NO. 11-5070

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

R.K., by next friends J.K. and R.K.

Plaintiff-Appellant

V.

BOARD OF EDUCATION OF SCOTT COUNTY, KENTUCKY, AND PATRICIA PUTTY, Superintendent, Officially and Individually

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(CENTRAL DIVISION, LEXINGTON)
NO. 5-09-00344-JMH
CIVIL PROCEEDING

BRIEF OF THE AMERICAN DIABETES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal:

1. **Amicus curiae in support of Appellant:** The American Diabetes Association

2. **Appellant:** R.K., by next friends J.K. and R.K.

3. **Appellee:** Board of Education of Scott County, Kentucky; Patricia Putty

4. **Attorney for Amicus:** Justin Gilbert

5. **Attorneys for Appellant:** Edward E. Dove

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s/ Justin S. Gilbert
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INTEREST OF THE AMERICAN DIABETES ASSOCIATION

The American Diabetes Association ("Association") is a nationwide, nonprofit, voluntary health organization founded in 1940, and has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. Presently, there are 25.8 million Americans with diabetes.[1] The Association is the largest, most prominent nongovernmental organization that deals with the treatment and impact of diabetes. The Association establishes and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes.[2] The Association publishes the most authoritative professional journals concerning diabetes research and treatment.[3]

The Association appears as *amicus curiae* in cases around the country addressing important issues regarding the rights of individuals with diabetes. One of the Association's principal concerns is protecting the rights of children with diabetes to have equal educational opportunity, to remain free from discrimination

[1] Centers for Disease Control & Prevention, *National Diabetes Fact Sheet* (2011).

[2] American Diabetes Ass'n, *Clinical Practice Recommendations 2011*, 34 Diabetes Care S1 (2011).

[3] The Association publishes four professional journals with widespread circulation: (1) Diabetes (original scientific research about diabetes); Diabetes Care (original human studies about diabetes treatment); (3) Clinical Diabetes (information about state-of-the-art care for people with diabetes); and, (4) Diabetes Spectrum (review and original articles on clinical diabetes management).

based on diabetes, and to have access to a free appropriate public education, including the diabetes care services they need in order to remain safe at school. It is the Association's position that "[a]ppropriate diabetes care in the school and day care setting is necessary for the child's immediate safety, long-term well being, and optimal academic performance."[4] Each year, the Association assists thousands of parents with children with diabetes facing challenges related to their children's care at school. For students who are not yet able to manage their diabetes independently, the Association advocates for the training of school personnel, including non-medical school staff, to provide needed diabetes care (such as blood glucose monitoring, carbohydrate counting, and insulin administration) during the school day. The Association opposes policies and practices, such as the one in this case relating to school assignment, that discriminate against students with diabetes based on their disability.

[4] American Diabetes Ass'n, *Position Statement, Diabetes Care in the School and Day Care Setting*, 34 Diabetes Care S70 (2011).

BACKGROUND INFORMATION ON DIABETES AND THE DIABETES CARE SERVICES REQUIRED BY PLAINTIFF[5]

Diabetes is a chronic and incurable disease of the endocrine system. Diabetes results from either the failure of the pancreas to produce enough insulin or the failure of the body to effectively use whatever insulin is produced. Insulin is a hormone that drives glucose from the bloodstream into the body cells where it is metabolized. Without insulin, glucose stays in the bloodstream, resulting in abnormally high blood glucose levels (hyperglycemia). Type 1 diabetes (the type experienced by Plaintiff R.K.) is an autoimmune disease in which the body destroys insulin-producing beta cells in the pancreas. As a result of this destruction, the body produces very little or no insulin.[6] Without the ability to produce insulin, the body's main energy source—glucose—cannot be used as fuel. Rather, glucose builds up in the bloodstream, causing severe and possibly fatal consequences. Thus deprived of energy, a person with type 1 diabetes who does not receive insulin will die within a matter of days to months.

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[5] This information on diabetes is based on the Association's position statement on diabetes care in schools as well as a publication issued by the National Diabetes Education Program, a joint program of the National Institutes of Health and the Centers for Disease Control and Prevention. See American Diabetes Ass'n, *Position Statement, Diabetes Care in the School and Day Care Setting*, 34 Diabetes Care S70 (2011), available at http://care.diabetesjournals.org/content/34/Supplement_1/S70.full.pdf+html; National Diabetes Education Program, Helping the Student with Diabetes Succeed: A Guide for School Personnel (2011), available at www.ndep.nih.gov/media/Youth_NDEPSchoolGuide.pdf. More information on diabetes is available from these sources.

[6] Type 2 diabetes, which is much more common among adults than type 1, is not at issue in this case.

Insulin injections can be given either through a syringe or using an insulin pen (a device which delivers a predetermined amount of insulin stored in a cartridge). Insulin injections are given subcutaneously (just under the skin). Insulin does not need to be given through intravenous or intramuscular injection in routine diabetes care.

Even when a person with diabetes gets the insulin he or she needs to survive, long-term risks remain. The buildup of glucose in the blood not only deprives the body's cells of energy, it also itself can damage body systems. Over many years, high blood glucose levels can cause damage to the eyes, kidneys, nerves, heart, blood vessels and other body systems. The primary goal of diabetes management is to keep blood glucose levels as close to target levels as possible in order to prevent or delay the development of these long term complications.

Because maintaining tight control of blood glucose levels significantly lowers the risk of long-term complications, most children with diabetes today are most appropriately treated with multiple (often 4-6) insulin administrations per day (some of which must be given during school hours) and more frequent blood glucose monitoring. A common insulin regimen today is known as a "basal/bolus" regimen. When a person is on this kind of regimen, he or she maintains a relatively constant low level of insulin in the blood, either through injections of a long-acting type of insulin or through an insulin pump. This constant lower level

of insulin is known as the basal rate. In addition, the person will take extra insulin (typically a rapid acting insulin) during the day in doses known as "boluses," typically given just before meals when the need for insulin is expected to rise and calculated to cover the anticipated amount of food. Additional doses of insulin are needed to treat abnormally high blood glucose levels, since all students, no matter how carefully their diabetes is managed, will experience high blood glucose levels from time to time. These are typically referred to as "correction doses," and can happen at any time during the day.

Plaintiff R.K. currently uses an insulin pump. Insulin pumps are electronic devices that send a pre-programmed amount of insulin into the body. The pump holds a reservoir of insulin, and the insulin reaches the body through a cannula, a tiny plastic tube that is inserted underneath the skin at the infusion site (which is often near the abdomen but can be in other places as well). When a button on the pump is pressed, insulin is sent from the pump into the body. Some pumps are clipped to the waistband or carried in a pocket and attached to the infusion site through plastic tubing; other pumps are worn directly on the skin. In addition, the pump can be programmed to deliver bolus doses of insulin for meals and corrections of high blood glucose levels.

The child's treating physician and health care team should provide detailed specifications to the school as to what insulin dosage is proper under different

circumstances. While many parents have the knowledge necessary to make minor dosage adjustments for their child (within broad parameters established by the treating physician), and some older and more mature children can make dosage adjustments themselves, it is not necessary for school personnel to decide independently how much insulin is needed in a given situation. Rather, they simply follow the instructions that the child's health care team provides. This is true whether a nurse or other health care professional is administering the insulin or whether administration is being done by a trained non-medical school employee. In either case, the person administering the insulin should follow medical orders, not make an independent judgment about how much insulin is needed or when it should be administered.

It is the position of the American Diabetes Association that non-medical personnel can be trained to safely administer insulin. Parents, family members, friends, and school personnel are routinely and successfully trained to administer insulin, often within hours to days of diagnosis. Non-medical personnel can be trained to administer insulin through any method (syringe, insulin pen, or insulin pump) and can also safely supervise a child who is actually giving the dose to ensure that the proper dose is given. Non-medical personnel can, and routinely do, safely administer insulin to children. The technical aspects of delivering a dose of insulin are very easy to learn, and there is no reason why a properly trained non-

medical person would be more likely to make an error and give the incorrect dose of insulin than would a nurse or other health care professional. Although it is possible for an incorrect dose to be given by anyone, blood glucose levels that are too high or too low as a result of an incorrect dose can be easily recognized and corrected with follow up care, such as giving an additional dose of insulin or providing a snack.

Administering a prescribed insulin dose based on detailed instructions from a child's treating physician, such as a scale relating carbohydrate counts or blood glucose levels to the number of insulin units to be given, does not require nursing judgment or assessment. Indeed, it is the position of the experts who have devoted their professional and personal lives to the care of people with diabetes that trained non-medical school personnel can – and should – administer insulin to students with diabetes in the absence of a school nurse. The Association has issued a peer-reviewed position statement from specialists in the area of pediatric endocrinology supporting this practice.[7] A statement of principles taking the same position has been signed by groups representing diabetes health care professionals, individuals with diabetes and others, including the American Academy of Pediatrics, American Association of Clinical Endocrinologists, American Association of

[7] American Diabetes Ass'n, Position Statement, *Diabetes Care in the School and Day Care Setting*, 34 Diabetes Care S70 (2011), available athttp://care.diabetesjournals.org/content/34/Supplement_1/S70.full.pdf+html.

Diabetes Educators, American Dietetic Association, Pediatric Endocrine Society, Pediatric Endocrine Nurses Society, Children with Diabetes, and Juvenile Diabetes Research Foundation.[8] The National Diabetes Education Program (NDEP) also supports insulin administration by unlicensed personnel in a guide developed for school personnel.[9] This guide states that unlicensed school personnel can and should be trained to provide diabetes health care services, including insulin administration. Broad-based medical organizations, including the American Academy of Pediatrics and the American Medical Association also support having trained non-medical school personnel administer insulin.

Many children, including Plaintiff, have their insulin dosages based on the number of carbohydrates they consume at meals and snacks. Such calculations are straightforward and do not require any advanced training or skill to perform. The number of carbohydrates can be provided by school food service staff or can be determined through consulting one of many easy-to-use books or web sites that list carbohydrate counts for common foods. Once the amount of carbohydrates is

[8] American Diabetes Ass'n, Safe at School Statement of Principles, available at http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/safe-at-school/safe-at-school-statement-of.html.

[9] National Diabetes Education Program, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (2011) (hereinafter "NDEP Guide"), available at www.ndep.nih.gov/media/Youth_NDEPSchoolGuide.pdf. This Guide was jointly published by the National Institutes of Health, the Centers for Disease Control and Prevention, and the U.S. Department of Education, and incorporates the views of an expert panel of representatives from key diabetes, pediatric medicine, and educational organizations, and federal agency staff.

known, school staff simply consults a chart or scale provided with the treating physician's orders and determine the number of units of insulin to be administered. Nothing more than simple arithmetic is required, and no nursing assessment or judgment is needed. There is no reason that trained non-medical school staff should not be permitted to count carbohydrates in determining insulin dosages, despite Defendants' refusal to train school staff in this task for Plaintiff.[10]

ARGUMENT

I. The District Court Erred In Failing To Consider Whether Defendants Discriminated Against Plaintiff By Requiring Him To Transfer To Another School

The district court simply failed to address the most important legal issue in this case: whether the removal of Plaintiff from Eastern Elementary School ("EES") was discriminatory disparate treatment on the basis of his disability. It bears emphasis that Defendants required Plaintiff to attend a different school than he would have in the absence of his diabetes, and assigned him to a particular school not based on his need for a specialized academic program or concern that he could not benefit educationally at his home school, but merely for the district's administrative convenience. Regardless of any other purpose it might serve, the practice of clustering children with disabilities into the same schools in order to

[10] See NDEP Guide, *supra* note 9, at 51.

receive necessary health services is segregation of these children. The Court need only answer a straightforward legal question to dispose of this case: is it discrimination in violation of federal civil rights statutes for a school district to place a child with diabetes at a different school than children without disabilities (separating the child from siblings, next door neighbors and friends) because the child needs health services that the school declines to provide in the child's home school? The answer is unequivocally yes.[11]

A. The Defendants' Actions In This Case Amount To Discriminatory Disparate Treatment On The Basis Of Diabetes

Turning first to the statutory language, Title II of the Americans with Disabilities Act ("ADA") states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subject to discrimination by such an entity." 42 U.S.C. § 12132. Similarly, § 504 of the Rehabilitation Act ("Section 504") provides that "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

[11] This answer is not affected by questions about what constitutes a free appropriate public education ("FAPE") or what districts are permitted to do under the Individuals with Disabilities Education Act ("IDEA"). As discussed further below, however, the Defendants' actions in this case also deny the Plaintiff FAPE, regardless of the case law under the IDEA relating to student assignment cited by the District Court.

under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

What the district court failed to analyze was whether Plaintiff was subjected to discrimination by Defendants; this question cannot be answered simply by saying that he had access to district programs and services or that he received a free, appropriate public education. *See Hornstine v. Township of Moorestown*, 263 F. Supp. 2d 887, 901 (D. N.J. 2003) (noting that a student who was denied the opportunity to be sole valedictorian because of her disability had a claim for discrimination under the ADA and § 504 even though she had received a free, appropriate public education). The court simply ignored the fact that Plaintiff is being treated differently solely because of his disability. The underlying premise of § 504 and the ADA is to prevent intentional disability discrimination. *See* 34 C.F.R. §§ 104.1, 104.4(a); 28 C.F.R. 35.101. Furthermore, as the Supreme Court has stated, discrimination does not need to reflect "affirmative animus," but instead, "thoughtlessness and indifference" to harms ensuing from such disparate treatment. *See Alexander v. Choate*, 469 U.S. 287, 296-97 (1985). The U.S. Department of Education regulations implementing § 504 forbid a covered entity from "[p]rovid[ing] different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as

effective as those provided to others." 34 C.F.R. § 104.4(b)(1)(iv). Furthermore, the regulations provide that "[d]espite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different." 34 C.F.R. § 104.4(b)(2). Defendants here are clearly providing a distinct and separate "service" from that provided to nondisabled children.

Children without diabetes in the Scott County schools have the choice to attend school with their siblings, friends and neighbors. Plaintiff does not. Parents in the district have the choice of living anywhere in the county and sending their child to a neighborhood school. Plaintiff's parents could do so only if they lived in the parts of the county assigned to the two schools that have a nurse (which they do not). Making attendance decisions solely on the basis of disability is discrimination, even if the educational program at the school where the child is transferred is identical in every respect.

B. The District Failed To Make Reasonable Modifications To Its Policies To Permit Plaintiff To Remain In His Home School

As part of their duty not to discriminate, Defendants must eliminate discriminatory policies. In *Alexander*, the Supreme Court made clear that under § 504, public authorities, including public schools, must adjust enforcement of rules

and procedures, *i.e.,* make "reasonable … modifications," to assure access to their programs for persons with disabilities. 469 U.S. at 300 (*citing Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979)). The same standards apply under ADA Title II. *See* 28 C.F.R. § 35.130(b)(7) (requiring reasonable modifications to policies and procedures for qualified individuals with disabilities); *Rathman v. Emory Univ.*, 123 F. 3d 446, 451 (7th Cir. 1997) (ADA and § 504 are construed to establish "nearly identical" rights). In determining what modifications are reasonable, the court must carefully consider the costs to both parties, including the intangible human costs. *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006). The determination of reasonableness is highly fact-specific. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085-86 (11th Cir. 2007).

Alternative eminently reasonable modifications would have permitted Plaintiff to remain at EES with his peers. First, given the district's position that a nurse was needed to administer insulin, the district made no showing that it could not provide nursing services at EES. Indeed, the record is silent as to why nurses were only assigned to two particular schools in the district and not to RK's.

Second, the district could have trained non-medical school staff at EES to count carbohydrates for Plaintiff and monitor and operate his insulin pump.[12] Apparently, it rejected this option simply because of a belief by its staff that such a practice *might* violate state law. However, more than mere speculation that a requested modification is not reasonable or feasible is required. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001). The district court accepted this belief without investigating whether Kentucky law actually prohibits non-medical school personnel from providing the diabetes care services needed by Plaintiff . In fact, state law should be read to permit the training of such personnel to provide these services. Kentucky law, at Ky. Rev. Stat. § 314.011(6), restricts the definition of "registered nursing practice" to tasks "requiring substantial specialized knowledge, judgment, and nursing skill."[13] Plaintiff needed school staff only to monitor his operation of his insulin pump and assist him with

[12] It is not clear from the record whether Plaintiff has at any time required assistance from a school employee to press the buttons on his insulin pump which release insulin into his body, or whether he merely required adult supervision while he pushed the relevant button himself. Only the former can be considered to be the "administration" of medication, and thus potentially a nursing function under state law. The district court assumed that the Plaintiff did not need this type of assistance. However, for the sake of argument, this section assumes that Plaintiff did require school personnel to administer medication to him through his insulin pump.

[13] Nursing is defined as: "[T]he performance of acts requiring substantial specialized knowledge, judgment, and nursing skill based upon the principles of psychological, biological, physical, and social sciences in the application of the nursing process in: …(c) The administration of medication and treatment as prescribed by a physician, … and as further authorized or limited by the board …."

carbohydrate counting. (Opinion at 2-3). Nothing in the statutory language suggests that simply monitoring a child's use of an electronic device like an insulin pump amounts to the administration of medication. But even if that is the case, medication administration is not considered a nursing function unless it requires "substantial specialized knowledge, judgment, and nursing skill," and the Board of Nursing and other state agencies may not override this statutory language through regulations or other action. Indeed, insulin administration and carbohydrate counting require no such knowledge, judgment or skill, and thus are not nursing functions and need not be performed by a nurse or other health care professional in the school setting.

Every day across the state individuals with diabetes (including older children) administer insulin, as do their family members and caregivers. Today, nearly all routine diabetes care is provided by lay-people, and insulin delivery methods have been developed with this in mind. Children, their families, and their caregivers do not have nursing training, and cannot be expected to exercise professional judgment or nursing skill. Nevertheless, they safely manage diabetes by administering doses of insulin, pursuant to the orders of treating physicians, every day. The training needed to do this task is neither difficult nor time-consuming. The idea that adult school personnel cannot be trained to safely administer insulin, even though children routinely are, defies logic and common

sense. And, as discussed further *supra*, the Association and other leading medical groups firmly support the safety of training non-medical personnel to administer insulin. It is similarly clear that carbohydrate counting does not require nursing judgment or skill, as this task is little more than simple arithmetic. *See supra* at 7-9.

Assuming for the sake of argument that counting carbohydrates and monitoring the operation of an insulin pump amounts to nursing tasks, state law permits nursing tasks to be delegated to trained non-medical school personnel. These tasks may be delegated by a physician, advanced practice nurse, or registered nurse, so long as the delegating professional trains the employee in the specific health service, the service is one that can be delegated, and the delegating professional certifies in writing that the employee is competent and has been trained. Ky. Rev. Stat. § 156.502(2)(c).[14] Thus, under these circumstances, delegation of carbohydrate counting and monitoring of an insulin pump (which, as discussed previously, do not require nursing judgment or skill) is permitted.

Defendant's reliance on advisory opinions issued by the Board of Nursing is misplaced, since these opinions do not have the force of law. State law does not

[14] Regulations define tasks that can be delegated as those that "a reasonable and prudent nurse would find is within the scope of sound nursing judgment to delegate," that "can be competently and safely performed . . . without compromising the client's welfare" and that "shall not require . . . independent nursing judgment or intervention." 201 Ky. Admin. Regs. 20:400(3).

give the Board of Nursing authority to override statutes or regulations through mere advisory opinions. Ky. Rev. Stat. § 314.011(2). At a minimum, the district court should have carefully considered whether state law permits monitoring an insulin pump and carbohydrate counting to be performed by non-medical school personnel, rather than simply deferring to the view of a school district employee (who lacks legal training) that it does not.

One modification that is not reasonable is the one chosen by the district—transferring Plaintiff to another school—because it represents exactly the kind of disparate treatment the statutes were enacted to prevent. In other words, it is not a reasonable modification of the program if the modification continues to result in the child with a disability being treated differently than his nondisabled peers.

The only way that this disparate treatment can be justified is if Defendants can demonstrate that it would require them to "fundamentally alter" the school program they provide or would impose an "undue hardship". 28 C.F.R. §§ 35.130(b)(7), 35.150(a). They made no attempt to make such a showing, and it makes little sense to suggest that simply making available staff to provide the diabetes care required by Plaintiff in his home school, rather than another school, would fundamentally alter any aspect of the education provided by that school or unduly burden school programs. It might be considered inconvenient by district personnel to arrange for these services in Plaintiff's home school, but without

actual evidence of a fundamental alteration Defendants cannot insulate themselves from liability for the disparate treatment of Plaintiff.

II. Defendants' Requirement That Plaintiff Attend A Different School Because Of His Diabetes Also Denied Him A Free Appropriate Public Education

A. The Education Provided By Defendant Was Not Appropriate Because It Forced Plaintiff To Transfer Schools And Failed To Meet His Needs As Adequately As Non-Disabled Peers

While the school district's actions in this case were clearly discriminatory treatment, they also constitute a denial of the free, appropriate public education required by federal law. The district court reasoned that because transferring Plaintiff to another school with a nurse was "objectively reasonable in light of the situation" and Plaintiff failed "to articulate any reason that [the new school] is unreasonable or insufficient to provide an adequate education for the child," § 504's FAPE requirement was not violated. Opinion at 14. Respectfully, this approach to deciding whether Plaintiff was denied a FAPE is woefully inadequate.

The regulations implementing § 504 include a requirement that disabled children in schools receiving federal funds be provided a "free appropriate public education" at 34 C.F.R. §104.33. The regulations provide further that "appropriate education" is regular or special education and related aids and services that "are designed to meet individual educational needs of handicapped persons as

adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.34. The regulations also require that students with disabilities be educated in the most integrated setting possible, and require that when a placement outside the regular educational environment is necessary the proximity of that placement to the child's home should be considered. 34 C.F.R. § 104.34(a). The appropriateness of the education, then, turns at least in part on its location and setting. Educating Plaintiff in a different school not because it provided him any educational benefit that could not be obtained at EES but simply for the school's convenience, can hardly be considered "appropriate" under the FAPE standard.[15] At the very least, these allegations present a material fact that cannot be resolved on a motion for summary judgment.

1. The Cases Cited By Defendant Are Distinguishable Because IDEA Has A Different Emphasis Than § 504

The district court improperly conflated the obligation under § 504 to provide FAPE with the obligation to avoid discrimination, and also based its decision on this issue in large part on case law decided under the IDEA. (Opinion at 14-15). However, these cases are inapposite for several reasons. They stand for the proposition that schools have broad latitude to choose where and how the academic

[15] In addition, even a full time nurse cannot alone meet the care needs of a student like Plaintiff because the nurse may be absent or tending to the needs of another student, and may not attend field trips and extracurricular activities. Some provision would need to be made for personnel to administer insulin in these situations. The best and easiest way to provide such backup is to train non-medical school personnel, as Appellant advocates.

needs of students with disabilities as those needs have been determined through the individualized education program ("IEP") process. And even if these cases represent a faithful interpretation of IDEA's statutory language and intent, they do not control cases like this one, which involve the provision of health care services to children who are not IDEA-eligible. *See Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008) (noting possible differences between what provision of FAPE requires under the two laws).

The cases cited by the district court emphasize the discretion to be granted to local school districts in making decisions about how to allocate resources to fulfill their academic mission. *McLaughlin v. Holt Publ. Sch. Bd. of Educ.*, 320 F. 3d 663, 673 (6th Cir. 2003); *Schuldt v. Mankato indep. Sch. Dist. No. 77*, 937 F. 2d 1357, 1361 (8th Cir. 1991). Yet IDEA provides procedural safeguards that limit this discretion, and that are not required under § 504. IDEA has a detailed and specific process school districts must follow. The process includes making an appropriate placement decision for a child after determining and documenting the educational services and goals for that child in an IEP. 20 U.S.C. § 1414(d). This process results in a written plan specifying in detail the needs of the child that is subject to administrative and judicial review. 20 U.S.C. § 1415(f), (i). This process ensures that school districts take into account the individual needs of the child and balance those against the administrative convenience of the district.

While IDEA includes a strong preference for a child to be educated close to home[16], this preference ultimately gives way to the central mission of IDEA – that a student shall be placed in the least restrictive environment where his IEP can be properly implemented.

On the other hand, students with disabilities who are covered by § 504 but not IDEA, like Plaintiff, do not need special education services. What they need, and what § 504 entitles them to, are some reasonable modifications and related aids and services that will allow them the same opportunities and benefits at school as their nondisabled peers. Section 504 entitles them to these modifications and services, but without the extensive procedural protections of IDEA. Section 504 does not require that a written plan be prepared or provide for the same level of administrative review as IDEA does. Therefore, there is less reason to believe that the individual needs of students will always be adequately considered, and less reason for deference to the conclusions reached by school districts.

Also, the services needed by Plaintiff do not relate to his academic environment or performance, but rather to his health care. This is a critical difference, because the foundation of the cases on which Defendants rely is the deference given by courts to the decisions of school districts about educational methodologies and resources. *See Urban v. Jefferson County Sch. Dist. R-1*, 870

[16] 34 C.F.R. § 300.116(c).

F. Supp. 1558 (D. Colo. 1994); *aff'd*, 89 F.3d 720 (10th Cir. 1996); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982) (courts should not second guess the educational decisions of school authorities or impose their own judgments on proper educational methodology). However, school districts do not have similar expertise in student health care; it is the treating physician who ultimately decides what is medically appropriate for the child. There is simply no reason to give so much deference to decisions that solely affect the health care of the child, especially when there is no basis for those decisions other than the school's administrative convenience. The district court recognized the distinction between IDEA claims related to academic and educational services and § 504 claims like this one in its discussion of administrative exhaustion. Opinion at 9 ("In other words, Plaintiff's claims are not related to the way that Defendants provide an education to the child.") The court should draw a similar distinction concerning the handling of school decisions about placement when those decisions relate to health care services.

To be clear, the flexibility afforded to school districts under IDEA to place a student outside his neighborhood school for sound and unavoidable educational purposes does not justify transferring a child – and all children with medical conditions – to another school solely for reasons of administrative inconvenience under § 504. Consequently, the cases relied on by the district court and

Defendants arising under IDEA are not supportive of the court's holding.[17] Here, where the child has no IEP that necessitates particular educational programming unavailable at his neighborhood school, there is no compelling educational basis for the school's actions.

B. Even Though Plaintiff Received Access To The General Education Program, He Was Harmed By Defendants' Refusal To Provide Him With FAPE By Allowing Him To Attend His Neighborhood School

The district court held that Plaintiff failed to introduce evidence that he had been denied FAPE because he did not allege that the educational program at his new school was insufficient. (Opinion at 15). In so concluding, the Court implies that Plaintiff must allege that attending that school will result in his receiving a lesser educational experience or demonstrably poor educational performance. In other words, the Court assumes that in order for Defendants to have violated § 504

[17] For example, in *McLaughlin, supra*, 320 F.3d at 668, the court was faced with a student whose IEP called for a "categorical classroom placement" which was not available at her neighborhood school. Under these circumstances and given the intensive educational programming needs of the child, the school district did not violate IDEA by placing the child in a different school. Similarly, in *Murray ex rel. Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 928-29 (10th Cir. 1995), and *Schuldt, supra,* 937 F.2d at 1361, the school districts were confronted with students whose specific educational programming needs justified placement in a non-neighborhood school. Finally, in *Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 727-28 (10th Cir. 1996), placement of the student in a non-neighborhood school was justified under IDEA because it was necessary in order for the plaintiff to receive the particular "transitional services" recommended in his IEP. The Court concluded that under these circumstances, § 504 did not, in effect, trump the appropriate placement of the child determined through the IEP process when the "child is already receiving educational benefits in another environment." *Id.* at 728.

or the ADA, the decision to transfer him to a different school because of his disability must harm Plaintiff in some educationally measurable way.

However, the Court can and should presume that the mere fact that Plaintiff was forced to transfer to a different school inflicted cognizable harm: the very real harm defendants caused by denying Plaintiff the same treatment and opportunities as his nondisabled peers. This differential treatment in and of itself inflicts injury on the Plaintiff even if he receives the same educational program at his new school as he would at EES. This is because a victim of discrimination may feel "innately inferior" by virtue of being treated differently because of an immutable characteristic.[18]

Furthermore, Defendants' policy of transferring children with disabilities who can be easily accommodated in their neighborhood school is a blueprint for segregating students with certain types of disabilities. It ignores entirely the different and negative significance of requiring students to transfer away from their local schools to place them with others sharing a common immutable characteristic. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483,

[18] *See Heckler v. Matthews*, 465 U.S. 728, 739-740 (1984); *Allen v. Wright*, 468 U.S. 737, 756 (1984) ("A stigmatic injury may occur when the victim is personally denied equal treatment."); *Smith v. City of Cleveland Heights*, 760 F.2d 720, 723 (6th Cir. 1985) (affirming that a stigmatic injury may be caused by personal discrimination). *See also Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 911 (D.N.J. 2003) (court awarded an injunction to prevent a school from altering its policy to name an additional valedictorian when the sole valedictorian was a student with an accommodated disability).

494-95 (1954), recognized the inherent flaw in "separate but equal." The Supreme Court also has rejected segregation of students based on group identity defended as benevolence or as the preference of "most" individuals targeted. For instance, the Court has held that "'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *U.S. v. Virginia*, 518 U.S. 515, 535-36 (1996). Defendants, therefore, are unpersuasive in contending that transferring Plaintiff – and other students who need help with diabetes care, against their will, and without considering practical steps to avoid such transfers -- is for these students' own benefit.

C. Defendant Does Not Have An Absolute Right To Assign Plaintiff To A Different School

Finally, the Court's analysis of whether § 504 was violated was also incomplete because it failed to consider the fact that Defendants implemented an unwritten blanket policy instead of conducting an individualized assessment as required by federal law. As noted above, in order to afford a free appropriate public education for all students in the district, school officials must make an *individualized* determination of a student's needs under § 504 and Title II of the ADA. It is a fundamental tenant of the U.S. Department of Education's Office for Civil Rights enforcement of § 504 that there must be an individualized

determination of accommodations and the application of blanket district policies is barred. *See Conejo Valley (CA) Unified School District*, No. 09-93-1002, 20 IDELR 1276, 20 LRP 2492 (OCR 1993).

Here, there is little evidence that Defendants actually did anything to evaluate Plaintiff's individual needs. Instead, the Defendants implemented an unwritten policy regarding placement of children with diabetes without making an individualized consideration and assessment of modifications and accommodations. In fact, Defendants concede that the decision of where to place a student rests solely on the degree of independence a child demonstrates when caring for his diabetes: "unlike those other students, R.K. was not fully self-sufficient with regard to counting carbohydrates and entering data accurately into the insulin pump and therefore required a properly qualified School District employee to administer the medication." (Opinion at 4). This demonstrates that the school formed its decision solely on the availability of "qualified School District personnel" rather than R.K.'s individual needs. Further, a blanket district policy is evidenced by the fact that the school took the same placement actions in a prior case and based its decision on its unwillingness to have a nurse provide the needed services or train unlicensed personnel, not the child's individual circumstances. *See B. M. v. Bd. of Educ. of Scott County,* 2008 U.S. Dist. Lexis 66645 (E. D. Ky. 2008). Options for keeping R.K. at his neighborhood school,

which include training volunteer, non-nurse school employees or having a nurse perform the needed services, were not adequately considered by the Court or the school district as part of an individualized determination.

In effectuating an unwritten policy of relocating children with diabetes who cannot self-administer insulin to schools where a school nurse is employed, the Defendants adopted a categorical rule with no individualized determination. Thus, the Defendants violated § 504 and Title II by failing to consider the issue of needed services on a student-by-student basis.

CONCLUSION

In the final analysis, this case concerns a baseless denial of educational choices open to other students. It is not just about denial of access to the Scott County curriculum; it also is about isolating students based on disability absent a sound educational basis. The district court's analysis ignores the fact that Plaintiff, and any other student with diabetes who needs assistance in managing his diabetes, is prohibited from attending his local school, unlike other Scott County children. For the reasons set forth above, the district court's order granting

Defendants summary judgment should be reversed, and this case should be remanded for trial.

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Respectfully submitted,

s/ Justin S. Gilbert

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CERTIFICATE OF SERVICE

I certify that today, June 7, 2011, I served the foregoing Brief of the American Diabetes Association as *Amicus Curiae* in Support of Appellant on counsel listed below through the Sixth Circuit's CM/ECF system:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,616 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

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