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by and through his parent
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IN THE UNITED STATES DISTRICT FOR THE NORTHERN DISTRICT OF CALIFORNIA

by and through his parent and conservator Plaintiff, v. EUREKA CITY SCHOOLS, Defendant.	**Case No.** 3:16-cv-00595 **PLAINTIFF MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER**

POINTS AND AUTHORITIES

BACKGROUND

(“ is an 18-year old student at Eureka High School in the Eureka City Schools district (“ECS”) diagnosed with autism who, for the past five years, benefitted from participation in cross country and track and field via an accommodation plan entered into pursuant to Section 504 of the Rehabilitation Act. This access to participation in an athletic endeavor is particularly meaningful to because, as a young man with autism, social relationships, comradery and youthful exuberance do not come easy to him – if at all. But prior to this school year – last year of eligibility to participate in high school athletics – ECS unilaterally altered accommodations from those that were agreed to in 2010. (Verified Complaint [VC] at Ex. A).

ECS removed the accommodation that have “consistent support personnel” to accompany him during his participation in track/cross country and instead replaced that with an aide who simply will sit in a chair at the track and observe run laps. (VC at Ex. B). is not allowed to be out of visual contact with the District’s assigned aide – meaning that will be unable to do long distance runs through the town or to receive the individualized instruction he requires in order to participate equally.

Complicating matters between the parties – and perhaps explaining in part the District’s sudden determination to withdraw an over five-year old accommodation – is an ongoing dispute between Plaintiff and ECS regarding his special education services. This dispute became so sharp that – around the same time that ECS with withdrawing the longstanding accommodation – ECS required (rather than his mother who holds educational rights through her role as conservator) sign his individualized education plan again eliminating longstanding services provided to (VC at Ex. E, page 8).

has no capacity to be able to make his own educational decisions, as ECS well knows, and the surreptitious attempt to circumvent his mother belies the goals of ECS. To that

end, the refusal to continue to provide the longstanding Section 504 accommodation must be viewed in light of the District's current pattern of attempting to evade its responsibilities.

There is every reason to believe that the competence of the 1:1 support staff during the Track & Field season is critical to access to the program offered to other members of the high school team.

Track & Field has several components for which needs support: distance running, sprints, and one field event. 'Distance' practices are the same as Cross-Country: off-campus and throughout the city, utilizing the varied geography to develop specific running and competition skills. 'Sprint' events are practiced on the track, using specialized equipment. 'Field' events are both on the track and at a field nearby but not easily accessed or viewed from a distance.

There is also every reason to believe the Head Coach will have to dismiss from the team if he does not arrive with competent support. She has said, "He needs specific, individual instruction from someone that stands directly next to him and explains and demonstrates the different skills that I am explaining and demonstrating to the other athletes. He needs this specific instruction from a qualified person to derive the same benefit that the other athletes are getting from my instructions. … I have seen that [is unable to pay attention, understand, and focus on what I am asking unless he has someone … next to him … doing what the other children are doing…. Without direct supervision, close at hand at all times, the track is not only unsafe for [but for the other athletes as well." (Bindel Decl. at ¶¶4-6).

Without the support that has been provided in past years, may lose his last semester of eligibility[1] in a sport that is one of the very few activities he actually excels in. To take away this opportunity is to deny the only time he gets to participate alongside his peers and take pride in his accomplishment. Conversely, the Head Coach also acknowledges "we all benefit

[1] California Interscholastic Federation (CIF) bylaws provide that students are eligible until they have completed 8 semesters of high school and until their 19th birthday. Bylaws 203, 204. The CIF bylaws may be accessed here: http://www.cifstate.org/governance/constitution/200_Series.pdf

from [s courage, work ethic, and strength under adverse circumstances." (Bindel Decl. at ¶7).

A recent Independent Educational Evaluator, paid for by ECS, reviewed this situation and determined, "[needs strenuous activities to keep his emotional system in check, and failure to allow him access undermines his efforts in this area."[2] (VC at Ex. E, page 8).

Without the consistent and competent training that is the heart of any athletic endeavor, loses his ability to focus and learn. Extracurricular sports provides with the necessary tools to quell his pervasive anxiety in a world he struggles to understand outside of the physical environment of athletics.

This suit seeks to *solely* enjoin ECS to provide the accommodations set forth in the 2010 Section 504 accommodation plan so that can participate in track for his final year of eligibility and obtain the crucial benefits of socialization and athletic competition.

The remedy sought is *solely* to require the District, as it did for five years, to pay for appropriate support personnel to participate with so that he may access the track and field program this spring.[3]

parent has attempted to informally[4] work this issue out with the District and has even offered to pay for a qualified assistant to run with if the District would just allow that to occur so that can equally participate – but the District refuses and *requires* to stay

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[2] Quoted from December 10, 2015 evaluation of Report by EvoLibri CEO, Jan Johnston-Tyler; Santa Clara, Calif.; State of California Non-Public Agency & Department of Rehabilitation Vendor.

[3] The parent has even offered to pay for the assistant to accompany and assist – if the District would only allow that to occur rather than requiring to remain at all times within visual distance from the District's assigned aide. Counsel for the undersigned, is of the opinion that it is the District's obligation to fund the assistant.

[4] The parties engaged in a Section 504 hearing in the fall cross country season before a hearing officer, hired by the District, who made a finding against However, disputes the hearing officer's findings as being non-compliant with federal law and also disputes the impartiality of the hearing office who was paid for by the District and may have incentive to rule in the District's favor in order to continue to obtain work from the District.

in visual contact with the District's aide who will be staying in a stationary position at the track facility simply watching (VC at Ex. G; Decl. of

Track and field begins on February 8, 2016, lasts only 10 weeks and seeks a temporary restraining order that allows him to have a qualified assistant to assist him during track and field practices.

LEGAL BACKGROUND

A public school's obligation to make reasonable accommodations/modifications to its programs arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 ("Section 504"), and the regulations thereunder promulgated at 34 C.F.R. part 104.

Section 104.4 of the Code of Federal Regulations ("CFR") provides:

"No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."

CFR Section 104.4(b)(2) provides:

"[A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."

An organization that receives federal funds violates Section 504 if it denies a qualified individual with a disability a reasonable accommodation that the individual needs in order to enjoy meaningful access to the benefits of public services. *See Alexander v. Choate*, 469 U.S. 287, 301-02, 105 S. Ct. 712, 83 L. Ed. 2d 661 & n.21 (1985); *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008). A school district must make reasonable modifications and provide those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program. *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (Section 504 may require reasonable modifications to a program or

benefit to assure meaningful access to qualified persons with disabilities); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (Section 504 does not prohibit a college from excluding a person with a serious hearing impairment as not qualified where accommodating the impairment would require a fundamental alteration in the college's program).

Among other things, Section 504 and Title II prohibit recipients/public entities from: (i) denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) affording 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) providing a qualified individual with a disability with an aid, benefit, or service that is not as effective as that provided to others; and (iv) providing different or separate aid, benefits, or services to persons with disabilities or to any class of persons with disabilities unless such action is necessary to provide a qualified individual with a disability with aid, benefits, or services that are as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(i)-(iv); 28 C.F.R. § 35.130(b)(1)(i)-(iv).

Section 104.12 of the Code of Federal Regulations provides:

"(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity."

To state a Section 504 claim, Student must allege that: (1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance. *Duvall v. County of Kitsap,* 260 F.3d 1124, 1135 (9th Cir. 2001).

The Supreme Court has approved a multi-step burden shifting analysis in determining what potential accommodations are reasonable and which rise to the level of an undue hardship. *US Airways, Inc. v. Barnett,* 535 U.S. 391, 401-02, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002). Under that approach, a plaintiff must first show that the accommodation "seems reasonable on its

face, *i.e.,* ordinarily or in the run of cases." *Id.* The burden then shifts to the defendant to demonstrate the accommodation would pose an undue hardship in the case at hand. *Id.*

Further with respect to the burden, "[t]he public entity has the burden to prove that a proposed action would result in undue burden or fundamental alteration, and the decision 'must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.' The public entity must 'take any other action that would not result in such an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.'" *K.M. v. Tustin Unified School Dist.*, 725 F.3d 1088, 1096-97 (9th Cir. 2013).

ARGUMENT

I. THE ADA AND SECTION 504 PROVIDE FOR INJUNCTIVE RELIEF AS REMEDIES AND INTENTIONAL DISCRIMINATION IS NOT REQUIRED.

The ADA states that the remedies and procedures set forth in section 505 of the Rehabilitation Act are the remedies available to any person alleging discrimination under the ADA. 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act, in turn, states that a person who is being discriminated against is entitled to injunctive relief. 29 U.S.C. § 794a. Intentional discrimination or deliberate indifference is required only for actions under the ADA or Section 504 seeking damages. *See Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008)

II. THE ELEMENTS FOR INJUNCTIVE RELIEF ARE PRESENT.

Rule 65 of the Federal Rules of Civil Procedure governs preliminary injunctions and temporary restraining orders. The Ninth Circuit has established a standard for preliminary injunctive relief for "a party who demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips in its favor." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). These are not separate tests, but rather "opposite ends of a

single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 826 (9th Cir. 1997).

a. PLAINTIFF HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

i. PLAINTIFF IS A PERSON WITH A DISABILITY WHO IS OTHERWISE QUALIFIED TO PARTICIPATE IN ATHLETICS AND DEFENDANT IN A PUBLIC ENTITY THAT RECEIVES FEDERAL FUNDING.

Plaintiff has been diagnosed with autism which is widely recognized as a disabling condition, and the Defendant has recognized Plaintiff as a person with a disability by providing him a Section 504 plan beginning in 2010 for his disabling condition. *Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010); VC at ¶6. The Defendant is a public school district that receives federal funding for its operations.

ii. PLAINTIFF CAN SATISFY HIS BURDEN TO ESTABLISH THE ACCOMMODATION IS NECESSARY.

Under Section 504 and Title II, reasonable accommodation regarding specific autism-related services is required if: (1) needs autism-specific services to enjoy meaningful access to the benefits of a public program; (2) the District was on notice that needed autism-specific services, but did not provide those services; and (3) autism-specific services were available as a reasonable accommodation. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097-98 (9th Cir. 2010); s*ee also, e.g., Duvall v. County of Kitsap*, 260 F.3d 1124, 1136-38 (9th Cir. 2001) (holding that there were genuine issues of fact regarding reasonable accommodation where there was some evidence that a hearing impaired plaintiff needed videotext display to follow court proceedings and that defendants denied plaintiff's request for videotext display without adequately investigating whether videotext display was available as a reasonable accommodation).

Under the *Barnett* burden shifting analysis, Plaintiff easily satisfies his burden since the accommodation he seeks was in place *beginning in 2010 and continuing through the 2014-2015 school year*. (VC at ¶¶6-10). Plaintiff is not seeking an expansion of accommodations already

provided to him but instead is seeking to obtain the very accommodation that he was previously provided before ECS unilaterally withdrew the accommodation. Thus, for over five years, Plaintiff's requested accommodation "seem[ed] reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett* 535 U.S. at 401-02.

When the running assistant was removed – performance in cross country decreased markedly: With an experienced training assistant, in 2012 competed at a 7:28/mile pace; in 2013 at a similar 7:38/mile pace; in 2014 with only 2-3 practices each week at a 8:16/mile pace, and in 2015 at a10:05/mile pace at the HDN Championships in November 2015 – with no support and no practices all season. is not arguing that he is entitled to services that maximize his performance – but without training and coaching that other athletes receive – his performance clearly suffers – and his access to track and field will not be meaningful without a training assistant. *See* 34 C.F.R. § 104.4(b)(ii) (prohibiting a recipient of federal funding from providing access to a program that is not equal to that of other non-disabled persons).

More than that, however, will not be able to access many of the aspects of the track program *at all* without the requested accommodation. He will not be able to do distance practice through the town of Eureka which all the other athletes are able to do. He will not receive equivalent instruction which needs to be given in an individualized fashion. will be stuck running circles around the track without anyone else and without any training or instruction. This is neither meaningful access to the track program nor is it access that is equivalent to non-disabled athletes who receive instruction and coaching. 34 C.F.R. § 104.4(b)(ii).

It is clear that requires instruction that he can understand from an individual with knowledge regarding running who can pass along coaches' instructions to Other non-disabled students can merely listen to the coach give group instruction before, during and after training. requires someone to interpret the instructions from the coach and this often occurs out in the field or during a run through the town – the District aide will do nothing more than sit in a chair at the track facility. Absent coaching and instruction, is not on equal footing with non-disabled students and will not be able to participate in track and field.

Moreover, the track coach acknowledges that she cannot address autism specific needs. (Bindel decl. at ¶5). Coach Bindel states that requires direct instruction in order to be focused and able to understand the instruction given. (Bindel decl. at ¶5). Coach Bindel also states that it is unsafe for to participate without direct instruction/supervision. (Bindel decl. at ¶6).

The burden thus shifts to ECS to show that the requested accommodation would pose a burden in the case at hand. This it cannot do.

iii. THE DISTRICT CANNOT ESTABLISH THAT THE ACCOMMODATION POSES AN UNDUE HARDSHIP.

Here, Plaintiff has already identified a qualified individual who can serve as a 1:1 running assistant for while he participates in the track and field training. (VC at ¶29). The District merely needs to pay for and allow the aide to assist Payment of the assistant's wages does not present an undue hardship for ECS' budget. Moreover, allowing the aide to participate with – so he understands the training exercises and can participate equally with the other athletes – is not an undue hardship nor a fundamental alteration of the program. It is merely another runner or coach to assist

b. THE HARM TO IS IRREPARABLE.

Even though Plaintiff has shown a substantial likelihood of prevailing on the merits – sufficient for the issuance of injunctive relief, the damage to is also irreparable.

is in his last year of eligibility for athletics. If he is not accommodated now, he will not be able to seek recompense against the Defendant that would require the athletics governing body to grant additional eligibility. (Fn. 1, *supra).* Moreover, money damages are inadequate. Mere monetary compensation will not supplant the experience of participation during his high school years and allow for socialization in this setting.

CONCLUSION

For the foregoing reasons, a temporary restraining order should issue compelling the District to allow and pay for the assistant identified by parent so that has meaningful and equal access to track and field.

Dated: February 4, 2016

Respectfully submitted,

By: /s Jay T. Jambeck
Jay T. Jambeck