#### CONCLUSION

Courts should not be allowed to change the standards for disability discrimination in these types of settings without providing more than just a superficial mention of the history of such a questioned standard.<sup>152</sup> One case can establish a precedent that will be relied on by other courts when dealing with similar issues. The Court of Appeals for the District of Columbia has only briefly mentioned *Monahan* once, in *Lunceford v. District of Columbia Board of Education*.<sup>153</sup> However, that decision has been treated significantly in the *Sellers* case from the Fourth Circuit, and the *N.L.* case in the Sixth.<sup>154</sup> So while a court may cite to a case such as *Monahan* only to suggest that such a standard might be appropriate under the right set of circumstances, other courts may inflate its original language to imply a much more sweeping acceptance.

One cannot help but wonder why the standard of care for educational professionals ought to be so low when working with handicapped students. Congress clearly saw a need—and continues to see the need—to protect the rights of the disabled by passing these laws. Lowering the standard of care to levels lower than the statutes proscribe render the language of the statutes and their purposes void. Such practices could lead to problems in the future if school districts do not provide adequate programs, and thereby challenge disabled students and their parents to overthrow the standard procedure of allowing school districts to more or less do as they wish.

“Contrary to the fears of some educators and educational critics, few learning-disabled students sue their [schools] over a failure to be provided the accommodations they believe they require.”<sup>155</sup> So while courts and state education officials may fear hypothetical outcomes and encourage us

---

<sup>151</sup> *Robinson v. Kansas*, 117 F. Supp.2d 1124, 1146 (D. Kan. 2000) (“such a requirement should not be imputed into the language of the Rehabilitation Act”).

<sup>152</sup> See *Howell v. Waterford Public Schs.*, 731 F.Supp. 1314 (E.D. Mich. 1990) (severely criticizing the *Monahan* standard as “dicta” and not appropriate in these types of cases). Other courts have also criticized the standard. See *Buck v. Thomas M. Cooley Law School*, 725 N.W.2d 485 (Mich. Ct. App. 2006); *Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1146 (D. Kan. 2000) (“such a requirement could not be imputed into the language of the Rehabilitation Act”); *David H. v. Spring Branch Independent Sch. Dist.*, 569 F. Supp. 1324 (S.D. Texas 1983); *Byrnes v. Riles*, 157 Cal. App. 3d 1170 (1984); and *Simmons*, *supra* note 10, at 822–823.

<sup>153</sup> *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1580 (D.C. Cir. 1984).

<sup>154</sup> See *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 529 (4th Cir. 1998); *N.L. ex rel. Mrs. C. v. Knox County Sch.*, 315 F.3d 688, 695 (6th Cir. 2003).

<sup>155</sup> *Suzanne Abram, Reasonable Accommodations for the Learning-Disabled University Students Under the ADA*, 28 J. L. & EDUC. 121, 127 (1999).

to lobby with them for a higher standard, it is important to remember the purposes for which these laws protecting disabled students were enacted.

Providing “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,”<sup>156</sup> will become outdated prose if the bad faith/gross misjudgment standard is allowed to stand. Protecting the rights of handicapped students, and assuring that “all handicapped children have available to them a free appropriate public education”<sup>157</sup> should remain the goal of courts in these cases. It seems that some courts, along with many state officials, have “greatly exaggerated” a problem<sup>158</sup> that presents no real threat to educational enterprise as we know it, but provides a good template for judicial overreaching and lowering statutory standards.

---

<sup>156</sup> 42 U.S.C. § 12101 (2000).

<sup>157</sup> 20 U.S.C. § 1400(d)(1)(A) (2000).

<sup>158</sup> Abram, *supra* note 155, at 128.

