No. 24-3143

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.M.,

Plaintiff-Appellant

v.

OREGON SCHOOL ACTIVITIES ASSOCIATION,
an Oregon Corporation, by and through the Board of Directors of
Oregon School Activities Ass'n,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR

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INTEREST OF THE UNITED STATES

This appeal raises important questions about a public entity's obligation to make reasonable modifications to accommodate a high school student's disabilities under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12132. Congress charged the Department of Justice with issuing regulations to implement Title II, *see* 42 U.S.C. 12134(a), and with enforcing the statute, *see* 42 U.S.C. 12133 (incorporating 29 U.S.C. 794a(a)(2), which in turn incorporates 42 U.S.C. 2000d *et seq.*); 28 C.F.R. 35.170 *et seq.* The Department of Education also has authority to enforce Title II in the school context. *See* 42 U.S.C. 12133; 28 C.F.R. 35.190(b)(2). As a result, the federal government has a substantial interest in supporting the proper interpretation and application of Title II, and in furthering the statute's purpose of providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

D.M. repeated a grade in high school because of his yearlong attendance at a mental-health treatment program. As a reasonable modification for his mental-health disabilities, he requested an exemption from the Oregon School Activities Association's rule limiting student participation in interscholastic high school athletics to eight consecutive semesters.

The United States addresses only the following questions:

1. Whether the district court committed legal error in evaluating whether D.M.'s requested modification was reasonable and would not fundamentally alter the nature of the interscholastic high school football program.

2. Whether the district court committed legal error in analyzing the causation element of D.M.'s reasonable-modification claim when it required him to establish that his attendance at the mental-health treatment program was necessary rather than merely causally related to his disabilities.

PERTINENT STATUTES AND RULES

Pertinent statutes and rules are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

This case concerns a high school student's request for a reasonable modification under Title II of the ADA. Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title II prohibits disability-based discrimination by public entities. The statute 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.

To comply with Title II's nondiscrimination mandate, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter

the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7)(i); *see also Tennessee v. Lane*, 541 U.S. 509, 531-532 (2004) (interpreting Title II to require public entities to make reasonable modifications for persons with disabilities).

B. Factual Background[1]

At the time this lawsuit was filed, plaintiff D.M. was a 17-year-old student with mental-health disabilities who wanted to play football alongside his classmates in his fifth and final year of high school—the 2022-2023 school year. 1-ER-3-4. Defendant, the Oregon School Activities Association (OSAA), regulates interscholastic athletics for nearly 300 high schools in Oregon. 2-ER-30-31. Under OSAA's rules, students are eligible to participate in athletics for only eight consecutive semesters after the student enters ninth grade, unless they satisfy specific criteria for a fifth-year waiver. 1-ER-4-5, 9. D.M. requested a waiver of OSAA's eight-semester rule to accommodate his disabilities,

[1] Because the United States addresses only legal issues and much of the record is sealed, this factual background is based on the facts as presented by the district court. The United States also cites D.M.'s opening brief for certain additional facts that appear not to be in dispute.

but OSAA denied the request. 1-ER-5-6. As a result, D.M. filed suit against OSAA, alleging, among other things, a violation of Title II of the ADA. 1-ER-6.

D.M. had enrolled in high school as a ninth-grader in August 2018—a year earlier than other students his age. 1-ER-5. His brother had died by suicide the year before, and the middle school had then agreed to consolidate D.M.'s seventh- and eighth-grade years so that he could join another brother at the high school early. *Ibid.* During his first two years of high school, D.M. faced academic, social, and behavioral challenges. *Ibid.* D.M. was diagnosed with several mental-health disabilities, including post-traumatic stress disorder, oppositional defiant disorder, attention-deficit hyperactivity disorder, and depression. 1-ER-4; Br. 9.[2]

In the summer of 2020, D.M.'s mother, concerned for her son, decided to enroll him at Triumph Academy—a residential high school and mental-health treatment program in Utah—for his third year of high school. 1-ER-5, 12-13. She believed Triumph was better equipped

[2] "Br. __" refers to plaintiff's Opening Brief. "Doc. __, at __" refers to documents entered in the district court docket.

to address D.M.'s behavioral, emotional, and mental-health needs. 1-ER-13. D.M.'s mother made the decision based on her experience as a parole officer, her independent research, consultations with mental-health professionals who had not treated D.M., and her assessment of his progress in therapy. *Ibid.*

While D.M.'s mental health benefited from treatment at Triumph, his academic performance suffered. *See* Br. 14, 16-18. When D.M. returned to high school in Oregon at the start of the 2021-2022 school year, the school district determined that D.M. was not "prepare[d] . . . to meet graduation requirements," and so it reclassified him as an 11th grader instead of a 12th grader. Br. 17 (citation omitted).

In the year following his return to Oregon, D.M. found solace and success on the football field. 1-ER-4; Br. 16. Football gave him confidence, motivated him to do well in school, and provided him a positive social structure. 1-ER-4. But because D.M. had entered the ninth grade in August 2018, his athletic eligibility under OSAA's eight-semester rule expired at the end of the 2021-2022 school year. 1-ER-5.

Hoping to play football alongside his classmates in his fifth and final year of high school, D.M. requested that OSAA waive its eight-

semester rule due to his disabilities. 1-ER-5. His application included a doctor's assessment, a letter from his therapist at Triumph, and statements from him and his mother. Br. 18. D.M. contends that he needed a waiver because he was unable to graduate in four years due to his yearlong stay at Triumph. 1-ER-12-13.

OSAA denied D.M.'s request because D.M. did not satisfy any of the established criteria for a waiver under OSAA's waiver policy. 1-ER-5-6. Under that policy, OSAA grants waivers to some students who are unable to graduate within four years because of a disability. It does so, however, only if the student has an Individualized Education Program (IEP) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, and is meeting the requirements of that IEP. 1-ER-9.[3] An IEP is an "education plan tailored to a child's unique needs that is designed by the school district in consultation with the

[3] OSAA also grants fifth-year waivers to (1) students who are unable to graduate in eight semesters due to their lack of English language ability; and (2) students who, due to circumstances beyond the control of them or their parents, have been absent from school for at least one semester and unable to obtain academic credit during that time. *See* 1-ER-9. D.M. did not qualify for these exceptions either, as he was able to obtain school credit while attending Triumph. 1-ER-5.

child's parents after the child is identified as eligible for special-education services." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 234 n.1 (2009) (citing 20 U.S.C. 1412(a)(4), 1414(d)). Schools use IEPs to satisfy their obligation under the IDEA to provide a "free appropriate public education" to all children who qualify under the IDEA. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017) (citation omitted).

OSAA never evaluated whether waiving the eight-semester rule for D.M. was reasonable or would fundamentally alter the nature of its interscholastic high school football program. *See* 1-ER-5-6. OSAA denied D.M.'s request because, "[a]s a general policy, [it] does not provide exceptions to the fifth-year waiver criteria for students with . . . disabilities under the ADA who do not have an [IEP]." *Ibid.*

C. Procedural Background

In August 2022, on the cusp of his fifth and final year of high school, D.M. filed this lawsuit against OSAA. As relevant here, D.M. alleged that OSAA's refusal to make a reasonable modification to its eight-semester eligibility rule and permit him to play football in his

fifth year of high school constituted discrimination in violation of Title II of the ADA. 2-ER-54-56.

D.M. filed motions for a temporary restraining order and a preliminary injunction to prohibit OSAA from enforcing its eight-semester rule, but the district court denied both motions on the grounds that D.M. had not shown a likelihood of success on the merits. *See* 2-ER-39-45, 61-69. D.M. appealed the denial of the preliminary injunction, but this Court dismissed his appeal as moot because D.M. had graduated by the time it decided the case. *See D.M. v. Oregon Sch. Activities Ass'n*, No. 22-36029, 2023 WL 4557739, at *1 (9th Cir. July 17, 2023).

Back in the district court, OSAA moved for summary judgment on D.M.'s remaining claims, including his claim for damages under the ADA. *See* Doc. 59. The court granted OSAA's motion, holding that (1) D.M.'s requested waiver was not a reasonable modification and would fundamentally alter OSAA's eight-semester rule; and (2) there was not a sufficient causal link between D.M.'s disabilities and his need for a modification. 1-ER-3. The court assumed without deciding that

OSAA is a public entity subject to Title II and that D.M. was a "qualified individual with a disability" under the ADA. 1-ER-8.

The court first addressed whether D.M.'s requested modification was reasonable or would impose a fundamental alteration, concluding that granting waivers for all students with ADA-qualifying disabilities would "fundamentally alter the purpose behind Defendant's eight-semester rule." 1-ER-11. The court observed that "multiple circuit courts have already concluded" that such a blanket waiver "constitutes a fundamental alteration of a high school sports program." 1-ER-10-11 (citing cases).

The district court also relied heavily on the fact that OSAA's policy already provides an exception for students with IEPs who are unable to graduate in four years because of their disabilities, and the court emphasized that D.M. was ineligible for an IEP. 1-ER-11. It was "rational," according to the court, to distinguish between students who do and do not have IEPs because an IEP "requires that professionals evaluate a student to determine that the student is disabled" under the IDEA, while other laws—like the ADA—provide "a low-barrier mechanism" to receive modifications. 1-ER-10 (citation omitted).

As for the causation issue, the district court determined that D.M. could not establish a sufficient causal connection between his disabilities and his ineligibility to play football. 1-ER-12. D.M. had argued that (1) he attended Triumph, the residential high school and mental-health treatment center, because of his mental-health disabilities; and (2) his year at Triumph, in turn, caused him to need an additional year of high school and a waiver of the eight-semester rule. Doc. 74, at 9-11. The court's analysis focused on the first link in the causal chain. 1-ER-12-13.

Although the district court initially recognized that D.M. must show that he would not have been excluded from football "but for" his disability (1-ER-12 (citation omitted)), the court went on to state that "[t]he crux of the issues lies in whether [D.M.'s] attendance at Triumph was *necessary* due to his disabilities" (1-ER-13 (emphasis added)). The court recognized that D.M.'s mother enrolled him at Triumph "to address his behavioral, emotional, and mental health," but it concluded there is a difference between "benefitting from . . . and requiring" therapeutic services. 1-ER-12-13. In assessing necessity, the court found it significant that D.M.'s therapist had not recommended that

D.M. enroll at Triumph, and the Oregon schools were not ill-equipped to address his disabilities. *Ibid.* As a result, the court determined that no reasonable juror could find a sufficient causal connection between D.M.'s disabilities and his need for the requested modification.

SUMMARY OF ARGUMENT

This Court should vacate the district court's grant of summary judgment to OSAA on D.M.'s reasonable-modification claim under Title II of the ADA because the court committed several legal errors in assessing the claim.

1. First, the district court misunderstood the proper legal analysis that should be applied in evaluating whether D.M.'s requested modification—a waiver of OSAA's eight-semester rule so he could play football his fifth year of high school—was reasonable and would not fundamentally alter the nature of OSAA's high school football program.

Contrary to precedent of the Supreme Court and this Court, the district court never conducted the individualized inquiry that Title II of the ADA demands. The court instead asked whether it would be reasonable to waive the eight-semester rule for *all* students with a disability under the ADA. The court relied on the fact that the

eligibility rule serves an important purpose—promoting academic progression and ensuring fair and safe competition—without considering whether waiving the rule only for D.M. would jeopardize that purpose, much less fundamentally alter OSAA's high school football program.

The district court also erred by focusing on whether D.M.'s requested modification would fundamentally alter OSAA's eight-semester eligibility *rule*. The pertinent question is not whether modifying a rule would fundamentally alter the *rule*; it is whether modifying the rule would fundamentally alter the *nature of the underlying service, program, or activity*, which here is OSAA's interscholastic high school football program.

The district court also erred in assessing the relevance of OSAA's policy of granting fifth-year waivers to other students, including students with IEPs under the IDEA. Contrary to the court's analysis, the existing exemptions in the policy strongly suggest that waiving the rule for D.M., too, would be reasonable and not fundamentally alter the nature of OSAA's high school football program.

Relatedly, the district court wrongly assumed that OSAA could satisfy its obligation to provide reasonable modifications under the ADA by granting fifth-year waivers only to students with IEPs under the IDEA. But the ADA requires public entities to provide reasonable modifications to *all* students who have a disability within the meaning of the ADA, regardless of their eligibility for an IEP. And students may fail to graduate high school in four years because of their disabilities even if they do not have an IEP.

2. On the question of causation, the district court legally erred by requiring D.M. to establish that his disabilities made his yearlong attendance at Triumph, a mental-health treatment center, "necessary." Under the correct reading of the statute, D.M. must instead establish that, but for his disabilities, he would not have been excluded from playing football during his final year of high school. He can establish that by showing that he would not have attended Triumph but for his disabilities, and that he would not have needed a fifth-year waiver but for his attendance at Triumph. This reading of Title II follows from the statutory text as well as binding precedent. Even the district court recognized that the but-for causation standard governs before it

mistakenly imposed a heightened causation standard in analyzing the link between D.M.'s disabilities and his attendance at Triumph.

ARGUMENT

As relevant here, Title II of the ADA prohibits public entities from "exclud[ing]" a qualified individual with a disability from "participation in" their services, programs or activities "by reason of such disability." 42 U.S.C. 12132. Accordingly, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary" to prevent such exclusion, "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7)(i); *Tennessee v. Lane*, 541 U.S. 509, 531-532 (2004); *see also Sheehan v. City of San Francisco*, 743 F.3d 1211, 1233 (9th Cir. 2014) (plaintiff bears the burden of showing a modification's reasonableness; defendant bears the burden of establishing a fundamental-alteration defense), *rev'd in part on other grounds, cert. dismissed in part*, 575 U.S. 600 (2015).

The district court committed multiple legal errors in analyzing whether OSAA violated Title II by denying D.M.'s request for a

modification that would have allowed him to play football his fifth and final year of high school. First, the court made several analytical mistakes in assessing whether the modification D.M. sought—an exception to OSAA's rule limiting participation in high school football to eight consecutive semesters—was "reasonable" and not a "fundamental alteration." Second, in determining whether D.M. was discriminated against—excluded from OSAA football—"by reason of" his disabilities, the court applied an incorrect causation standard. The court required D.M. to show that his disabilities *necessitated* his attendance at Triumph when D.M. needed to show only that he would not have attended Triumph *but for* his disabilities. This Court should vacate and remand for further proceedings.

I. The district court committed multiple legal errors in assessing whether the waiver D.M. requested was a "reasonable" modification and not a "fundamental alteration."

The district court's analysis of whether a waiver of OSAA's eight-semester rule would be a "reasonable" modification that did not "fundamentally alter" the nature of OSAA's football program was flawed in multiple ways. The court made the wrong inquiries, drew an

erroneous inference, and incorrectly limited Title II's protections to students who have disabilities under the IDEA.

A. The district court failed to conduct an individualized inquiry.

Whether a particular modification is reasonable or causes a fundamental alteration "depends on the individual circumstances of each case" and "requires a fact-specific, individualized analysis." *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999); *see also Where Do We Go Berkeley v. California Dep't of Transp.*, 32 F.4th 852, 862 (9th Cir. 2022) (same); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) (same).

But the district court never examined D.M.'s individual circumstances in analyzing his request for a fifth-year waiver. Instead, the court evaluated whether it would be reasonable and not cause a fundamental alteration to waive the eight-semester rule "for *all* students with a qualifying disability under the ADA." 1-ER-8 (emphasis added).[4] The court reasoned that the requested modification

[4] The district court mischaracterized D.M.'s position as seeking only a "blanket fifth-year waiver . . . for any student with an ADA-qualifying disability." 1-ER-9-10. Although D.M. argued that OSAA's

for every student with a disability was unreasonable because it would undermine the purpose of the eligibility rule, which is to "promote academic progression" and "fair and safe competition." 1-ER-9-10 (citation omitted). The court never considered whether waiving the rule for D.M. specifically would jeopardize that purpose, nor did it evaluate the ultimate question whether a waiver for D.M. alone would be reasonable or fundamentally alter the nature of OSAA's high school football program. If anything, the court's findings suggest that a waiver for D.M. would have *promoted* his academic progression. *See* 1-ER-4 (recognizing football motivated D.M. academically).

The district court's analysis stands in sharp contrast to the analysis of a very similar question in *Doe v. Rhode Island Interscholastic League*, No. CV 23-414, 2024 WL 2725475 (D.R.I. May 28, 2024), *appeal pending*, No. 24-1619 (1st Cir. docketed July 1, 2024). There, the student-plaintiff requested a waiver of an eight-semester rule designed to prevent redshirting, *id.* at *12, which is the act of gaining a competitive advantage over other students by repeating a

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eight-semester rule is facially unlawful, he also asserted that he should have received an individual modification. *See* Doc. 74, at 1-2, 32-47.

year of school to have additional time to grow, develop, and mature, *see McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 456 (6th Cir. 1997) (en banc).

In assessing whether the requested waiver was reasonable or would fundamentally alter the nature of the interscholastic high school athletic program, the court in *Doe* properly considered not just the purpose of the rule—to prevent redshirting—but whether the plaintiff was himself engaged in redshirting. *See* 2024 WL 2725475, at *12. The court also evaluated whether the plaintiff would be taking another student's place if he were to play, whether his participation would upset fair competition, and whether he had particularly strong athletic abilities. *Ibid.* The district court in this case never considered case-specific factors like these.

Instead of conducting an individualized inquiry, the district court relied on the fact that "multiple circuit courts have already concluded that a [blanket] waiver of [a similar] eight-semester rule and/or age restriction rule constitutes a fundamental alteration of a high school sports program." 1-ER-10-11 (citing cases). In those cases, the courts held that a case-by-case assessment of individual waiver requests would

impose an undue burden on the school. *See McPherson*, 119 F.3d at 461-462; *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1034-1035 (6th Cir. 1995); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929-931 (8th Cir. 1994)).

But the Supreme Court squarely rejected such reasoning in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), and mandated a case-by-case assessment of requests for reasonable modifications under the ADA. Applying the similarly worded reasonable-modification mandate in Title III of the ADA, *PGA Tour* held that a golf tournament sponsor's "refusal to consider [the plaintiff's] personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA."[5] *Id.* at 688. It is "the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis."

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[5] Title III of the ADA requires an entity operating "public accommodations" to make "reasonable modifications" in its policies "when . . . necessary to afford such . . . accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of . . . such accommodations." 42 U.S.C. 12182(b)(2)(A)(ii). The reasoning in *PGA Tour* as to why the reasonable-modification inquiry must be individualized applies with equal force to Title II. *See Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 77-78 (2d Cir. 2016).

Id. at 690. The Court acknowledged that "the ADA admittedly imposes some administrative burdens" on covered entities "that could be avoided by strictly adhering to general rules and policies." *Ibid.* But, the Court emphasized, "Congress intended" these entities to "give individualized attention" to requests for reasonable modifications. *Id.* at 690-691.[6]

The district court thus erred in failing to conduct an individualized analysis of whether waiving the eight-semester rule for D.M. would be reasonable and not fundamentally alter the nature of OSAA's interscholastic high school football program, taking into account whether a waiver for D.M. would undermine academic progress or lead to unfair or unsafe competition in contravention of the rule's goals. Indeed, "[t]o require a focus on the general purposes behind a rule without considering the effect an exception for a disabled

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[6] Of note, *PGA Tour* affirmed a decision of this Court that expressly cited and rejected *McPherson*, *Sandison*, and *Pottgen*—the very cases the district court relied on here. *See Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1002 (9th Cir. 2000), *aff'd*, 532 U.S. 661 (2001). This Court explained that it does "not share the antagonism to individual determinations reflected in these cases" and adopted instead the approach embraced by the dissent in *Pottgen* and the Seventh Circuit's decision in *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999), where "the inquiry must focus on the *individual* exception." *Ibid.* (emphasis in original).

individual would have on those purposes would negate the reason for requiring reasonable exceptions." *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 851 (7th Cir. 1999).

B. The district court mistakenly evaluated whether the modification would fundamentally alter the nature of the eligibility *rule* rather than OSAA's high school football *program*.

In determining whether the "fundamental alteration" defense applied, the district court also erred by requiring D.M. to establish that his requested modification "would not fundamentally alter the nature of Defendant's *eight-semester rule*." 1-ER-8 (emphasis added). The pertinent question is not whether a requested modification to a rule would fundamentally alter that rule; it is whether the requested modification "would fundamentally alter the nature of *the service, program, or activity*" that the plaintiff seeks equal access to. 28 C.F.R. 35.130(b)(7)(i) (emphasis added). In this case, D.M. seeks access to OSAA's high school football program. Thus, the district court should have analyzed whether granting D.M. a fifth-year waiver would fundamentally alter the nature of that football program.

In other parts of the decision below, the district court appeared to focus on whether the modification would fundamentally alter not just

the rule itself, but the purpose of the rule. *See* 1-ER-11 (concluding no reasonable jury could conclude the modification "would not fundamentally alter the purpose behind Defendant's eight-semester rule"). For similar reasons, that inquiry is not dispositive of the ultimate question.

To be sure, courts may consider whether a requested modification would compromise the purpose of an eligibility rule. But courts must also evaluate the importance of the rule to the nature of the underlying public service, program, or activity. *See PGA Tour*, 532 U.S. at 689-690; *see also Mary Jo C. v. New York State & Loc. Ret. Sys.*, 707 F.3d 144, 159 (2d Cir. 2013) (explaining that a court must undertake "an independent analysis of the importance of a rule for the service in light of the service's purpose"). The purpose of an eligibility rule matters only to the extent it affects the "nature of the [underlying public] service, program, or activity." 28 C.F.R. 35.130(b)(7)(i). Therefore, the district court needed to do more than consider whether a waiver for D.M. would fundamentally alter, or be contrary to, the purpose of the eight-semester rule. *See* 1-ER-9-10. The district court should have

considered whether a waiver for D.M. would compromise the nature—and purpose—of OSAA high school football.

C. The district court failed to recognize that OSAA's existing waiver policy is evidence that a waiver for D.M. would be reasonable and not a fundamental alteration.

In addition to making the foregoing errors, the district court drew the wrong inference from the fact that OSAA has a waiver policy providing enumerated exceptions to the eight-semester rule, including an exception for students with IEPs. In determining that D.M.'s request was unreasonable and would require a fundamental alteration, the court stressed the existence of OSAA's waiver policy and the fact that D.M. did not qualify for a waiver under that policy. 1-ER-10-11. But the court should have drawn the opposite inference: OSAA's established practice of granting waivers to other students in analogous circumstances is evidence that a waiver for D.M. would be reasonable and would not fundamentally alter the nature of OSAA high school football.

An established practice of modifying a rule based on individualized circumstances will often support a similar modification to accommodate a disability. *See Zukle v. Regents of Univ. of Cal.*, 166

F.3d 1041, 1049 (9th Cir. 1999) (considering whether other students were granted similar modifications when assessing whether requested modification was reasonable); *Washington*, 181 F.3d at 852 (holding requested waiver of eight-semester rule was reasonable and would not fundamentally alter athletic program in part because school had granted waivers in the past); *Doe*, 2024 WL 2725475, at *12 (recognizing an existing workaround to the eight-semester rule as evidence that the requested waiver would not fundamentally alter the nature of interscholastic athletics). As the Supreme Court has explained in addressing reasonable accommodations, a "plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002).[7]

Here, OSAA has an established practice of waiving its eight-semester eligibility rule for three categories of students, including

[7] *US Airways* addressed employers' obligations under Title I of the ADA to grant employees "reasonable accommodations," 42 U.S.C. 12112(b)(5), but this Court has held that "reasonable accommodation" under Title I and "reasonable modification" under Title II "create identical standards," *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021).

students with IEPs who are unable to graduate within eight semesters because of their disability. *See* 1-ER-9. OSAA's policy of waiving the eight-semester rule for certain students suggests that a waiver for D.M.—who appears to be similarly situated to other exempted students—is a reasonable modification that would not fundamentally alter the OSAA high school football program.

D. The district court improperly conditioned relief under Title II on a student's ability to satisfy the more restrictive standard for obtaining an IEP under the IDEA.

The district court also made a fourth, related error in analyzing whether excepting D.M. from the eight-semester rule was reasonable. The court incorrectly assumed that OSAA's existing modification of the eight-semester rule for students entitled to IEPs under the IDEA was sufficient to satisfy OSAA's obligation under the ADA. *See* 1-ER-9-10.

The ADA and IDEA, however, provide distinct legal protections, and compliance with the IDEA does not ensure compliance with the ADA. "[T]he IDEA sets only a floor of access to education for children with . . . disabilities" that impede learning. *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013). Title II of the ADA, by contrast, requires public entities "to take steps towards making existing

services not just accessible, but *equally* accessible" to students with disabilities. *Ibid.*

Moreover, Title II requires that public entities provide reasonable modifications to *all* students who have a disability within the meaning of the ADA, 42 U.S.C. 12132; 28 C.F.R. 35.130(b)(7)(i)—not just those students who also have an IEP under the IDEA. And students who do not satisfy the definition of a "child with a disability" under the IDEA—and thus are ineligible for an IEP—may still fail to graduate in eight semesters due to disabilities under the ADA. *Compare* 20 U.S.C. 1401(14) (defining an IEP as a written statement "for each child with a disability"), *and* 20 U.S.C. 1401(3)(A) (defining "child with a disability" under the IDEA to mean students who need special education by reason of certain disabilities, including intellectual disabilities, specific learning disabilities, or visual or hearing impairments), *with* 42 U.S.C. 12102(1) (defining "disability" under the ADA to include any "physical or mental impairment that substantially limits one or more major life activities of such individual").

The district court stated that it was "rational" to distinguish between the two groups of students with disabilities—those who have

IEPs and those who do not—because "[a]n IEP requires that professionals evaluate a student to determine that the student is disabled for the purposes of the [IDEA]," whereas Title II "provides a low-barrier mechanism for students to receive some special services or accommodations." 1-ER-10 (citation omitted).[8] But, as the statutory definitions just recited above make clear, the standard for determining whether a student has a qualifying disability under the IDEA is not necessarily higher or more demanding than it is under the ADA; the standards are simply different. *See* p. 27, *supra.*

Nor would it matter if the IDEA did impose a higher standard. D.M. bought a claim under Title II of the ADA. The mere fact that a student has a disability within the meaning of Title II but is not eligible for an IEP under the IDEA says nothing about whether a waiver for the student is required as a "reasonable modification" under Title II, nor does it say anything about whether a waiver would fundamentally alter

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[8] The district court referenced Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), not Title II, but the definition of "disability" is the same under the two statutes. *See* 29 U.S.C. 705(20)(B) (defining "individual with a disability" for purposes of Section 504 as "any person who has a disability as defined in section 12102 of Title 42").

the nature of OSAA's high school football program. The district court correctly recognized that some students might have a disability under the ADA but not qualify for an IEP under the IDEA. It wrongly concluded, however, that OSAA could categorically refuse to accommodate such students, effectively denying a significant subset of students with ADA-qualifying disabilities important protections under Title II.

In sum, for the foregoing four reasons, the district court committed legal error in evaluating whether D.M.'s request for a waiver was a reasonable modification that would not fundamentally alter the nature of OSAA high school football. The district court should be directed to apply the correct legal standards on remand.

II. The district court applied the wrong standard in assessing whether D.M.'s disabilities caused his need for a modification.

In addition to applying faulty legal analysis in assessing whether the modification D.M. requested was reasonable, the district court applied an incorrect standard in evaluating the causation element of D.M.'s reasonable-modification claim.

To prove a violation of Title II of the ADA, a plaintiff must establish that he was denied equal access to a program, service, or activity "by reason of" his disability. 42 U.S.C. 12132. This requires a plaintiff to establish that, but for his disability, he would have enjoyed equal access and not needed the requested modification. *See Murray v. Mayo Clinic*, 934 F.3d 1101, 1106-1107 (9th Cir. 2019) (Title I ADA case explaining that "by reason of" indicates but-for causation); *see also Finley v. Huss*, 102 F.4th 789, 821 (6th Cir. 2024) (applying but-for causation in context of Title II reasonable-modification claim); *A.H. v. Illinois High Sch. Ass'n*, 881 F.3d 587, 593 (7th Cir. 2018) (same). Thus, to satisfy the causation requirement, there need only be some "causal connection" between a plaintiff's disability and his need for a reasonable modification. *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 848 (7th Cir. 1999); *see also Doe v. Rhode Island Interscholastic League*, No. CV 23-414, 2024 WL 2725475, at *8 (D.R.I. May 28, 2024) (requiring "a causal link between the plaintiff's disability and the defendant's discriminatory action"), *appeal pending*, No. 24-1619 (1st Cir. docketed July 1, 2024).

Although the district court initially stated the correct legal standard, it went on to recite and apply an incorrect, heightened causation standard. The court first correctly recognized that there need only be a "causal connection" between D.M.'s disabilities and his need for a modification, elaborating that D.M. "must show that he would have been eligible to participate in school sports but-for his disabilities." 1-ER-12. But the court then focused on one link in the causal chain—the connection between D.M.'s disabilities and his yearlong attendance at Triumph, the residential mental-health treatment center. 1-ER-13-14. In analyzing that link, the court required more than a causal connection. The court required that D.M. establish that his "attendance at Triumph was *necessary* due to his disabilities," and explained that "there is a material difference between benefitting from services and requiring them." 1-ER-13 (emphasis added).

That was a legal error. Although a plaintiff must establish that the "[*requested*] *modifications* are necessary to avoid discrimination on the basis of disability," 28 C.F.R. 35.130(b)(7)(i) (emphasis added), he need not establish that every event that led to his need for a modification was "required" by his disability. For example, in

Washington, a student challenging a similar eight-semester rule "met the causation requirement" because he claimed that "his disability caused him to drop out of school." 181 F.3d at 849. The Seventh Circuit did not ask whether dropping out was necessary. All that mattered was that, but for the plaintiff's disability, he would not have needed an exemption from the rule. *Ibid.* The "necessity" standard adopted by the district court below is thus contradicted by the text of the statute and regulation and the relevant case law.

Based on the district court's own presentation of the facts, it is likely that there is at least a material question of fact as to whether D.M. would not have attended the mental-health treatment program at Triumph but for his mental-health disabilities. Indeed, according to the court, D.M. had several mental-health disabilities and his mother enrolled him in Triumph because she believed it was "better equipped to address his behavioral, emotional, and mental health concerns." 1-ER-4, 13.

In concluding that there was an insufficient causal connection between D.M.'s disabilities and his need for a modification, the district court relied on the fact that (1) D.M.'s Oregon school was purportedly

able to meet his mental-health needs; and (2) D.M.'s therapist had not recommended that he enroll in Triumph. 1-ER-13-14. But it is beside the point whether D.M.'s Oregon school could address D.M.'s disability-related needs and whether the enrollment decision was based on a therapist's advice or just a mother's concern for her child's mental health. These facts do not resolve the question whether D.M.'s enrollment at Triumph was *because of* his disabilities. Someone with disabilities may seek treatment that has not been recommended by a treating professional and is not strictly necessary but nonetheless benefits him in light of his disabilities. All that matters is that he would not have sought the treatment but for his disabilities.

It bears noting that, even if D.M.'s mother had enrolled D.M. at Triumph solely because of his behavioral challenges, that too would be sufficient to establish a causal link so long as D.M.'s mental-health disabilities caused those behavioral challenges. "[A]ccommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability." *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1150 (9th Cir. 2003) (summarizing the holding of *US Airways*, *supra*, a Title I

ADA case); *cf. Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (holding that requirement that dogs entering the State be quarantined for 120 days discriminates against visually impaired persons by reason of their disabilities due to their "unique dependence upon guide dogs").

Thus, the district court applied an incorrect standard when it required D.M. to establish that his disabilities made his attendance at Triumph necessary. The proper inquiry is whether D.M. would not have attended Triumph but for his disabilities, and whether he would not have needed a fifth-year waiver but for his attendance at Triumph. And, at this stage of the litigation, D.M. need only establish that there are questions of fact as to whether his disabilities caused his need for a waiver. *See Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014).

Because the district court employed faulty legal analysis in evaluating the reasonableness of D.M.'s requested modification and the causal connection between D.M.'s disabilities and his need for a modification, the court's judgment should be vacated, and the case remanded for the court to apply the correct legal standards.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment and remand with instructions for the district court to conduct the correct analysis of the reasonableness and causation issues.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

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42 U.S.C. 12132. Discrimination.

Subject to the provisions of this subchapter, 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.

28 C.F.R. 35.130. General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of

disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(ii) A public entity is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of "disability" at § 35.108(a)(1)(iii).

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(i) Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.