

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON**

- Electronically Filed -

R.K., by next friends, J.K. and R.K.,)
)
 Plaintiff,)
)
 v.)
)
 BOARD OF EDUCATION OF)
 SCOTT COUNTY, KENTUCKY,)
)
 Defendant.)
 _____)

Case No. 5:09-CV-344-JMH

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

INTRODUCTION

In this case, the plaintiffs allege that the defendant school board violated the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, 42 U.S.C. § 1983, and Kentucky state law when the Board forcibly transferred R.K., a child with diabetes, to an out-of-zone school because his zoned school lacked a full-time nurse. R.K.’s family states that this transfer was unnecessary and thus discriminatory because R.K.’s diabetes could have been well-managed at his local school through assistance by trained non-nurse school personnel. The Board argues that the decision to transfer R.K. was legally permissible so long as he was provided a general education somewhere in the school district. The parties’ cross-motions for summary judgment are pending.

Because there appears to be confusion in the briefing as to the application in this context of title II of the Americans with Disabilities Act (“title II” or “ADA”), 42 U.S.C. § 12131 *et seq.*

and its implementing regulation, 28 C.F.R. Part 35, the United States respectfully submits this Statement of Interest to clarify the proper framework for evaluating the ADA claim before this Court.¹ We also clarify that the U.S. Constitution’s Supremacy Clause requires that state law give way where it is in conflict with a federal law such as the ADA. Finally, the Department addresses, and urges the Court to reject, the Board’s renewed argument that R.K.’s ADA claim is foreclosed for failure to exhaust administrative remedies under IDEA, a federal statute with no nexus to this case.²

I. AUTHORITY TO FILE AND PROCEDURAL HISTORY

Under 28 U.S.C. § 517, the Attorney General may send any officer of the Department of Justice “to attend to the interests of the United States in a suit pending in a court of the United States” As the officer mandated to enforce the ADA and the author of the title II regulations, the Attorney General has an interest in supporting the ADA’s proper interpretation and application; furthering the statute’s explicit congressional intent to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; and ensuring that the Federal Government plays a central role in enforcing the standards established in the ADA.³ *See* 42 U.S.C. § 12101(b).

¹ Together with the U.S. Department of Education, the Justice Department filed a brief as *amicus curiae* when this case was on appeal to the Sixth Circuit Court of Appeals to address, among other things, questions related to Section 504 of the Rehabilitation Act. Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellant and Urging Reversal, *R.K. v. Bd. of Educ. of Scott County*, No. 11-5070 (6th Cir. June 7, 2011), *available at* www.ada.gov/briefs/rk_amicus_brief.pdf (last visited December 13, 2013). We note that title II of the ADA and its regulations “shall not be construed to apply a lesser standard than the standards applied under [Section 504] or the regulations issued by Federal agencies pursuant to that [statute].” 28 C.F.R. § 35.103(a); *see also* 42 U.S.C. § 12134(b). Thus, the protections of title II can be greater, but not less, than the rights provided by the Section 504 regulations.

² The Department takes no position on any other issues currently before the Court.

³ The Department’s interpretation of its regulations is entitled to substantial deference. *See, e.g., Olmstead v. L.C.*, 527 U.S. 581, 598 (1999) (“The well-reasoned views of the agencies

These interests are particularly strong in this case given the prevalence of children with diabetes in the nation's public schools. Diabetes is a condition currently affecting approximately 215,000 Americans aged 20 or younger.⁴ It is a physical impairment that substantially limits one or more major life activities including, but not limited to, the operation of the endocrine and digestive systems (major bodily functions). 42 U.S.C. § 12102; 28 C.F.R. § 35.104. *See also Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 858 (9th Cir. 2009) (explaining that diabetes "affects the digestive, hemic and endocrine systems"). As such, diabetes is a disability under the ADA. 42 U.S.C. § 12102; 28 C.F.R. § 35.104. Students with diabetes are entitled to the full protections of the statute.⁵

II. ARGUMENT

A. Under the ADA, School Districts Cannot Discriminate on the Basis of Disability Against Students with Diabetes.

Title II 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 the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. The regulations implementing title II reflect the statute's broad nondiscrimination

implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (internal quotation marks omitted).

⁴ Centers for Disease Control and Prevention, *Diabetes Public Health Resource, Diabetes Research and Statistics*, available at <http://www.cdc.gov/diabetes/consumer/research.htm> (last visited December 5, 2013).

⁵ This issue is at the forefront of the Department's recent affirmative ADA enforcement work. On December 9, 2013, the United States issued a Letter of Findings to the State of Alabama and three Alabama school districts informing them that their practice of unnecessarily transferring students with diabetes away from their zoned schools violates title II by denying such students a benefit afforded to students without disabilities. *See* December 9, 2013, Letter of Findings re: The United States' Investigation Under Title II of the Americans with Disabilities Act with respect to Public School Children with Diabetes in Alabama, D.J. Nos. 204-1-72, 204-1-73, 204-1-74, and 204-2-59, available at <http://www.ada.gov/alabama-LOF.htm> and attached hereto as Exhibit 1.

mandate. *See* 28 C.F.R § 35.130(a). This mandate requires public entities, including public school districts, to afford students with diabetes, and individuals associated with them, an equal opportunity to participate in or benefit from any aid, benefit, or service provided to others. 28 C.F.R §§ 35.130(b)(1), (g). School districts cannot provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others. 28 C.F.R. § 35.130(b)(1)(iv). Nor can a public entity otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. 28 C.F.R. § 35.130(b)(1)(vii). Title II also prohibits public entities from utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. §§ 35.130(b)(3). In addition, such entities must make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7).

Immediately below, the Department discusses the regulatory framework for addressing the title II claim at issue in this case. Further, we explain that the Board may not avoid its ADA nondiscrimination obligations even if compliance might violate Kentucky law.

i. The ADA Seeks to Remedy More Than Outright Exclusion of Persons With Disabilities.

The Board posits that no title II violation stands as long as R.K. was provided a general education *somewhere* within the school district. *See* Board of Education’s Memorandum of Law in Support of Motion for Summary Judgment on the First Amended Complaint, ECF Doc. No.

84-1 at pp. 11-12 (“The Student does not even allege he has been denied participation in the general education program offered by the Board, but instead asserts a right to attend school at a particular location, notwithstanding the availability of comparable educational programming at a different location. . . .”). The Board’s theory cannot be squared with the text and purpose of the ADA, which seeks to remedy more than outright exclusion. Indeed, in enacting the ADA, Congress explicitly found that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of . . . overprotective rules and policies, failure to make modifications to existing . . . practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(a)(5). Thus, title II’s implementing regulations, consistent with Congressional intent, require public entities, such as the Board here, to also afford individuals with disabilities equal benefits to the benefits afforded to others. *See* 28 C.F.R. § 35.130.

Attendance at a child’s zoned school, or a school of choice where applicable, is a benefit generally provided children in school districts across the nation. Many parents, when selecting where to live, place great importance on the schools zoned for their home’s location; they expect that their children can attend these schools with siblings and neighbors. R.K.’s parents, who live in Scott County, Kentucky, were no different. As R.K.’s father notes: “My wife and I purchased our home in the district for Eastern Elementary because we wanted our children educated at Eastern Elementary. R.K.’s friends attended this school.” Affidavit of J.K., ECF Doc. No. 82-2 at para. 3. If children without disabilities can generally expect or opt to attend their zoned schools, the ADA mandates that children with disabilities be afforded that same opportunity, unless placing them elsewhere is necessary to provide them with benefits or services as effective

as those provided to others. 28 C.F.R. § 35.130(b)(iv). And if reasonable modifications to policies, practices, or procedures would permit a child with diabetes to safely attend his or her zoned school, the school district must make those modifications unless doing so would fundamentally alter the nature of the service, program, or activity being provided. 28 C.F.R. § 35.130(b)(7). Thus, while the ADA contemplates and permits differential treatment of individuals with disabilities in some instances, a school district cannot justify forcibly transferring a child away from his or her zoned school based on administrative convenience or a “policy choice” favoring centralization of services.

There is no dispute that for two full academic years, R.K. was denied placement at Eastern Elementary. Over the objections of his parents, R.K. was sent to Anne Mason Elementary School, located outside of his regular zone, due to the presence of a full-time nurse at that location. But contrary to the Board’s assertion, R.K.’s receipt of a general education elsewhere in the district is not dispositive of his ADA claim. Rather, at issue before this Court is whether R.K.’s transfer was “necessary” to provide him with equally effective aids, benefits, or services, and whether there were reasonable modifications to school district practices that would have permitted R.K. to safely remain at his zoned school, such as allowing trained non-nurse staff at Eastern Elementary to perform diabetes management tasks.⁶

⁶ Absent a school district’s showing of fundamental alteration, where a parent and a child’s physician or other qualified health care professional deem it appropriate for the child to be assisted in diabetes care by a non-nurse (relying on objective medical data as to the current health status of the individual child), allowing a trained layperson to do so would be a reasonable modification under the ADA. *See* 28 C.F.R. § 35.130(b)(7). *Cf. Am. Nurses Ass’n v. Torlakson*, 304 P.3d 1038, 1040 (Cal. 2013) (“[California] state law in effect leaves to each student’s physician, with parental consent, the question whether insulin may safely and appropriately be administered by unlicensed school personnel, and reflects the practical reality that most insulin administered outside of hospitals and other clinical settings is in fact administered by laypersons.”).

ii. The Board May Not Avoid Its Obligations Under the ADA Even if Compliance Might Violate State Law.

In its summary judgment papers, the Board relies on Kentucky law to justify its refusal to allow R.K. to attend his zoned school with trained, non-nurse school personnel assisting in R.K.'s diabetes management. The Board's analysis of Kentucky law appears incomplete. Moreover, R.K.'s ultimate placement at a school without a full-time nurse undermines any argument that Kentucky law barred the Board from delegating R.K.'s diabetes care to trained unlicensed personnel. But even if Kentucky law were construed to prohibit the delegation of diabetes-related care to non-nurses, the U.S. Constitution's Supremacy Clause requires that state law give way where it is in conflict with a federal law such as the ADA.

The Board invokes Kentucky Revised Statutes Sections 156.501 and 156.502 to support its position that it was justified in denying R.K. the opportunity to attend his zoned school. Section 156.502 requires that health services be provided "in a school setting" by a physician, nurse, or "[a] school employee who is delegated responsibility to perform the health service" by a physician or nurse. Ky. Rev. Stat. § 156.502(2). Section 156.501 requires the Kentucky Department of Education to "provide, contract for services, or identify resources to improve student health services, including . . . [s]tandardized protocols and guidelines for health procedures to be performed by health professionals and school personnel." Ky. Rev. Stat. § 156.501(1)(a). The statute further requires that these "protocols and guidelines" include the "delegation of nursing functions consistent with administrative regulations promulgated by the Kentucky Board of Nursing." Ky. Rev. Stat. § 156.501(1)(a)(1). Hence, the language of both Sections 156.501 and 156.502 contemplate delegation of health services or procedures to non-licensed personnel in the school setting.

While the United States takes no position on the proper interpretation of Kentucky law, several observations regarding the Board’s arguments on this point are in order. The Board does not identify any “administrative regulations” issued by the Kentucky Board of Nursing that prohibit school employees who are not licensed medical professionals from assisting students with insulin administration or carbohydrate calculations. Instead, it points to two statements on the topic issued by the Board of Nursing. One said that it would be inappropriate for a nurse to delegate to an unlicensed school employee the responsibility for operating insulin pumps or counting carbohydrates. (ECF Doc. No. 26-5, Ky. Bd. of Nursing, “Teaching and Delegating Carbohydrate Counts and the Administration of Insulin via an External Pump in a School Setting,” Updated May 24, 2005). In the other, an advisory opinion, the Board of Nursing opined that nurses should not delegate to unlicensed personnel the “[a]dministration of medications via any injectable route,” except in some emergency situations. (ECF Doc. No. 26-4, Ky. Bd. of Nursing, Advisory Opinion Statement No. 15, p. 4 & n.2 (2005)). Even the advisory opinion, however, contains an explicit disclaimer that it “is not a regulation of the Board and does not have the force and effect of law.” (*Id.* at p. 5).

Nor did the Board highlight that one of the statutes on which it relies authorizes physicians to delegate health-related duties to properly trained school personnel who are not medical professionals. *See* Ky. Rev. Stat. 156.502(2)(c). The Kentucky Board of Medical Licensure has issued an advisory opinion on questions including whether physicians can “delegate carbohydrate counting, insulin dose calculations, and insulin administration (injection or pump bolus)” to unlicensed school employees under Section 156.502, and whether “a student’s physician – rather than a school physician – [may] delegate the above tasks to an unlicensed school employee.” Ky. Bd. of Med. Licensure, “Board Opinion Regarding Training

of and Delegation to School Employees” (Dec. 17, 2009), available at <http://kbml.ky.gov/board/Pages/Opinion-and-Policy-Statements.aspx> (last visited December 7, 2013), attached hereto as Exhibit 2. The opinion makes clear that any duly licensed physician may indeed train school personnel on those health services and, upon a determination that the personnel can perform the services safely and effectively, delegate the authority to perform those services in a school setting pursuant to the school personnel’s employment.⁷ *Id.* at p. 4. This advisory opinion, like those from the Kentucky Board of Nursing, does not have the force of law. But omission of any reference to it in the Board’s discussion of these matters, and the Board’s failure to engage the question of whether a physician (rather than a nurse) would be willing to delegate the responsibility for the insulin administration to laypersons at R.K.’s zoned school, are notable.

The factual record is also instructive. In remanding this case back to this Court, the Sixth Circuit noted that “bundled up” in the preemption issue was the feasibility of delegation of R.K.’s blood sugar monitoring and counting of carbohydrates to a non-professional. *R.K. v. Bd. of Educ. of Scott County*, 494 F. App’x 589, 598 (6th Cir. 2012). The record now contains additional information directly addressing the feasibility of delegation of R.K.’s diabetes management to non-nurse staff.

Assuming, for the purposes of argument alone, that Kentucky law did bar delegation of diabetes-related care in the school setting to unlicensed personnel, the state law must yield to the ADA where the two are at odds. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, the laws of the United States “shall be the supreme Law of the Land; and the Judges in every State

⁷ The opinion therefore recognizes that the delegating physician need not have an employment or contractual relationship with the school district. Provided that the physician has the requisite knowledge of the service that he or she is delegating, a child’s treating physician may delegate diabetes management tasks to unlicensed school personnel.

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” State law must give way to the extent it “conflicts with federal law.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 378 (2000). Such conflicts exist not only where “it is impossible . . . to comply with both state and federal law,” but also “where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 372-73 (internal citation and quotation marks omitted). The Supreme Court has “held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes,” *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985), and that “[f]ederal regulations have no less pre-emptive effect than federal statutes,” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

The courts of appeals have repeatedly applied such principles in holding that federal disability rights laws, including the ADA, preempt state statutes to the extent that state laws conflict with federal mandates. *See, e.g., Astralis Condo. Ass’n v. HUD*, 620 F.3d 62, 69-70 (1st Cir. 2010) (defendant could not permissibly rely on Puerto Rico law to refuse to provide an accommodation required under the Fair Housing Act for a person with a disability); *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (concluding that Hawaii’s animal quarantine law, as applied to guide dogs, denied plaintiffs access to state services, programs, and activities in violation of the ADA); *Barber v. Colorado Dep’t of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009) (emphasizing that proposed accommodation under federal disability law is not unreasonable simply because it might require defendants to violate state law). As the Tenth Circuit has emphasized, “[r]eliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause.” *Barber*, 562 F.3d at 1233. Simply put, a

defendant “is duty bound not to enforce a [state] statutory provision if doing so would either cause or perpetrate unlawful discrimination” under federal law. *Astralis*, 620 F.3d at 69.

Thus, even if Kentucky law clearly barred delegation of diabetes-related care to unlicensed personnel, the U.S. Constitution’s Supremacy Clause makes clear that the Board could not excuse itself from compliance with the ADA’s mandates. To the extent Kentucky law impedes the Board’s ability to comply with its ADA obligations, state law must “give way.” *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

B. As This Court Has Already Determined, the Administrative Exhaustion Requirements of IDEA, a Federal Statute Not Implicated in This Case, May Not Be Used to Foreclose R.K.’s Valid ADA Claim.

Having addressed the substantive ADA issues at the heart of this case, we now address the Board’s renewed assertion that R.K. was required to exhaust administrative remedies under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* This is an argument that the Court has already considered and rejected. *R.K. v. Bd. of Educ. of Scott County*, 755 F. Supp. 2d 800, 805-07 (E.D. Ky. 2010). That determination should remain undisturbed under the “law of the case” doctrine, which establishes that a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation. *See, e.g., U.S. v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) (noting that the doctrine applies with “equal vigor” to the decisions of a coordinate court in the same case and to a court’s own decisions.) Were this Court to reexamine this issue, however, it should once again dispense with argument since IDEA is not implicated in this case: R.K. does not need special education and has never been provided IDEA services by the school district. He cannot be forced to exhaust administrative remedies under a statute that does not apply.

R.K.'s claims have no nexus to IDEA, which requires states that receive federal IDEA funds to assure that children with disabilities receive special education and related services designed to meet the student's individual learning needs. 20 U.S.C. §§ 1400, 1412. It further requires that a party seeking relief that is also available under IDEA must exhaust the administrative process described in that statute prior to bringing suit in state or federal court. 20 U.S.C. § 1415(l). However, plaintiffs seeking relief for disability discrimination not related to special education cannot be forced to fulfill administrative exhaustion requirements under IDEA.⁸ In *Sullivan ex rel. Sullivan v. Vallejo City Unified School District*, 731 F. Supp. 947, 951 (E.D. Cal. 1990), the court held that administrative exhaustion under IDEA's predecessor statute was not required in a Rehabilitation Act case where a student who sought to be accompanied by service dog at school did not dispute the adequacy of her educational program. Similarly, in a case where a child with AIDS was excluded from his classroom, the district court found no administrative exhaustion requirement under IDEA's predecessor statute because the requirements would attach to students with AIDS "only if their physical condition is such that it adversely affects their educational performance; i.e., their ability to learn and to do the required classroom work." *Doe ex rel. Doe v. Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342, 345 (S.D. Ill. 1987) (original emphasis).⁹

⁸ Of course, where special education issues covered by IDEA are actually implicated, a party may not avoid IDEA administrative exhaustion requirements simply by excluding an IDEA count. See *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 915-16 (6th Cir. 2000) (reviewing case law on IDEA exhaustion requirement). As further documented *infra*, that is not the case here.

⁹ A child with diabetes could be covered under IDEA where, for instance, the child experiences frequent hyperglycemia or hypoglycemia such that her ability to concentrate and learn is affected on a regular basis and thus specialized education is necessary. See 34 C.F.R. § 300.8(c)(9) (defining "disability" under IDEA to include an "[o]ther health impairment," which means "having limited strength, vitality, or alertness . . . that results in limited alertness with respect to the educational environment," that (1) is due to chronic or acute health problems and

It is undisputed that R.K. never requested, and does not need, special education. The Board’s “Statement of Material Facts” makes that point repeatedly. *See, e.g.*, ECF Doc. No. 84-2 at para. 41 (“R.K. did not require any specialized educational services. . . .”); *id.* at para. 19 (“No academic issues were presented . . . which would have required the committee to create or identify a particular or specialized academic program in order for the student to access the curriculum or otherwise fully participate in the regular education program of the School District”); *id.* at para. 12 (“The Student’s records do not contain any information to demonstrate that the Student had unique educational needs . . . or to demonstrate that the Student required any specialized educational placement in order to participate in the regular primary program”). The Board’s renewed argument that R.K. must nevertheless exhaust administrative remedies under IDEA ignores both the facts and the law of this case.

The Board’s admissions regarding R.K.’s lack of need or request for special education foreclose the argument that R.K. was required to exhaust administrative procedures under IDEA. The Board’s citation in its summary judgment papers of cases on IDEA exhaustion requirements – all involving students with a need for special education – is misplaced. *See* ECF Doc. No. 84-1 at pp. 6-8. The central question of this case involves only *where* R.K.’s education was provided, not *how* it was provided. Accordingly, this Court should once again deny the Board’s motion for summary judgment on this IDEA administrative exhaustion argument.

CONCLUSION

Because the Board’s forced transfer of R.K. away from his zoned school directly implicates the ADA’s statutory and regulatory protections for children with disabilities, the United States requests that this Court consider the title II framework and preemption principles

(2) adversely affects a child’s educational performance. As discussed *infra*, that scenario is not implicated here.

discussed in this Statement of Interest when analyzing the pending cross-motions for summary judgment. In addition, the United States respectfully requests that this Court deny the Board's motion for summary judgment on administrative exhaustion under IDEA. This question has already been addressed and rejected since IDEA is a federal statute with no nexus to this case.

Respectfully submitted this 22nd day of January, 2014.

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