No. 14-17384

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES CHADAM, *et al.*,

Plaintiffs-Appellants

v.

PALO ALTO UNIFIED SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

JAMES COLE, JR.
General Counsel

VANITA GUPTA
Principal Deputy Assistant
Attorney General

FRANCISCO LOPEZ
JESSICA WOLLAND
Attorneys
U.S. Department of Education
Office of the General Counsel

MARK L. GROSS
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – RFK 3748
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

RULES: **PAGE**

LEGISLATIVE HISTORY:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-17384

JAMES CHADAM, *et al.*,

Plaintiffs-Appellants

v.

PALO ALTO UNIFIED SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

STATEMENT OF THE ISSUE

Defendant Palo Alto Unified School District transferred plaintiff C.C. from his neighborhood school against his and his parents' wishes because he had a genetic marker for cystic fibrosis (but not the disease itself), and the school district believed he posed a danger to two students in the school who had cystic fibrosis. Plaintiffs filed suit for damages under Title II of the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act (Section 504). The

district court dismissed the complaint for failure to state a claim. We address the following question:

Whether the district court erred in dismissing plaintiffs' ADA and Section 504 claims on the basis that the school district reasonably believed C.C. posed a direct threat for medical reasons to two students in his neighborhood school.

INTEREST OF THE UNITED STATES

This appeal arises from the application of Title II of the ADA, 42 U.S.C. 12131 *et seq.*, and Section 504, 29 U.S.C. 794, and their implementing regulations, to a public school district's involuntary transfer of C.C. out of his neighborhood school. Title II prohibits state and local governments from excluding an otherwise qualified individual with a disability from participation in, or denying the individual the benefits of, their services, programs, or activities because of the disability, or otherwise discriminating against that individual on the basis of disability. 42 U.S.C. 12132. Section 504 similarly prohibits disability discrimination by recipients of federal funding. 29 U.S.C. 794. The Attorney General has authority to bring civil actions to enforce both provisions. See 42 U.S.C. 12133; 29 U.S.C. 794a. The Justice Department also has authority to issue regulations implementing Title II and, in programs receiving funds from the Justice Department, Section 504. See 42 U.S.C. 12133-12134, 12205a; 29 U.S.C. 794, 794a; 28 C.F.R. Pts. 35 & 41. The Department of Education has the same

regulatory responsibility under Section 504 for programs receiving federal funds from that agency. See 34 C.F.R. Pt. 104; 28 C.F.R. 35.190(b)(2). In addition, the Department of Education shares in the enforcement of Title II. The United States has an interest in ensuring that these statutes and accompanying regulations are properly interpreted and applied. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. C.C.'s Removal From His Neighborhood School[1]

a. In July 2012, the Chadams enrolled their son, C.C., in their neighborhood middle school in the Palo Alto Unified School District. E.R. 110.[2] As a newborn, C.C. was diagnosed with the genetic marker for cystic fibrosis, but not the disease itself. Despite the genetic marker, he does not have, and never has had, cystic fibrosis and is a healthy teenager. E.R. 109-110.

When the Chadams registered C.C. for school, they completed a medical information form. E.R. 110. On September 11, 2012, without permission from C.C.'s parents, one of C.C.'s teachers told the parents (referred to as Mr. and Mrs. X) of two students at the school that C.C. *had* cystic fibrosis. E.R. 111. Later that

[1] Because the complaint was dismissed for failure to state a claim, we summarize the facts as alleged in the second amended complaint.

[2] Citations to "E.R. __" refer to page numbers in the Excerpts of Record filed by plaintiffs-appellants along with their opening brief.

day, the Chadams were asked to come to a meeting with the school principal and other school officials. The Chadams were told that two students (siblings) at the school had cystic fibrosis, and that the parents of those students had "discovered" that C.C. also had the disease. E.R. 111. The Chadams responded that C.C. did not, in fact, have cystic fibrosis. E.R. 111. That evening, Mrs. Chadam received a telephone call from Mrs. X asking about C.C.'s medical condition and how long the family intended to remain in Palo Alto. E.R. 111-112.

A few days later, Dr. Carlos Milla sent a letter to the school district addressing medical issues arising from C.C.'s presence at the school. E.R. 112. The letter does not indicate who asked him to send the letter. E.R. 112.[3] The letter recommended that C.C. be removed from the middle school for the safety of Mrs. X's two children. E.R. 112. As a general matter, there is a risk of infection between people who *have* cystic fibrosis because a person with the disease can be a carrier of bacteria that is easily transmitted and harmful to others with cystic fibrosis.

On September 14, 2012, the Chadams told the school principal that they did not want C.C. to be transferred from his neighborhood school. E.R. 112. The principal responded that there was no need to make any changes at that time

[3] The district court noted that "[d]etails about Dr. Milla's identity and connection to the case are not disclosed." E.R. 3.

because Mr. and Mrs. X had decided to move their two children out of the school. E.R. 112. But two days later, Mrs. X requested that the school district remove C.C. from the school so that her children could return. E.R. 113. The next day, Dr. Milla sent the school another letter, this time stating that children with cystic fibrosis "must not be" in the same school together. E.R. 113.

b. On September 17, 2012, the principal called the Chadams and stated that, based on C.C.'s medical records and Mr. and Mrs. X's demands, the school district intended to transfer C.C. to a school approximately 3.5 miles away from the Chadams' home. E.R. 113. The Chadams demanded that the school district provide evidence and documentation to support this decision. E.R. 113.

Several days later, the Chadams gave the school district a letter from one of C.C.'s doctors, Dr. John Morton, stating that he has seen C.C. for the past five years, C.C. does not have cystic fibrosis, there "has been no progression of the symptoms" of cystic fibrosis, and C.C. is not "any risk whatsoever to other children with [cystic fibrosis] even if they were using the same classroom." E.R. 113. On the same day, the Chadams met with school district officials and reiterated that although C.C. had the genetic marker for cystic fibrosis, he did not have and never had the disease. E.R. 114. When the Chadams asked for the reason C.C. was being transferred, they were told it was based on a letter from a Stanford doctor, whom the school district did not identify. E.R. 114. A few days

later, Mrs. Chadam again met with a school district official and offered to provide more medical evidence that C.C. was not a risk to anyone. E.R. 114.

On September 28, 2012, the school district told the Chadams that it was transferring C.C. to a different school. E.R. 114. A few weeks later, C.C. was removed from class during the school day in front of his classmates and told that it was his last day at that school. Distraught, he walked home without saying goodbye to his classmates. E.R. 114.

On October 12, 2012, the Chadams filed suit in state court seeking to enjoin the school district from transferring C.C. to a different school. Several weeks later, the parties settled the case, and C.C. returned to his neighborhood middle school. E.R. 114. C.C. did not attend school for approximately two weeks. E.R. 117.

2. The Federal Complaint

a. On September 6, 2013, plaintiffs filed this action seeking damages. E.R. 126. Subsequently, they filed a second amended complaint. E.R. 108-119. Count I alleges that defendant Palo Alto School District violated the ADA because it "perceived [C.C.] as a disabled person" and deprived him of his "right to attend the public school * * * closest to his home." E.R. 115. Count I further alleges that, as a result, C.C. suffered humiliation, anxiety, deterioration of his grades, and various physical ailments. E.R. 116. Count II mirrors Count I and alleges a violation of Section 504. E.R. 116-117. Other counts allege a violation of the

"federal constitutional right to privacy" and common law negligence. E.R. 117-119.

The school district moved to dismiss. E.R. 78-107. With regard to the ADA and Section 504 claims, defendant argued that: (1) plaintiffs' allegation that C.C. was denied attendance at his neighborhood school did not constitute a claim that he was denied the benefits of defendant's educational program, as required by Title II of the ADA and Section 504; (2) plaintiffs failed to allege that C.C. was a qualified individual with a disability, noting that plaintiffs repeatedly asserted that C.C. did not have cystic fibrosis; (3) plaintiffs failed to allege that defendant *intended* to violate the ADA and Section 504, precluding liability for damages; (4) defendant's actions were "expressly allowed by law" – a California law requiring schools to ensure the safety of all students – and therefore the transfer of C.C. was "legally mandated" and "cannot form the basis of liability"; and (5) C.C.'s transfer was not "because of" C.C.'s disability, but rather to protect the health and safety of others. E.R. 90-101; see also E.R. 33-37, 42-44.[4]

---

[4] Defendant also argued that plaintiffs' ADA damages claim was barred by the Eleventh Amendment. E.R. 93-96. Because the district court dismissed the second amended complaint "for other reasons," the court did not address this issue, and therefore it is not presented here. E.R. 8-9. In any event, because plaintiffs seek relief under both the ADA and Section 504, the complaint alleges that defendant receives federal funds (E.R. 116), and, as noted below (p. 14 n.6), the analysis under each statute for liability and remedies is substantially the same, it is unnecessary to address whether plaintiffs' Title II claim is barred by the Eleventh

(continued…)

Plaintiffs responded that C.C. was a qualified person with a disability because the defendant perceived and regarded C.C. as disabled. E.R. 64-66. Plaintiffs also argued that, by being transferred to a different school, C.C. was deprived of the benefit of attending his neighborhood school in accordance with school district policy. E.R. 67. Plaintiffs further asserted that the complaint adequately alleges intentional conduct by the defendant. E.R. 71-72. Finally, plaintiffs asserted that compliance with state law is not a defense to a federal ADA or Section 504 claim because the federal statutes preempt state law. E.R. 72.

b. The district court granted defendant's motion to dismiss. E.R. 25. The court concluded that plaintiffs alleged sufficient facts to support the inference that defendant "regarded" C.C. as an "individual with a disability" and acted on that mistaken belief. E.R. 9, 11-13. But the court found that defendant reasonably believed that C.C. posed a health risk to the two children at school with cystic fibrosis, and therefore defendant did not violate the ADA or Section 504. E.R. 14-16, 20-21. The court did not address whether plaintiffs adequately alleged that C.C. was denied the benefits of a program or activity.

(…continued)
Amendment. See, *e.g.*, *Bennett-Nelson* v. *Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (unnecessary to decide whether Title II is valid Fourteenth Amendment legislation where plaintiff has identical 504 claim); *Lovell* v. *Chandler*, 303 F.3d 1039, 1050-1051 (9th Cir. 2002) (because State accepted Section 504 federal funds, it waived its Eleventh Amendment immunity from suit under that statute).

The court construed defendant's argument that state law required it to transfer C.C. to another school to protect the health of other students as raising the "direct threat" defense under Title II, citing 28 C.F.R. 35.139. E.R. 14. The court then applied the reasoning of *Lockett* v. *Catalina Channel Express, Inc.*, 496 F.3d 1061 (9th Cir. 2007), which addressed circumstances where a defendant believes a person with a disability poses a risk to others and has to make a quick, one-time decision about whether to exclude the person for that reason. E.R. 15. This Court in *Lockett* concluded that a defendant may make such a decision without violating Title II if it made a reasonable judgment about the risks involved. E.R. 15 (citing *Lockett*, 496 F.3d at 1067).

Relying on *Lockett*, the district court stated that plaintiffs "have not alleged any facts to support the inference that [the school district] did not act in an effort to preserve the safe operation of the school. Nor have they alleged any facts to support the inference that [the school district's] brief exclusion of C.C. from the school closest to his home, in light of the risk involved, was not reasonable given the information [the school district] had." E.R. 15. The court emphasized that plaintiffs acknowledge that the school district "told them it was basing its decision on medical evidence provided both by Dr. Milla and a 'top Stanford doctor,'" and that the school district "made its decisions on the basis of its belief that C.C.'s presence in the school was a serious threat to other students." E.R. 15-16. The

court concluded that "the Chadams admit that [the school district] believed the risk to other children was real and based on medical evidence." E.R. 16. The court therefore held that dismissal was appropriate.

Finally, the court concluded that, even if plaintiffs' claims were not dismissed for other reasons, they failed because the complaint does not allege sufficient facts to support a claim of intentional discrimination, which is a prerequisite for damages claims under the ADA and Section 504. E.R. 17-21.

c. On December 3, 2014, plaintiffs filed a timely notice of appeal. E.R. 26-27.

SUMMARY OF THE ARGUMENT

This appeal arises in the context of a motion to dismiss on the pleadings. Counts I and II (the ADA and Section 504 claims) allege sufficient facts to support the claim that, by involuntarily transferring C.C. from his neighborhood school, defendant denied C.C. the benefits of a program, service, or activity, or otherwise discriminated against him, because of his perceived disability. That is enough to survive a motion to dismiss. The complaint also alleges sufficient facts to support plaintiffs' claim that defendant acted with discriminatory intent, and that therefore defendant may be liable for monetary damages. Indeed, because defendant admitted that the transfer was tied to its belief that C.C. had cystic fibrosis, it is clear that its action was intentionally based on disability.

The allegations in this case present a quintessential ADA claim – allegations that a child was denied access to his neighborhood school based on prejudice, stereotypes, and unfounded fear. Here, that fear was that C.C. – because of a perceived, but not actual and, hence, misunderstood, medical condition – might put the health of two other students at risk. But a public entity cannot deny an otherwise qualified individual the benefit of a service, program, or activity based on the possibility that a child's disability might cause a direct threat to others without making an individualized "direct threat" assessment "based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence." 28 C.F.R. 35.139. The direct threat exception is an affirmative defense that defendant must assert, and on which defendant bears the burden of proof. Accordingly, whether defendant used "reasonable judgment" in concluding that C.C., a child with a genetic marker for cystic fibrosis but not the disease itself, posed a health risk to other children, and that a transfer to a different school was required, are fact questions that cannot be resolved in the context of a motion to dismiss. The district court's conclusion to the contrary constitutes legal error.

ARGUMENT

PLAINTIFFS ALLEGE SUFFICIENT FACTS TO SUPPORT CLAIMS OF INTENTIONAL DISCRIMINATION UNDER TITLE II OF THE ADA AND SECTION 504

To survive a motion to dismiss on the pleadings, a complaint must comply with Federal Rule of Civil Procedure 8(a)(2) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief" so that defendant is given fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). The allegations "must be enough to raise a right to relief above the speculative level" and allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims across the line from conceivable to plausible." *Id.* at 555, 570; see also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 677-678 (2009).[5]

This Court has summarized: "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss* v. *United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Therefore,

---

[5] This Court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Mendiondo* v. *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1102 (9th Cir. 2008). The Court accepts "all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Knievel* v. *ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

"[d]ismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo* v. *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A motion to dismiss "is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." *Chavez* v. *Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 360 (9th Cir. 2009) (citation omitted).

A. The Second Amended Complaint Sufficiently Alleges Violations Of Title II And Section 504 To Survive A Motion To Dismiss

1. Title II states: "[N]o 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. Section 504 states: "No otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Therefore, to prove a violation of Title II or Section 504 a plaintiff must establish three elements: (1) he or she is a qualified individual with a disability; (2) he or she was excluded from participation in, or was denied the benefit of, a public entity's service, program, or activity, or was otherwise discriminated against by the public entity; and (3) the public entity

did so by reason of his or her disability. 42 U.S.C. 12132; 29 U.S.C. 794(a); see *Daubert* v. *Lindsay Unified Sch. Dist.*, 760 F.3d 982, 985 (9th Cir. 2014) (setting forth elements of Title II).[6] In addition, where, as here, the plaintiff seeks damages, the plaintiff must prove that the public entity acted with discriminatory intent. *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. 12102(1)(A). The statutory definition of disability also includes "being regarded as having" such an impairment. 42 U.S.C. 12102(1)(C). "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. 12102(3)(A); see also 29 U.S.C. 705(20)(B) (applying Title II's definition of disability to Section 504).

The Justice Department's Title II regulations state that, in providing benefits and services, discrimination includes providing "a qualified individual with a

---

[6] Plaintiffs allege that the school district receives federal funds. E.R. 116. Under the facts alleged in the complaint, the claims under Title II and Section 504 can be combined for analytic purposes. See, *e.g.*, *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1135-1136 (9th Cir. 2001).

disability an opportunity to participate in or benefit from the aid, benefit, or service that *is not equal* to that afforded others," or providing such person "an aid, benefit, or service that is *not as effective* in affording equal opportunity." 28 C.F.R. 35.130(b)(1)(ii)-(iii) (emphasis added). They also state that a public entity may not provide "*different* or separate aids, benefits, or services to individuals with disabilities" unless such action is "necessary" to provide such persons with "aids, benefits, or services that are as effective as those provided to others." 28 C.F.R. 35.130(b)(1)(iv) (emphasis added). The statutes and regulations reflect Congress's intent that individuals with disabilities receive the same benefits of a program as those without disabilities. See *C.G.* v. *Pennsylvania Dep't of Educ.*, 734 F.3d 229, 236 (3d Cir. 2013); see also 34 C.F.R. 104.4(b)(1)(ii)-(iv) (Department of Education regulations implementing Section 504).

2. The complaint alleges that defendant perceived C.C. as a person with a disability; the district court correctly concluded that these allegations satisfy the definition of being regarded as having a disability. E.R. 11-13. The allegations in the complaint also clearly assert that defendant removed C.C. from his neighborhood school because it thought he had cystic fibrosis (the district court did not address this element of a statutory violation, *i.e.*, that defendant acted by reason of C.C.'s disability). E.R. 110-114. Therefore, the only issues concerning the sufficiency of plaintiffs' allegations are: (1) whether plaintiffs adequately allege

that, by removing C.C. from his neighborhood school, defendant denied him a benefit of its educational program, or otherwise discriminated against him because of his disability; and (2) whether plaintiffs adequately allege, to support a damages claim, that defendant did so intentionally.

a. First, the complaint sufficiently alleges that defendant denied C.C. a benefit of its educational program by removing him from his neighborhood school. See E.R. 115-116.[7]

There is no dispute that defendant's educational program is a service, program, or activity encompassed by Title II and Section 504.[8] See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 524-525 (2004) (referring to "public education" as a public service, program, or activity covered by Title II). Although the district

[7] The issue whether defendant's actions also violate Title II's and Section 504's more general prohibitions against a person being "subjected to discrimination" is not presented here.

[8] Although neither the ADA nor the Title II regulations define these terms, Section 504 defines "program or activity" as "all of the operations of" a qualifying local government. 29 U.S.C. 794(b)(1)(A). The ADA statutory language is based on that of Section 504. See, *e.g.*, *Fortyune* v. *City of Lomita*, 766 F.3d 1098, 1101-1102 (9th Cir. 2014). This Court has explained that Title II's phrase "services, programs, or activities" is "similarly broad, bringing within its scope anything a public entity does" as long as it is a "normal function of a government entity." *Id.* at 1102 (citation and internal quotation marks omitted). This conclusion is consistent with the notion that the ADA must be broadly construed to implement its fundamental purpose of eliminating discrimination against persons with disabilities. *Id.* at 1101; see also H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990) (Title II extends Section 504's anti-discrimination provision "to all actions of state and local governments").

court did not resolve this issue, attending one's neighborhood school is a *benefit* of that program. Plaintiffs allege that defendant's attendance policy is that students attend their neighborhood schools. E.R. 115-116. Plaintiffs further allege that if C.C. was not perceived as having cystic fibrosis, he would not have been excluded from his neighborhood school. E.R. 115. Therefore, plaintiffs have sufficiently alleged that defendant denied C.C. the benefits of attending his neighborhood school because of his perceived disability. See 28 C.F.R. 35.130(b)(1)(i)-(ii); 34 C.F.R. 104.4(b)(1)(i)-(ii).

There are often significant benefits to attending one's neighborhood school. Parents may value the opportunity to send their children to neighborhood schools, as it can help the family more easily participate in extracurricular activities, the Parent Teacher Association, and informal networks of parents and children. Going to a neighborhood school can also help the child and his family foster connections with the local community. Further, assigning a child to a neighborhood school can reduce the safety hazards to children in traveling to school, decrease the cost of transporting students, and increase the amount of communication between the family and the school. Moreover, in a neighborhood school environment, it may be that the "cost of communication and cooperation among the parents of school children is reduced" and information about student, teacher, and administrator

behavior can be more easily shared. Peter F. Colwell and Karl L. Guntermann, *The Value of Neighborhood Schools*, 3 Econ. Educ. Rev. 177, 177 (1984).

b. Second, the district court erred in concluding that the complaint did not allege sufficient facts to support the allegation that defendant acted with discriminatory intent. The court stated that although plaintiffs allege defendant's conduct "was intended to cause harm and injury to plaintiffs, they do not allege any facts to support that accusation" and plaintiffs "admit that [defendant's] actions resulted from its belief that student safety was at risk." E.R. 18 (internal quotation marks omitted). In so concluding, the court misconstrued the intent element and failed to properly construe plaintiffs' allegations in the context of a motion to dismiss.

The discriminatory intent standard does not require a showing of bad motive or ill will. A plaintiff satisfies the discriminatory intent standard by showing that defendant intentionally excluded plaintiff from access to a benefit or service because of plaintiff's disability. In *Lovell* v. *Chandler*, 303 F.3d 1039 (9th Cir. 2002), for example, certain individuals with disabilities were excluded from a state healthcare program. This Court explained that, unlike cases alleging a failure to accommodate, "this case involves *facial discrimination*, in the form of a categorical exclusion of disabled persons from a public program," and "by its very terms, facial discrimination is 'intentional.'" *Id.* at 1057. Indeed, this is the most

straightforward type of intentional discrimination claim. Cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment' * * * is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their [protected characteristic].").

Therefore, the absence of bad faith does not prevent an award of damages where, as here, the defendant purposely subjects an individual to different treatment because of his disability. Plaintiffs are not required to allege (and prove) that the defendant intended, in an act of bad faith or bad motive, to "harm" or "injure" them. E.R. 18. "Intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person." *Barber* v. *Colorado Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009). As this Court has explained, the purpose of the intent standard "is not to measure the degree of institutional ill will toward a protected group, or to weigh competing institutional motives," but to ensure that the entity had knowledge and notice that its actions may violate statutory prohibitions as a prerequisite to financial liability. *Lovell*, 303 F.3d at 1057.

This Court has also held that evidence that a public entity acted with "deliberate indifference" can establish intentional discrimination under Title II. *Duvall*, 260 F.3d at 1138-1140 (addressing a reasonable accommodation claim).

The deliberate indifference standard is satisfied by showing "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Id.* at 1139. This Court has made clear that where, as here, a public entity "facially discriminates" against persons with disabilities, or categorically excludes them from a public program or benefit, the public entity is "at the very least, 'deliberately indifferent.'" *Lovell*, 303 F.3d at 1057. In these circumstances, the public entity necessarily has the requisite knowledge and notice of its potential liability, and fails "to act with the requisite care to protect the rights of [persons with disabilities]." *Ibid.*

Here, the complaint alleges that defendant believed C.C. had cystic fibrosis and, solely for that reason, removed him from his neighborhood school. E.R. 110-114. The complaint alleges, for example, that the school principal called the Chadams and stated that "based upon C.C.'s * * * medical information and the demands of Mr. [a]nd Mrs. X," the school district intended to transfer C.C. to a different school. E.R. 113. In view of these straightforward allegations, the complaint cannot reasonably be construed to allege anything other than that defendant intentionally removed C.C. from his school, and therefore denied him the benefit of attending his neighborhood school, because of his perceived disability. As discussed below, defendant's belief that it had to transfer C.C. to protect the safety of other students may be used as a possible affirmative defense to

plaintiffs' claims, but it does not defeat the complaint for damages at the pleading stage.

B. The District Court Erred In Dismissing The Complaint Based On Its Conclusion That C.C. Constituted A "Direct Threat"

Defendant did not directly argue that C.C. posed a direct threat to other students at his school. Rather, defendant argued that transferring C.C. did not violate Title II and Section 504 because state law required the school district to transfer C.C. to another school to protect Mr. and Mrs. X's two children. E.R. 99-100. The district court construed this argument as asserting the "direct threat" defense, and concluded that C.C.'s transfer was reasonable as a "one-time exclusion" because the school district *believed* that C.C. posed a health risk to others. E.R. 15-16. The court dismissed the Title II and Section 504 counts on this basis. E.R. 16. In so doing, the district court erred.

1. First, the argument that defendant could not have violated Title II because its actions were required by state law is not correct. Even if defendant's actions fell within the scope of the state law, which they did not because C.C. did not have cystic fibrosis and therefore was not a health risk to other students, the ADA may preempt inconsistent state laws, or require modification to or exemption from such laws, where necessary to effectuate its purpose. In *Crowder* v. *Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), this Court addressed a request by a person with a disability using a guide dog for an exemption from Hawaii's law requiring the quarantine of

dogs entering the State. In reversing summary judgment for the defendants, this Court explained that Hawaii's quarantine law was subject to the ADA's reasonable modification requirement, and that there was a genuine issue of fact whether the plaintiffs' proposed modifications to the law amounted to "reasonable modifications." *Id.* at 1485; see also *Mary Jo C.* v. *New York State & Local Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013) ("ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision."). Therefore, the mere fact that a requested accommodation conflicts with state law does not mean that the accommodation is necessarily unreasonable or fundamentally alters the State's program. Moreover, that argument provides no basis to dismiss the complaint at the pleading stage. See *Mary Jo C.*, 707 F.3d at 163-165.

2. Second, defendant has the burden to raise and prove direct threat as an affirmative defense. As this Court has recognized, the party "asserting a 'direct threat' as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others." *Lockett* v. *Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007). A good faith belief that a risk exists is not sufficient. See *Bragdon* v. *Abbott*, 524 U.S. 624, 649 (1998). Nor can defendant rely on generalizations about

the effects of a disability. Rather, "[i]n determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence." 28 C.F.R. 35.139.[9]

This assessment must address "the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. 35.139; see *Bragdon*, 524 U.S. at 648-649 (Title III ADA case; dentist who believed treating HIV-infected patient constituted a direct threat "had the duty to assess the risk of infection based on the objective, scientific information available"). Requiring the defendant to make an "individualized direct threat inquiry" based on "the best current medical or other objective evidence" is essential to the ADA's fundamental goal of "protect[ing] disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear." *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999) (Title I ADA case).

---

[9] See also *School Bd. of Nassau Cnty.* v. *Arline*, 480 U.S. 273 (1987) (interpreting Section 504 to include the direct threat defense); cf. 29 U.S.C. 705(20)(D) (addressing direct threat in Section 504 employment cases).

Because the direct threat defense requires the defendant to make the specific factual showing set forth above, it is rare that it can be the basis for a motion to dismiss. See *Sprewell* v. *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("Review is limited to the contents of the complaint."); cf. *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1502 (10th Cir. 1995) (reversing dismissal of Fair Housing Act case; plaintiff made out a prima facie case of disability discrimination and "there was no basis in this record to conclude – at least not on a 12(b)(6) motion – what legitimate government purposes were involved" in the challenged restrictions). As one court has explained, whether plaintiff was a direct threat "is a question of fact arising from what would be an affirmative defense to a claim of irrational intentional disability discrimination," and therefore "[a]n anticipated 'direct threat' defense * * * is not grounds for a Rule 12(b)(6) dismissal." *Tyner* v. *Brunswick Cnty. Dep't of Soc. Servs.*, 776 F. Supp. 2d 133, 152 (E.D.N.C. 2011); see also *Gil* v. *Vortex, LLC*, 697 F. Supp. 2d 234, 242 (D. Mass. 2010) (direct threat defense, "which is fact-laden, simply has no place in a motion to dismiss").[10]

[10] Cf. *Gragg* v. *New York State Dep't of Envtl. Conservation*, No. 97-cv-1506, 2000 WL 246272, at *4-5 (N.D.N.Y. Mar. 3, 2000) (dismissing ADA count where plaintiff conceded at oral argument that, given his history of seizures, defendant had an obligation to prevent him from driving as part of his job, and complaint failed to allege any facts challenging the defendant's determination that plaintiff posed a direct threat to others). Also, dismissal on the pleadings may be

(continued…)

The fact that, here, the complaint recites the school district's justification for transferring C.C. cannot support dismissal of the complaint. E.R. 112-113 (referring to Dr. Milla's letters recommending that C.C. be removed from the school for the safety of Mrs. X's children and that "children with cystic fibrosis * * * must not be" in the same classroom). First, the complaint repeatedly alleges that C.C. does not, in fact, *have* cystic fibrosis, and that C.C.'s parents repeatedly told that to school officials. Indeed, that is the basis of this lawsuit in the first place. Dr. Milla's letters do not address the question at issue in this case – whether a child with a genetic marker for cystic fibrosis, but *not* the disease itself, may pose a direct threat to the health of children with cystic fibrosis. As such, the letters do not constitute an individualized assessment of C.C.'s condition. Accordingly, the complaint's reference to Dr. Milla's letters cannot support the conclusion that C.C. posed a direct threat to others.

Moreover, even considering Dr. Milla's letters at this stage of the case, whether defendant could reasonably have believed that C.C. posed a significant health risk (as the court found) is a fact question that cannot be resolved on the

---

(…continued)
appropriate in the rare instance where the court of appeals for the circuit in which the district court resides has already held that an individual with the same disability, with identical manifestations, in the precise factual circumstances alleged in the complaint, presents a direct threat. In those circumstances, it is likely that a full trial would not change the outcome. That, of course, is not the situation presented here.

pleadings. The complaint alleges that defendant was *repeatedly* told that C.C. had only a genetic marker for cystic fibrosis, and not the disease itself, and that C.C.'s doctor opined that, therefore, C.C. did not pose a health threat to the two students who had cystic fibrosis. E.R. 111-114. This fact issue is clearly disputed. As a result, the district court erred in holding that, as a matter of law, C.C. fell within the direct threat exception, without further factual development regarding what medical information the school district had available, and whether it exercised reasonable judgment relying on current medical knowledge, in excluding him.

3. In dismissing the complaint, the court relied upon this Court's decision in *Lockett*, 496 F.3d at 1061. In that case, a public ferry boat service had a "dander-free" area for a frequent passenger who was allergic to animals. *Id.* at 1063. When a passenger with a service animal sought to use that area of the boat (with its more comfortable accommodations), the ferry service refused. In affirming summary judgment for the defendant, this Court held that this one-time refusal did not violate the ADA. See *id.* at 1065-1067. This Court stated that the ferry was scheduled to depart and the boat staff needed to make an "on the spot" decision whether to expose the frequent traveler to animal dander or to accommodate the plaintiff. *Id.* at 1065. In these circumstances, this Court concluded that the ferry could exclude the plaintiff from the dander-free area while it investigated the matter. See *id.* at 1065-1066. This Court emphasized that its holding was limited

to this "single determination" and the context of whether the ferry should have "immediately accede[d] to" the plaintiff's request. *Id.* at 1066. In these circumstances, this Court found that the defendant had exercised "reasonable judgment" as required under the ADA Title III direct threat regulation, 28 C.F.R. 36.208. *Id.* at 1067.

Applying *Lockett*, the district court explained that the school officials here reasonably believed C.C. posed a risk to others and that they had to make a quick, one-time decision about whether to exclude him. E.R. 14-16. In effect, the court applied what could be characterized as an "exigent circumstances" direct threat defense, and concluded that plaintiffs did not "allege[] any facts to support the inference that [the school district's] brief exclusion of C.C. from the school closest to his home, in light of the risk involved, was not reasonable given the information [the school district] had." E.R. 15.

Lockett has no application here. The school district was not faced with the need to make the same kind of immediate, on-the-spot decision without the benefit of time to investigate and assess any potential risk. Indeed, Mr. and Mrs. X moved their children out of the school first, and doctors were involved. School personnel then took nearly a month to determine how to resolve the matter.

The school district had plenty of time to make an informed decision, and at least could have confirmed, as his parents repeatedly stated, that C.C. actually did

not have cystic fibrosis, but only the genetic marker. In *Doe* v. *Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 349-350 (S.D.N.Y. 2010), the court rejected a basketball camp's argument that it did not violate the ADA by refusing to admit an HIV-positive child because it had less than a week to assess the child's condition and could not have determined whether the child actually posed a significant risk to others. The court in *Doe*, citing *Lockett*, stated that although "in certain circumstances, courts may apply a lower standard of reasonableness to a non-medically trained person with a very short time period in which to make a decision, * * * this is not such a case" because, in part, "[d]efendants had several days to make their determination." *Id.* at 349; cf. *Blind Indus. & Servs. of Md.* v. *Route 40 Paintball Park*, No. 11-cv-3562, 2013 WL 1209649, at *2-4 (D. Md. Mar. 21, 2013) (court, citing *Lockett*, concludes that paintball facility did not violate ADA by excluding blind individuals who arrived an hour late, as the facility was required to make a "one-time, on-the-spot decision" that there was insufficient time to orient the players on safety issues).

Indeed, had the school district made the required individualized assessment, the school district could have asked Dr. Milla to opine on the risks, if any, that C.C.'s true situation – as someone with only a genetic marker – posed to students with the disease. On those facts, the doctor's conclusion may well have been very different. And even if the consensus of medical opinion turned out to be that a

child with only the genetic marker poses *some* risk, the school district was required to consider the severity of the risk, the probability that potential injury would occur, and whether any accommodations would permit C.C. to remain at his neighborhood school while mitigating those risks. See 28 C.F.R. 35.139. The complaint does not reflect that any such determinations were made.

CONCLUSION

This Court should reverse the district court's judgment and remand the case for further proceedings.

Respectfully submitted,

JAMES COLE, JR.
General Counsel

VANITA GUPTA
Principal Deputy Assistant
Attorney General

/s/ Thomas E. Chandler

FRANCISCO LOPEZ
JESSICA WOLLAND
Attorneys
U.S. Department of Education
Office of the General Counsel

MARK L. GROSS
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – RFK 3748
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d) because this brief contains 6,915 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: January 21, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney