NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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.

No. 24-3143

D.C. No. 6:22-cv-01228-MC

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, Chief District Judge, Presiding

Argued and Submitted June 9, 2025
Submission Withdrawn June 11, 2025
Resubmitted August 18, 2025
Portland, Oregon

Before: TALLMAN, OWENS, and VANDYKE, Circuit Judges.
Dissent by Judge VANDYKE.

D.M. appeals from the district court's grant of summary judgment in favor of the Oregon School Activities Association ("OSAA"). We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

under 28 U.S.C. § 1291. "We review a district court's grant of summary judgment de novo." *Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722, 734 (9th Cir. 2025) (citation omitted). As the parties are familiar with the facts, we do not recount them here. We reverse and remand.

1. Under Title II of the Americans with Disabilities Act ("ADA"), a public entity[1] must make reasonable modifications that are "necessary to avoid discrimination on the basis of disability," unless the modification would "fundamentally alter the nature" of the program or activity. 28 C.F.R. § 35.130(b)(7)(i). "[T]he question of what constitutes a reasonable [modification] under the ADA 'requires a fact-specific, individualized analysis of the disabled individual's circumstances and the [modifications] that might allow him to meet the program's standards.'" *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (citation omitted).

The district court first erred by failing to conduct an individualized analysis of D.M.'s circumstances and instead relying on OSAA's exemptions for students with an Individual Education Plan ("IEP") under the Individuals with Disabilities Education Act ("IDEA"). *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001).

[1] OSAA argues that it is not a public entity under the ADA. It raised this argument for the first time in its reply brief in support of its summary judgment motion below, and the district court did not address it. Therefore, this question is not properly before us and we decline to reach it. *See Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019).

Whether a student with disabilities needs specialized education under the IDEA is different from whether a student needs reasonable modifications under the ADA. *See McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 910–11 (9th Cir. 2020).

Second, genuine disputes of material fact remain as to whether D.M.'s requested modification was reasonable and whether the modification would have fundamentally altered OSAA's football program. The record before us does not show as a matter of law that granting D.M. a waiver would have undermined the goals of OSAA's eight-semester rule, i.e., to promote academic progress and to ensure safe and fair competition. *See Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1002 (9th Cir. 2000), *aff'd*, 532 U.S. 661 (2001). Additionally, OSAA does not argue or show that providing waivers in these circumstances would result in "undue financial and administrative burdens." *Updike v. Multnomah County*, 870 F.3d 939, 950 (9th Cir. 2017) (citation omitted). Rather, OSAA already has exceptions for students with IEPs. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002).

2. To establish a violation of Title II of the ADA, D.M. must show that he was excluded from participation in OSAA football "by reason of" his disabilities. 42 U.S.C. § 12132. The language "by reason of" means D.M. must show but-for causation. *See Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 (9th Cir. 2019). "[A] but-for test directs us to change one thing at a time and see if the

outcome changes." *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020). "If it does," then there is "but-for cause." *Id.*

Here, there is a genuine dispute of fact regarding whether D.M.'s disabilities were the but-for cause of his ineligibility to play football. D.M. has presented facts that show if he did not have disabilities, then he would not have gone to a residential treatment facility, he would not have had to repeat a grade, and then he would have been eligible to play football under the eight-semester rule. Because the result changes, D.M. has raised a genuine dispute of fact as to whether there is but-for cause. To the extent the district court considered whether D.M.'s year at a residential treatment facility was "necessary," instead of whether there was but-for causation, it erred.

The district court and OSAA construe the facts as establishing it was the "choice" of D.M.'s mother to send D.M. to a residential treatment facility, and not due to his disabilities. But that there may be "multiple but-for causes" does not preclude liability. *Id.* And on summary judgment, we must construe the evidence and draw all reasonable inferences in the light most favorable to D.M. *See Hartzell*, 130 F.4th at 734.

3. "[F]acially discriminatory [policies] present per se violations of § 12132 [Title II of the ADA]." *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 735 (9th Cir. 1999). We agree with D.M. that the

district court erred in granting summary judgment as to D.M.'s facial challenge. The district court erroneously applied the "reasonable modifications test," which does not "apply to facially discriminatory [policies]." *Id.*[2]

4. Finally, D.M. argues the case should be reassigned to a different judge on remand. "Absent proof of personal bias on the part of the district judge, remand to a different judge is proper only under unusual circumstances." *Disability Rts. Mont., Inc. v. Batista*, 930 F.3d 1090, 1100 (9th Cir. 2019) (citation omitted). Here, D.M. has not shown remand to a different judge is warranted.

REVERSED and REMANDED.

[2] OSAA argues that even if the district court erred, we should affirm because D.M. cannot show deliberate indifference. The district court did not address this issue because it granted summary judgment based on the reasonable modification and causation issues. While we have discretion to reach this issue, we decline to do so as "the issue is better left for the district court in the first instance on remand." *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 490 n.4 (9th Cir. 2023).

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VANDYKE, Circuit Judge, dissenting:

Instead of reversing and remanding this case, and I would affirm the district court's decision on the alternative ground of no showing of deliberate indifference by the Oregon School Activities Association ("OSAA"). Even assuming that OSAA improperly denied D.M. a fifth year of playing eligibility, there is no evidence that OSAA was deliberately indifferent when it declined D.M.'s requested waiver of the rule limiting participation in sports to eight semesters ("the eight-semester rule").

We have discretion to affirm on any ground—including issues not expressly decided below—so long as the issue was presented to the district court and the record is sufficiently developed. *Munden v. Stewart Title Guar. Co.*, 8 F.4th 1040, 1049 (9th Cir. 2021). Although our court often "do[es] not resolve issues that the district court did not first reach," *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 490 n.4 (9th Cir. 2023) (citation omitted), it is appropriate to "exercise our discretion to address … an issue of law that does not depend on any further development of the facts" and was "'properly raised' … in the district court." *CFPB v. Gordon*, 819 F.3d 1179, 1191 n.5 (9th Cir. 2016).

Those requirements are satisfied here. The parties raised the issue of deliberate indifference during the summary judgment proceedings before the district court and in their briefing on appeal. This issue is legal in nature and turns on whether D.M. presented sufficient evidence to create a triable issue of fact on

deliberate indifference.[1] Because the record is fully developed and the parties already sufficiently briefed the issue before the court below, I would reach the issue now instead of leaving the issue "for the district court [to review] in the first instance on remand."

On the merits of the issue, I see no evidence in this case that OSAA acted with deliberate indifference. This is decisive in this case because D.M.'s only remaining claim after his prior appeal is his claim for damages, and as a prerequisite for recovering monetary damages under Title II of the Americans with Disabilities Act ("ADA"), a plaintiff must show that the defendant acted with deliberate indifference. *Duvall*, 260 F.3d at 1138; *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002). Deliberate indifference requires that a plaintiff establish "both knowledge that a harm to a federally protected right is substantially likely," and that "a failure to act upon that ... likelihood" was "more than negligent, and involves an element of deliberateness."[2] *Duvall*, 260 F.3d at 1139 (citation omitted).

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[1] This court treats the question of whether a defendant acted with a particular motive or mental state as a legal issue rather than a question of fact. *See, e.g.*, *Jeffers v. Gomez*, 267 F.3d 895, 907 (9th Cir. 2001); *see also Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138–39 (9th Cir. 2001).

[2] D.M.'s counsel correctly emphasized during oral argument that this standard does not require a showing of malice. But D.M. does need to show that OSAA *knew* there was a substantial likelihood of harm to D.M.'s federal rights by denying his waiver request.

D.M. failed to marshal evidence to create a fact dispute regarding either of these requirements. D.M. provided no evidence that OSAA knew the denial of his requested waiver was "substantially likely" to result in "harm to a federally protected right." *Id.* OSAA denied D.M.'s request because he did not fall into one of the organization's narrow categories for such waivers. Specifically, D.M. did not have an Individual Education Plan ("IEP") (he was twice denied such a plan) and because he could have graduated within four years but for the choice to attend a special school focused on mental health. So although OSAA had notice of D.M.'s mental health struggles and D.M.'s belief that those struggles contributed to his requested accommodation, there is no evidence that OSAA knew that the denial of D.M.'s waiver was "substantially likely" to cause "harm to a federally protected right." *Id.*

If anything, evidence in the record supports only the opposite conclusion. OSAA adhered to its longstanding policy of only granting waivers in narrow circumstances that did not apply to D.M., presumably because that rule was previously upheld in the face of a challenge similar to this one. *See Bingham v. Or. Sch. Activities Ass'n*, 60 F. Supp. 2d 1062 (D. Or. 1999) (approving of OSAA's fifth-year eligibility rule), *aff'd in part by*, *Bingham v. Ediger*, 20 F. App'x 720, 721 (9th Cir. 2001) ("[T]here is no longer any legitimate concern about OSAA's [e]ight-[s]emester [r]ule ...."). D.M.'s requested waiver did not, by itself, provide notice to OSAA that the accommodation was required to avoid harming a federally protected

right. And the district court's denial of *two* injunctions to D.M. further validated OSAA's view that the denied waiver did not violate D.M.'s rights under the ADA.

D.M. has also not shown that OSAA acted with a deliberate or purposeful disregard of his rights when it denied the requested waiver. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a[n] ... actor disregarded a known or obvious consequence of his action." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 390 (1988). D.M. points to OSAA's refusal to depart from its eight-semester rule, but that refusal amounts to bureaucratic rigidity at most—not deliberate disregard for a known or obvious consequence. And this court has made clear that "bureaucratic slippage that constitutes negligence" is insufficient to show deliberate indifference. *Duvall*, 260 F.3d at 1139. It is also difficult to see how OSAA's adherence to a policy favorably upheld by this circuit could qualify as deliberate indifference because it undercuts the notion that OSAA acted with the requisite discriminatory intent. Instead, OSAA's adherence to the rule provides support for the conclusion that OSAA applied its policy in good faith based on its understanding that requiring an IEP for a waiver is not discrimination.

This remains true even assuming the majority is correct that OSAA ultimately reached an incorrect conclusion about whether D.M. was entitled to a waiver. An incorrect determination obviously does not alone establish purposeful

discrimination. *See Duvall*, 260 F.3d at 1139. While Title II also creates "a duty to gather sufficient information ... to determine what accommodations are necessary," OSAA did so here. *Id.* (quoting *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999)). The record shows that OSAA assessed D.M.'s waiver request and, after considering the evidence, reached the conclusion that a waiver for D.M. was not warranted because he did not have an IEP and because he could have graduated in four years if he had not attended the special school. There is no indication that OSAA deliberately failed to act. Nor is there any evidence that OSAA stringently applied the IEP exception for the purpose of discriminating against D.M.

* * *

As D.M.'s only remaining claims are for monetary damages,[3] I would affirm the district court's dismissal because D.M. is not entitled to damages under Title II absent a showing of deliberate indifference. I therefore respectfully dissent.

[3] D.M.'s state law claims should be dismissed for the same reason, because Oregon courts construe the analogous state statute in "lockstep" with the ADA. *Fenimore v. Blachly-Lane Cnty. C.E.A.*, 441 P.3d 699, 706 (Or. 2019) (citation omitted).