No. 11-5070

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

R.K., Next Friend R.K., Next Friend J.K.,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF SCOTT COUNTY, KENTUCKY; PATRICIA PUTTY, Individually and in her Official Capacity as Superintendent,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

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IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

This case raises important questions about the rights of students with disabilities under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). The Attorney General has authority to bring civil actions to enforce

Section 504 and has promulgated regulations implementing the statute. See 29 U.S.C. 794a; 28 C.F.R. Pt. 35, App. B, Subpt. F (2011); 28 C.F.R. Pt. 41. The Department of Education also has promulgated regulations implementing Section 504 in the education context and administratively enforces Section 504 in that context. See 28 C.F.R. 35.190(b)(2); 34 C.F.R. Pt. 104.

ISSUES PRESENTED

The United States will address the following issues:

1. Whether the district court applied the correct legal standards in determining whether defendants violated their obligations under Section 504 to provide plaintiff a free appropriate public education (FAPE), where the court did not acknowledge, much less apply, the FAPE requirements contained in the Department of Education's Section 504 regulations.

2. Whether a school district may refuse to comply with its FAPE obligations under Section 504 simply because doing so may conflict with state law.

STATEMENT OF THE CASE

R.K. is a student with diabetes who requires administration of insulin during the school day. R.K.'s parents, acting on their son's behalf, sued Scott County's Board of Education and school superintendent under Section 504 of the Rehabilitation Act and other statutes, alleging that defendants violated R.K.'s federally protected rights by transferring him away from his neighborhood school

and requiring him to attend one of two schools with a full-time nurse on staff. The school district rejected R.K.'s request that a volunteer employee at his neighborhood school be trained to help him with his insulin administration. The district court granted defendants' motion for summary judgment on all of R.K.'s claims.

STATEMENT OF THE FACTS

1. R.K., who has diabetes, attends school in Scott County, Kentucky. He was a kindergartner in 2009 when this litigation began and was in first grade during the 2010-2011 school year. (R. 1, Complaint, p. 3).[1] Before R.K. started kindergarten, his parents informed the school district that their son had diabetes and would need insulin injections at school. (R. 1, Complaint, p. 3; R. 39, Opinion, pp. 1-2). The school district advised his parents that R.K. could not attend his neighborhood school, Eastern Elementary School, but must attend one of two schools with a full-time nurse on staff. (R. 1, Complaint, p. 3; R. 39, Opinion, p. 2). R.K.'s parents decided to send him to Anne Mason Elementary School (AMES), which had a nurse. R.K. wanted to attend school with his brothers and neighborhood friends, however, and his parents felt he was being singled out

[1] "R. _" refers to documents filed in the district court, identified by docket number.

because of his disability. (R. 32-1, Affidavit, p. 2; R. 37, Defs.' Pretrial Mem., p. 2; R. 39, Opinion, p. 2).

In December 2009, R.K.'s parents informed the school district that their son had an insulin pump and no longer needed injections with a needle and syringe. (R. 39, Opinion, p. 2). An insulin pump is an electronic device that can be programmed to dispense doses of insulin on a regular schedule as well as on demand (generally before or after eating). (R. 39, Opinion, p. 2 & n.2); American Diabetes Ass'n, *Diabetes Basics: Common Terms*, available at http://www.diabetes.org/diabetes-basics/common-terms/common-terms-f-k.html. The pump is typically about the size of a deck of cards and is carried on a belt or waistband. *Ibid*. It is attached by a small tube to a needle that remains inserted in the skin. *Ibid*. The amount of insulin administered depends on certain information, such as the user's carbohydrate intake, entered into the pump. See *AP* v. *Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1125, 1131 (D. Minn. 2008) (describing an insulin pump); National Diabetes Education Program, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* 47 (2010), available at http://ndep.nih.gov/media /Youth_NDEPSchoolguide.pdf (*Helping the Student with Diabetes Succeed*).[2]

[2] The National Diabetes Education Program is a federally sponsored, joint program of the National Institutes of Health and the Centers for Disease Control

(continued . . .)

Although R.K. "has become more comfortable with the use of his insulin pump" as he has gotten older, he still needs help monitoring the pump and "some assistance" in counting the carbohydrates he eats so that the correct information can be entered into the pump. (R. 39, Opinion, pp. 2-3 & n.2). R.K.'s physician prepared a "Diabetes Medical Management Plan," which states that an adult must supervise the boy's use of the insulin pump and that he needs assistance in counting carbohydrates. (R. 14-1, Diabetes Medicine Management Plan, pp. 5, 7). The plan does not state that a nurse or other licensed health care provider must be the one who supervises and assists R.K. with his insulin administration. R.K. has successfully attended a summer day camp and an after-school program, neither of which had a nurse on duty. (R. 32-1, Affidavit, pp. 2-3). The staff members at the camp and after-school program assisted R.K. in operating the pump and counting carbohydrates. (R. 32-1, Affidavit, pp. 2-3).

After R.K. started using an insulin pump, his parents asked school district officials to permit their son to attend his neighborhood school and requested that the school district train an employee at that school to help R.K. operate the pump and calculate his carbohydrate intake. (R. 39, Opinion, pp. 2-3). The school

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(. . . continued)
and Prevention. *Helping the Student with Diabetes Succeed* 1, 128. The United States Department of Education supports the use of this publication, and prepared pages 113-118 of the guide. *Id.* at 5.

district refused the request, insisting that R.K. "must attend a school with a nurse on staff." (R. 39, Opinion, p. 3). Defendants claimed that providing a nurse at the neighborhood school would be too expensive. (R. 39, Opinion, pp. 13-14). The school district permits other students who use insulin pumps to attend schools without a nurse if those students are "fully self-sufficient" in monitoring and operating the pump and in counting carbohydrates. (R. 26-1, Defs.' Mem. in Supp. of Summ. J., p. 4).

Defendants also asserted that the school district might be liable under Kentucky Revised Statutes Sections 156.501 and 156.502 if it allowed a non-nurse to assist R.K. with the insulin pump and carbohydrate calculations. (R. 26-1, Defs.' Mem. in Supp. of Summ. J., p. 13). 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).

The school district did 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 pumps or carbohydrate calculations. Instead, the school district pointed to two advisory opinions issued by the Board of Nursing. One of those opinions stated that it would be inappropriate for a nurse to delegate to an unlicensed school employee the responsibility for operating insulin pumps or counting carbohydrates. (R. 26-5, Board of Nursing Updated 5/24/05 Opinion). In the other 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. (R. 26-4, Ky. Bd. of Nursing, Advisory Opinion Statement No. 15, p. 4 & n.2 (2005)). The opinion also states, however, that an advisory opinion "is not a regulation of the Board and does not have the force and effect of law." (R. 26-4, Ky. Bd. of Nursing, Advisory Opinion Statement No. 15, p. 5).

2. After R.K. was denied permission to transfer to his neighborhood school, he filed suit against the Scott County Board of Education and school superintendent, claiming that their refusal to allow him to attend his neighborhood school violated Section 504; Title II of the Americans With Disabilities Act

(ADA), 42 U.S.C. 12131 *et seq.*; and other statutes. (R. 1, Complaint, pp. 4-7). As relevant here, R.K. alleged that defendants had violated his right to a FAPE under Section 504 and the Department of Education's Section 504 regulations. (R. 1, Complaint, pp. 4, 7; R. 18, Pls.' Resp. to Defs.' Mem. in Opp. to Mot. for Injunctive Relief, p. 3 (citing federal FAPE regulations at 34 C.F.R. 104.33)). He did *not* bring a claim under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, which requires states that receive federal IDEA funds to assure that children with disabilities receive special education services designed to meet the student's individual learning needs. 20 U.S.C. 1412(a)(1) & (5).

3. The district court granted defendants' motion for summary judgment. (R. 39, Opinion). At the outset, the court rejected defendants' argument that R.K. was required to exhaust administrative remedies under the IDEA. (R. 39, Opinion, pp. 5-9). In reaching this conclusion, the court explained that "Plaintiff's claims are not related to the way that Defendants provide an education to the Child. Rather, he complains of constitutional and statutory violations independent of the IDEA." (R. 39, Opinion, p. 9).

But the court rejected plaintiff's Section 504 and ADA claims, asserting that R.K. had not alleged his non-neighborhood school was "insufficient to provide an adequate education." (R. 39, Opinion, p. 14). In reaching this conclusion, the

court did not mention the Department of Education's regulations, which set forth detailed requirements that schools must meet to fulfill their Section 504 obligations to provide a FAPE to students with disabilities. See 34 C.F.R. 104.33-104.36.

With regard to R.K.'s proposal that non-nurse staff be trained to assist him with his insulin pump and carbohydrate calculations, the court suggested that the school district properly refused to do so "because of potential liability under Kentucky regulations which could be construed as prohibiting non-medical personnel from administering injections." (R. 39, Opinion, p. 14; see also R. 39, Opinion, pp. 16-17). The court did not decide, however, whether Kentucky law in fact prohibited non-medical personnel from administering insulin.

SUMMARY OF ARGUMENT

The district court did not apply the proper legal standards in evaluating R.K.'s claim that defendants violated his right to a free appropriate public education (FAPE) under Section 504 of the Rehabilitation Act. R.K. alleges that defendants did not adhere to Section 504's FAPE requirements when they decided to bar him from attending the neighborhood school he otherwise would have attended if he had no disability. The Department of Education has promulgated regulations setting forth detailed requirements that school districts must meet to comply with their FAPE obligations under Section 504, consistent with the general non-discrimination requirements under Section 504. Although the Department's

Section 504 regulations require specific procedures for making placement decisions, the district court did not refer to these requirements or apply them to R.K.'s case.

As part of its Section 504 FAPE obligations, the school district was required to make an individualized, pre-placement evaluation of R.K.'s specific needs and was not permitted to base the placement decision on a blanket policy or administrative convenience. The district court should have determined whether the school district conducted such an individualized assessment before deciding where to place R.K. Specifically, in deciding whether defendants complied with the Section 504 regulations in making the placement decision, the district court must determine whether defendants properly considered his individual medical and other characteristics, and the necessity (if any) of placing him away from his neighborhood school. This case should be remanded for application of the correct legal standards set forth in the Section 504 regulations.

In addition, the court erred in suggesting that a school district could refuse to allow a trained, non-medical staff member to help R.K. with his diabetes management simply because the school district believed this might conflict with state law. Under the Supremacy Clause, federal laws barring discrimination against school children with disabilities take precedence over state law requirements to the extent that they conflict with federal obligations.

ARGUMENT

I

THE DISTRICT COURT FAILED TO APPLY THE CORRECT LEGAL STANDARDS IN ANALYZING WHETHER DEFENDANTS COMPLIED WITH SECTION 504'S FAPE AND GENERAL NON-DISCRIMINATION REQUIREMENTS

The district court failed to apply the proper legal standards in analyzing R.K.'s claim that defendants violated his right to a FAPE under Section 504. As explained below, the Section 504 FAPE requirements are set forth in regulations promulgated by the Department of Education, see 34 C.F.R. 104.33-104.36, and are consistent with Section 504's general non-discrimination requirements, see 34 C.F.R. 104.4. But in rejecting R.K.'s Section 504 claim, the district court did not mention, much less apply, the standards that the Department of Education mandated in the Section 504 regulations.[3] The district court failed to apply those standards even though R.K. stated in his pleadings that his Section 504 claim was based, in large part, on the alleged denial of a FAPE (R. 1, Complaint, pp. 4, 7), and even though he specifically invoked the Department of Education's FAPE regulations in support of that claim. (See R. 18, Pls.' Resp. to Opp'n to Mot. For

[3] The district court included, in a string cite, a parenthetical explaining that "IDEA regulations indicate preference not mandate for neighborhood school unless IEP requires placement elsewhere." (R. 39, Opinion, p. 14). But the district court never mentioned, even in passing, any Section 504 regulations that apply to R.K.'s FAPE claim.

Preliminary Injunctive Relief, p. 3 (explaining that 34 C.F.R. 104.33 provided the right to a FAPE)).[4] Because the district court failed to apply the relevant legal standards governing Section 504 FAPE claims, this Court should vacate the grant of summary judgment and remand for reconsideration under the correct standards.

A. Standard Of Review

This Court reviews de novo the grant of summary judgment, including the question whether the district court applied the proper legal standard. *Merritt* v. *International Ass'n of Machinists & Aero. Workers*, 613 F.3d 609, 618 (6th Cir. 2010).

B. Section 504's FAPE Requirements[5]

Most students with diabetes are covered by Section 504 of the Rehabilitation Act, which provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program

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[4] Appellant also relies on the Section 504 FAPE requirements in this appeal. See Appellant's Opening Br. 16, 18-19, 32-33 & n.1.

[5] Although this brief focuses on the Section 504 FAPE requirements, 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. This brief does not address all of the mandates that Section 504 and Title II impose in the education context.

or activity receiving Federal financial assistance." 29 U.S.C. 794(a).[6] The term "program or activity" includes "all of the operations" of a school system. 29 U.S.C. 794(b)(2)(B).

A person with diabetes will virtually always be an "individual with a disability" under Section 504. Congress has mandated that the ADA's definition of disability also apply to Section 504. See 29 U.S.C. 705(9)(B), 705(20)(B) (applying that definition to Subchapter V of the Rehabilitation Act, which includes Section 504). Under the ADA and Section 504, "disability" includes "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." 42 U.S.C. 12102(1)(A); accord 34 C.F.R. 104.3(j)(1) (same definition in Department of Education's Section 504 regulations). Diabetes is an impairment under the ADA, 28 C.F.R. 35.104, and, hence, also under Section 504. In the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3555, Congress clarified that a "major life activity" includes, *inter alia*, "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. 12102(2)(B). Diabetes adversely affects the operation of major bodily functions, including the

[6] Most people with diabetes are also protected by the ADA. See 28 C.F.R. 35.104.

digestive and endocrine systems. See *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").

The United States Department of Education has promulgated regulations interpreting Section 504 in the education context. See 34 C.F.R. Pt. 104. "The obligation to comply with [those regulations] is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services." 34 C.F.R. 104.10(a).

Those regulations include general non-discrimination requirements applicable to all entities that receive federal funding from the Department of Education. See 34 C.F.R. 104.4. The general provisions make clear that, among other things, covered entities may not "[p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary" to provide those persons "with aid, benefits, or services that are as effective as those provided to others." 34 C.F.R. 104.4(b)(iv).

In addition to these general non-discrimination provisions, the Department of Education's Section 504 regulations include requirements that apply specifically to public elementary and secondary schools. See 34 C.F.R. 104.31-104.38. Under the regulations, such schools are required to provide a "free appropriate public

education" (FAPE) to students with disabilities "regardless of the nature or severity" of the students' disabilities. 34 C.F.R. 104.33(a); see also *Smith* v. *Robinson*, 468 U.S. 992, 1016-1017 (1984) (discussing FAPE requirement under Section 504 regulations).[7] These Section 504 regulations define FAPE to include "the provision of 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. 104.33(b)(1). Such "educational and related services" must be provided "without cost to the handicapped person or to his or her parents or guardian" (except for fees also imposed on nondisabled students and their parents). 34 C.F.R. 104.33(c)(1). For those students who have a Section 504 plan requiring insulin doses during the school day, insulin administration is considered one of the "related aids and services" that the school must provide as part of its FAPE obligations under the Section 504 regulations. See *Helping the Student with Diabetes Succeed* 114.

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[7] The IDEA also includes a FAPE requirement that applies to students with disabilities who are eligible for special education and related services. See 20 U.S.C. 1400(d)(1)(A), 1412(a)(1) & (5). Some children with diabetes are covered by the IDEA. See 34 C.F.R. 300.8(c)(9); *Helping the Student with Diabetes Succeed* 115. This Court has held that, if a plaintiff brings FAPE claims under both the IDEA and Section 504, a failure to prove a violation of IDEA's FAPE requirements necessarily requires rejection of the plaintiff's Section 504 FAPE claims. See *N.L.* v. *Knox Cnty. Schs.*, 315 F.3d 688, 695-696 (6th Cir. 2003). *N.L.*'s holding is inapposite here because, as the district court recognized, R.K. did not allege a violation of the IDEA's FAPE requirements. (See R. 39, Opinion, pp. 5-9).

To satisfy their FAPE obligations under Section 504, schools must adhere to the procedural requirements in 34 C.F.R. 104.34, 104.35, and 104.36. See 34 C.F.R. 104.33(b)(1). One critical procedural requirement is that a school conduct an individualized assessment of a student's needs before making a school placement decision. 34 C.F.R. 104.35. In conducting this individualized assessment, a school system must consider a variety of information, including the student's "aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. 104.35(c).

The school must ensure that the placement decision also complies with 34 C.F.R. 104.34, which imposes standards for selecting the appropriate educational setting for a student with a disability. That provision mandates that "[a] recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. 104.34(a). That requirement reflects one of the core underlying principles of the regulations' general non-discrimination mandates – namely, that a funding recipient not "[p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped

persons unless such action is *necessary*." 34 C.F.R. 104.4(b)(iv) (emphasis added); see p. 14, *supra*.

C. The District Court Improperly Ignored The FAPE Standards And The General Non-discrimination Requirements Imposed By The Department Of Education's Section 504 Regulations

1. The District Court Failed To Determine (1) Whether Defendants Based The Placement Decision On An Individualized Assessment Of R.K.'s Specific Needs, And (2) Whether Denying Him Admission To His Neighborhood School Was Truly Necessary

As previously explained, the Section 504 FAPE regulations require schools to conduct an individualized assessment of a student's needs before making a school placement decision. 34 C.F.R. 104.35(a); see also 34 C.F.R. Pt. 104, App. A, Subpt. D, No. 25 at 409 (2010) ("Section 104.35(a) requires * * * an individual evaluation" of a student's needs). When making this individualized assessment, the school must consider a variety of factors, including the particular student's test scores, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. 34 C.F.R. 104.35(c)(1).

In interpreting the Section 504 FAPE regulations, the Department of Education has emphasized that "the needs of the handicapped person are determinative as to proper placement." 34 C.F.R. Pt. 104, App. A, Subpt. D, No. 24 at 408. Accordingly, the Department has made clear that "[t]he overriding rule regarding placement is that placement decisions must be made on an individual basis," and that such decisions "may not be based on category of disability, the

configuration of the delivery system, the availability of educational or related services, availability of space, or administrative convenience." 57 Fed. Reg. 49,274, 49,275 (Oct. 30, 1992) (interpreting both Section 504 regulations and IDEA). The Department of Education's interpretation of its regulations is entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 463 (1997); *Wolf Creek Collieries* v. *Robinson*, 872 F.2d 1264, 1268 (6th Cir. 1989).

In making this individualized determination, a school district must bear in mind one of the key non-discrimination principles underlying the Section 504 regulations – *i.e.*, that a funding recipient may not provide "different or separate" services to persons with disabilities unless doing so is "necessary" to provide them with services "that are as effective as those provided to others." 34 C.F.R. 104.4(b)(iv) (emphasis added). The Department of Education has construed this regulation to mean that, although different or separate services may be justified in some instances, "the provision of *unnecessarily* separate or different services is discriminatory." 34 C.F.R. Pt. 104, App. A, Subpt. A, No. 6 at 401 (emphasis added).

In granting summary judgment, the district court did not determine whether the school district based R.K.'s placement on an individualized assessment of *his* needs. Nor did the court decide whether barring R.K. from attending his neighborhood school with his siblings and friends was truly necessary to provide

him effective services. Notably, the court did not determine whether a lay person could adequately provide R.K. the assistance he needed with insulin administration or whether only a nurse or physician could safely and effectively provide such assistance.

On remand, the district court should assess whether the school district conducted an appropriate inquiry into R.K.'s specific needs or, instead, simply applied a blanket policy that children needing assistance with insulin administration must attend one of two schools with a nurse. Because "the needs of the [student] are determinative as to proper placement," 34 C.F.R. Pt. 104, App. A, Subpt. D, No. 24 at 408, a categorical rule is not an appropriate ground for a placement decision under the Section 504 FAPE regulations, see 57 Fed. Reg. 49,274, 49,275 (Oct. 30, 1992).

In considering whether the school district adequately assessed R.K.'s individual needs, the court should take into account the possibility that the nurse assigned to R.K.'s current school could be absent or occupied with assisting another student when R.K. needs help, or may be unavailable to go on field trips or attend after-school activities with R.K.[8] Thus, the school district's blanket ban on

[8] Non-academic services, including health services, and extracurricular services and activities are also part of a recipient's education program, and students with disabilities must be afforded an equal opportunity to participate in those

(continued . . .)

allowing non-nurse employees to assist with insulin administration may interfere with its ability to provide R.K. the "related aids and services," 34 C.F.R. 104.33(b)(1), that it must offer as part of its FAPE obligations under the Section 504 regulations. See p. 15, *supra*. The blanket ban, if enforced during field trips or after-school events when no nurse is available, might also conflict with the school district's obligation to "provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. 104.37(a). See also *Helping the Student with Diabetes Succeed* 16 (noting children with diabetes need supervision during field trips and similar activities and recommending that additional personnel be trained to provide routine and emergency care).

2. The District Inappropriately Assumed That The Location Of R.K.'s Placement Was Irrelevant In Deciding Whether Defendants Met Their Obligations Under Section 504

In determining where to educate a student with a disability who, like R.K., needs assistance with diabetes care, a school district must ensure that its placement deliberations are consistent with the general non-discrimination provisions of the Department of Education's Section 504 regulations. 34 C.F.R. 104.4. Under these

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(. . . continued)
services. See 34 C.F.R. 104.37(a); see also 34 C.F.R. Pt. 104, App. A, Subpt. D., No. 26 at 410.

regulations, a person with a disability shall not on the basis of disability "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." 34 C.F.R. 104.4(a). Among other things, recipients must provide persons with disabilities an equal opportunity to participate in or benefit from recipients' educational programs and activities. 34 C.F.R. 104.4(b)(1)(ii). The regulations permit recipients to provide different or separate aids, benefits, or services to persons with disabilities only when doing so is necessary to provide such aids, benefits, or services that are as effective as those the recipients provide to persons without disabilities. 34 C.F.R. 104.4(b)(iv).

In this case, the determination of what constitutes the appropriate placement for R.K. must include consideration of where he would be assigned if he did not have a disability, consistent with the Section 504 regulations' general non-discrimination requirements. That is, unless the school district can demonstrate that it is necessary to assign this student to a different school (*i.e.*, a different school is needed in order to provide the student aids, benefits, or services that are as effective as the aids, benefits, or services provided to students without disabilities), this student should be assigned to the school he would attend if he did not have a disability.

The district court ignored the Department of Education's Section 504 regulations and seemed to assume that, as long as R.K. receives an adequate education, the location of his placement is irrelevant to whether the school district has complied with its Section 504 obligations. (See R. 39, Opinion, pp. 4, 14-15). The court thus did not consider whether the school district had engaged in the required individualized assessment to determine whether R.K.'s needs could have been met in the school that he would have attended but for his disability. Instead of applying the relevant Section 504 regulations, the district court cited this Court's observation in *McLaughlin* v. *Holt Public School Board of Education*, 320 F.3d 663, 670 n.2 (6th Cir. 2003), that placement in a neighborhood school is not an "absolute right" under the IDEA. (R. 39, Opinion, p. 14). But while placement in a neighborhood school is not an absolute right under either the IDEA (which does not apply to this case) or Section 504 (which does), recipients are prohibited from discriminating on the basis of disability in providing services in the regular educational environment, including school assignments.

Because the district court failed to consider whether, under the Department of Education's Section 504 regulations, R.K. could have been educated in his neighborhood school with supplementary aids and services, a remand is in order. On remand, the court should determine whether the school district adequately considered whether R.K. could have been provided the supplementary aids and

services that he needs at the school he would attend but for his disability. The court should determine if the school district demonstrated that its placement of R.K. in a school to which he would not otherwise be assigned was necessary to provide him aids, benefits, or services as effective as the aids, benefits, or services provided to students without disabilities in the same attendance zone.

II

UNDER THE SUPREMACY CLAUSE, A SCHOOL DISTRICT MAY NOT AVOID ITS OBLIGATIONS UNDER FEDERAL LAW EVEN IF COMPLIANCE MIGHT VIOLATE STATE LAW

The district court further erred in denying R.K.'s FAPE claim based on defendants' purported fears of liability under state law. In rejecting R.K.'s claim that the school district should have allowed a trained lay person to assist him with insulin administration at his neighborhood school, the court cited "potential liability under Kentucky regulations which could be construed as prohibiting non-medical personnel from administering injections." (R. 39, Opinion, p. 14; see also R. 39, Opinion, pp. 16-17 (asserting that defendants declined to train a lay person "because of the viable concerns for cost and liability")). Contrary to the district court's ruling, a school district may not rely on state law to avoid its federal obligations.[9]

[9] That is not to say that state law is irrelevant. State law may be pertinent, for example, in deciding which of two equally effective changes a local

(continued . . .)

Even if Kentucky law barred a lay person from administering insulin in public schools, such a state law requirement must yield to federal obligations.[10] Under the Supremacy Clause, state law must give way to the extent it "conflicts with federal law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 378-

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(. . . continued)
government entity is required to implement to bring itself into compliance with federal law. A defendant should be allowed to choose the option that comports with state law, so long as it is equally effective in providing equal opportunity to the person with a disability. In addition, a court can permissibly consider the policy reasons underlying a state law (for example, health and safety concerns) in determining whether federal law requires a proposed change in a defendant's policy. But if federal law would otherwise require a change in policy, a defendant cannot refuse to make the change simply because doing so would violate state law.

[10] The district court did not decide whether Kentucky law *actually* prohibited the school district from allowing non-nurses to assist R.K. with his insulin pump and carbohydrate monitoring. Although the United States takes no position on the proper interpretation of Kentucky law, we note that the district court seems to have overlooked a number of factors potentially relevant to the state law question. Defendants relied on two advisory opinions of the Kentucky Board of Nursing, but those opinions are not "regulation[s]" and do "not have the force and effect of law." (R. 26-4, Ky. Bd. of Nursing, Advisory Opinion Statement No. 15, p. 5). And one of the statutes on which defendants relied 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 that would allow physicians "to delegate carbohydrate counting, insulin dose calculations, and insulin administration (injection or pump bolus)" to unlicensed school employees under Section 156.502 in appropriate circumstances. See Ky. Bd. Med. Licensure, "Board Opinion Regarding Training of and Delegation to School Employees" (Dec. 17, 2009), available at http://www.kbml.ky.gov/board/policies.htm. The district court's opinion does not discuss whether a physician, rather than a nurse, would be willing to delegate the responsibility for the insulin administration to lay persons at R.K.'s neighborhood school.

379 (2000); see U.S. Const. Art. VI, Cl. 2. 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." *Crosby*, 530 U.S. at 372-373 (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 Medical Laboratories, Inc*., 471 U.S. 707, 713 (1985), and that "[f]ederal regulations have no less pre-emptive effect than federal statutes," *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Consistent with these preemption principles, the Department of Education's Section 504 regulations emphasize that "[t]he obligation to comply with [these regulations] is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services." 34 C.F.R. 104.10(a).

In the context of civil rights law, the Supreme Court has long recognized that state and local governments can be required to take action to bring themselves into compliance with federal law even if state law would otherwise prohibit such action. For example, in *North Carolina State Board of Education* v. *Swann*, 402

U.S. 43, 45 (1971), the Court recognized that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct" federal law requirements, "it must fall." See also *Missouri* v. *Jenkins*, 495 U.S. 33, 56-57 (1990) (federal court could order a local government to take action to support a federally mandated school desegregation plan, even if doing so exceeded the locality's authority under state law); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 694-695 (state agencies could be ordered to adopt rules to implement the requirements of federal treaties even though the agencies lacked power under state law to promulgate such regulations), modified, 444 U.S. 816 (1979).

The courts of appeals have repeatedly applied these principles in holding that federal disability rights law, including Section 504, preempt state statutes to the extent they conflict with federal mandates. See *Helms* v. *McDaniel*, 657 F.2d 800, 805-806 (5th Cir. 1981) (Section 504 and IDEA preempted state laws governing hearing procedures), cert. denied, 455 U.S. 946 (1982); *Robert M.* v. *Benton*, 634 F.2d 1139, 1142 & n.11 (8th Cir. 1980) (same as to IDEA);[11] *Hacienda La Puente Unified Sch. Dist.* v. *Honig*, 976 F.2d 487, 492 (9th Cir. 1992) (state laws must yield to the extent they impede exercise of IDEA rights); see also

[11] When *Helms* and *Robert M.* were decided, the IDEA was known as the Education for All Handicapped Children Act.

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, interfered with the state's compliance with Title II of the ADA); *Barber* v. *Colorado Dep't of Revenue*, 562 F.3d 1222, 1232-1233 (10th Cir. 2009) (emphasizing that proposed accommodation under ADA 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 69-70.

In this case, the district court erroneously relied on state law in accepting defendants' claims that R.K. must attend a school with a nurse. Although Section 504 and its implementing regulations require that the school make an individualized determination about R.K.'s specific needs before selecting a placement, see pp. 17-20, *supra*, the court essentially allowed the district to apply the purported state requirement as a blanket rule barring all students who need

assistance with insulin administration from attending a school without a nurse on staff. That was error. To the extent Kentucky law impedes defendants' ability to comply with their FAPE obligations under the Section 504 regulations, state law must "give way." *Swann*, 402 U.S. at 45.[12]

[12] A finding of preemption in R.K.'s case would not require the Court to invalidate any state laws or regulations on their face, and would not prevent them from being applied in any context where they do not stand as an obstacle to the achievement of the purposes of federal law.

CONCLUSION

This Court should reverse the district court's judgment and remand for reconsideration under the proper legal standards.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains no more than 6409 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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Date: June 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Title
1	Complaint
14	Defendants' Memorandum of Law in Response and Opposition to Motion for Preliminary Injunction 14-1 Diabetes Medicine Management Plan
18	Plaintiff's Response to Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunctive Relief
26	Defendants' Motion for Summary Judgment 26-1 Defendants' Memorandum of Law in Support of Motion for Summary Judgment 26-4 Kentucky Board of Nursing, Advisory Opinion Statement No. 15 (2005) 26-5 Board of Nursing Updated 5/24/05 Opinion
32	Plaintiff's Response to Defendants' Motion for Summary Judgment 32-1 Affidavit
37	Defendants' Pretrial Memorandum
39	Opinion filed Dec. 15, 2010