No. 14-6213

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,

Defendant-Appellee

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 under Federal Rule of Appellate Procedure 29(a).

This case raises important questions about the rights of students with disabilities under the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and 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 both

statutes, and has promulgated regulations implementing both. See 42 U.S.C. 12133; 29 U.S.C. 794a; 28 C.F.R. Pt. 35, 41. The Department of Education has promulgated regulations implementing Section 504 in the education context and administratively enforces Section 504. See 34 C.F.R. Pt. 104; 28 C.F.R. 35.190(b)(2).

ISSUES PRESENTED

The United States will address the following issues:

1. Whether a student whose disability does not qualify him for special education services under the Individuals with Disabilities Education Act (IDEA) must exhaust IDEA procedural remedies before seeking relief under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

2. Whether a school discriminates against a child on the basis of disability when it excludes him from his neighborhood school because of his diabetes, where a nurse is not necessary to assist the child.

STATEMENT OF THE CASE

1. R.K.'s School Assignments

R.K., who has diabetes, attends school in Scott County, Kentucky. This case involves his exclusion from his neighborhood school during his kindergarten and first-grade years.[1]

a. Before R.K. started kindergarten in 2009, his parents told the school district he had diabetes and would need insulin injections at school. (Complaint, R.1, PageID#3; Opinion, R.39, PageID#326-327; Affidavit, R.83-1, PageID#739). School officials told them R.K. could not attend his neighborhood school, Eastern Elementary School, but must attend a school with a full-time nurse. (Complaint, R.1, PageID#3; Affidavit, R.32-1, PageID#253-254; Amended Complaint, R.59, PageID#453-454; Opinion, R.39, PageID#327). R.K. accordingly chose to attend Anne Mason Elementary School. (Affidavit, R.32-1, PageID#268). R.K.'s parents wanted him to attend Eastern Elementary with his neighborhood friends. (Affidavit, R.32-1, PageID#268; Defs.' Mem., R.37, PageID#321; Opinion, R.39, PageID#327).

b. In December of his kindergarten year, R.K.'s parents informed the school district that their son now had an insulin pump and no longer needed injections.

[1] During second grade, R.K. moved outside the attendance area for the neighborhood school. (Opinion, R.121, PageID#1382-1383).

(Affidavit, R.32-1, PageID#268; Opinion, R.39, PageID#327; Affidavit, R.83-1, PageID#741-742). An insulin pump can be programmed to dispense insulin on a regular schedule as well as on demand, generally before or after eating. (Opinion, R.39, PageID#327 & n.2; Affidavit, R.26-2, PageID#214). It is attached to a small tube that remains inserted in the skin. (Affidavit, R.26-2, PageID#214). The amount of insulin administered depends on certain information, such as the user's carbohydrate intake, which is calculated and keyed into the pump. (Affidavit, R.26-2, PageID#214); see *AP* v. *Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1125, 1131 (D. Minn. 2008).

With the pump, R.K. needed assistance only in counting the carbohydrates he ate so that the correct information could be entered into the pump. (Opinion, R.39, PageID#327-328 & n.2; Affidavit, R.83-1, PageID#742-743; Exhibit, R.84-15, PageID#1196, 1199). R.K.'s parents told the school officials that R.K. could be "monitor[ed] * * * by a minimally trained lay person." (Affidavit, R.32-1, PageID#269; Affidavit, R.83-1, PageID#743). R.K.'s physician prepared a "Diabetes Medical Management Plan," which stated that an adult should supervise the boy's use of the insulin pump, and that R.K. needed assistance in counting carbohydrates. (Diabetes Medicine Management Plan, R.14-1, PageID#94, 96). The physician's plan did not require a nurse.

After R.K. started using the pump, his parents asked school district officials to enroll him at his neighborhood school since an adult present at the school could be easily trained to help R.K. operate the pump and calculate his carbohydrate intake. (Opinion, R.39, PageID#327-328; Amended Complaint, R.59, PageID#454; Affidavit, R.83-1, PageID#742-744). The school district refused, and also stated that providing a nurse at the neighborhood school would be too expensive. (Opinion, R.39, PageID#328, 338-339).

2. R.K.'s Suit

After R.K. was denied permission to attend his neighborhood school, his parents filed suit against the Scott County Board of Education and Superintendent, claiming that their refusal to allow R.K. to attend his neighborhood school violated Section 504, 29 U.S.C. 794; Title II of the ADA, 42 U.S.C. 12131 *et seq.*; and other statutes. (Complaint, R.1, PageID#3-7).

a. The District Court's First Opinion

The district court granted the school district's motion for summary judgment, concluding that neither the ADA nor Section 504 required the school district to allow R.K. to attend his neighborhood school. At the outset, the court rejected the school district's argument that R.K. was required to exhaust administrative remedies under the IDEA, 20 U.S.C. 1400 *et seq.* R.K.'s claims did

not fall within the IDEA as R.K. did not allege that he needed the special education services the IDEA provides. (See Opinion, R. 39, PageID#330-334).

Turning to the merits of the ADA and Section 504 claims, the district court stated that the school declined to provide a nurse at R.K.'s neighborhood school "in light of the additional cost burden." (Opinion, R.39, PageID#330-334). The court concluded that, as long as the school provided R.K. an education similar to that given to all other students and did so somewhere in the district, Section 504 and Title II were not violated. (Opinion, R.39, PageID#338-339).

b. The First Appeal

R.K. appealed the district court's decision. (NOA, R.41, PageID#348-349). The United States filed as amicus, explaining that a school's Section 504 equal treatment obligations required equal treatment in school assignment and called for an individualized determination of whether R.K. could safely attend his neighborhood school. The United States also argued that state nursing regulations regarding insulin administration could not justify a school district's refusal to comply with federal antidiscrimination provisions. U.S. Br., *R.K.* v. *Board of Educ. of Scott Cnty.*, 494 F. App'x 589 (6th Cir. 2012) (11-5070).

This Court reversed and remanded. *R.K.*, 494 F. App'x at 597-599. The Court stated that the record was not well developed, and that there was "a genuine issue of material fact in dispute as to whether the [Board considered]

individualized factors" in deciding about R.K.'s treatment. *Id*. at 597. This Court stated that the district court had also failed to consider relevant federal law, including Section 504 and its implementing regulations, and acknowledged that state laws regarding insulin administration may be preempted by federal requirements. *Id*. at 597-598.

c. Proceedings On Remand

On remand, R.K. filed an amended complaint, and expanded the record somewhat. (Amended Complaint, R.59, PageID#450-462). The United States filed a Statement of Interest arguing that any state laws regarding insulin administration in schools must give way to federal antidiscrimination laws, and that R.K. was not required to exhaust administrative remedies under the IDEA. The United States also argued that, under Title II of the ADA, a school district may not require a student with a disability to attend a school with a nurse, rather than his neighborhood school, if nursing services are unnecessary. (Statement of Interest, R.90, PageID#1040-1080).

R.K.'s parents affirmed they purchased their house because it was zoned for Eastern Elementary and they regarded Eastern Elementary as academically superior. (Affidavit, R.83-1, Page#ID739; Opinion, R.121, PageID#1386). R.K.'s father felt his son was "being singled out" because of his diabetes (Affidavit, R.12-2, PageID#59). He later explained, in addressing state law claims, that neighbors

asked him why R.K. did not attend Eastern Elementary, and that he had to explain his son's medical needs to others, even when it was "emotionally difficult" to do so and even though he wanted R.K. to "fit in" despite his disability. (Declaration, R.124-2, PageID#1441). R.K. presented an expert report explaining that R.K. did not need nursing services, particularly after he was fitted with an insulin pump, (Report, R.83-2, PageID#774-777), and submitted a copy of his diabetes management plan from the end of his kindergarten year, stating that "any trained layperson can supervise" the insulin pump. (Deposition, R.83-3, PageID#841). R.K.'s father stated that there were people at Eastern Elementary who were willing to assist R.K. (Affidavit, R.83-1, PageID#742).

Nurse Tony Harrison, in a deposition, added to his former affidavit about R.K.'s treatment. He commented on his former statements in favor of a nurse for R.K., explaining that the school had sought his opinion on whether a "nurse would be better" for monitoring R.K. (Deposition, R.83-3, PageID#804-805). He had not been asked if a nurse was "necessary." (Deposition, R.83-3, PageID#804). He said that, at least by the time R.K. was in first grade, he would have been comfortable having trained non-medical staff monitor the pump. (Deposition, R.83-3, PageID#817-818, 824, 834, 841, 852). The school district presented evidence that school officials, including nurses, concluded that it would have been

"inappropriate, impractical, and/or imprudent" to delegate his care to a layperson. (Interrogatories, R.83, PageID#736; Exhibit, R.83-1, PageID#747-758).

d. The District Court's Second Opinion

The district court granted the school district's motion for summary judgment. First, the court reiterated its previous holding that exhaustion was not required under the IDEA. (Opinion, R.121, PageID#1397). The court considered the expanded record, acknowledging R.K.'s diabetes management plans explaining that the assistance he needs from an adult did not require a nurse. (Opinion, R.121, PageID#1386 (citing Exhibit, R.84-6, PageID#1166)). The court emphasized a doctor's earlier assessment of R.K., stating that he needed "frequent finger stick glucose checks + nurse to help with insulin administration." (Opinion, R.121, PageID#1387 (citing Exhibit, R.84-6, PageID#1166) (emphasis omitted)). The court considered school officials' statements that, at the time they assigned R.K. to Anne Mason Elementary, they believed "injection for R.K.'s diabetes" to be "solely a nursing function." (Opinion, R.121, PageID#1389 (citation omitted)). The court also took into account the "concerns" school nursing staff cited about "allowing untrained staff to be responsible for the implementation of [R.K.'s] Accommodation Plan." (Opinion, R.121, PageID#1391 (citation omitted)).

Discussing Title II and Section 504, the court found that R.K. had not been harmed by being sent to Anne Mason, "except for the fact that it was a different

school than he would have attended if he were not disabled." (Opinion, R.121, PageID#1402). The court stated that R.K. could succeed only by showing that "the Board's decision to enroll R.K. at Anne Mason Elementary, where there was a full-time nurse on duty, was unreasonable." (Opinion, R.121, PageID#1405). Because R.K. received the same general education at Anne Mason that he would have received at his neighborhood school, the court held, the school district violated neither Title II nor Section 504. (Opinion, R.121, PageID#1406).

SUMMARY OF ARGUMENT

R.K.'s claims are based on Section 504, 29 U.S.C. 794; Title II of the ADA, 42 U.S.C. 12131 *et seq.*; and state statutes. (Complaint, R.1, PageID#4-7; Amended Complaint, R.59, PageID#456-459). He did not bring a claim under the IDEA, as R.K. does not need IDEA services. Where, as here, a student's claims are unrelated to the IDEA, the student need not exhaust the administrative procedures the IDEA requires.

Section 504, Title II, and their regulations require that students with disabilities receive an equal opportunity to use any benefit or service provided to other students, and bar an entity from providing "different or separate aids, benefits, or services" to students with disabilities "unless * * * necessary." 28 C.F.R. 35.130(b)(1)(iv); see also 34 C.F.R. 104.4(b)(1)(iv). Here, R.K. argues that he did not receive an "opportunity to participate in" a benefit the school provided

"that is * * * equal to that afforded others." He argues that he was unnecessarily sent to a school other than the school the rest of the students in his neighborhood attended solely because of his disability. 28 C.F.R. 35.130(b)(1)(ii); 34 C.F.R. 104.4(b)(1)(ii). He claims that the school district offered him a "different or separate" benefit – attendance at a school other than his neighborhood school – even though (a) that location was not "necessary" to accommodate his individual needs, and (b) that location denied him benefits equal to those other students in his neighborhood enjoyed.

The district court did not apply the proper legal standard to his claims. Instead of evaluating whether the school had established that it was "necessary" to bar R.K. from attending his neighborhood school, the court merely assessed how R.K. was taught at Anne Mason Elementary and found he did not lack educational opportunities. The court concluded that moving R.K. to Anne Mason Elementary was "reasonable"; it never inquired whether it was "necessary." And instead of deciding whether R.K. could attend his neighborhood school with reasonable modifications, such as training a volunteer school employee to help monitor R.K.'s insulin pump and carbohydrate intake, the court considered only whether R.K. was properly cared for at Anne Mason Elementary.

Title II and Section 504 require equal treatment of students with disabilities. It is uncontested that, in order to attend public school and have his educational

needs met as adequately as the needs of students without diabetes, R.K. needed some assistance with insulin administration (which the school offered, albeit not at the child's neighborhood school). Because R.K. was offered necessary help with his diabetes injections and monitoring at Anne Mason Elementary, the school district's Section 504 obligation to provide a "free appropriate public education" (FAPE) (see p. 17 & n.2, *infra*), is not in dispute. Rather, the crux of this case is the school district's insistence that these services must be provided in a way that results in unnecessarily different treatment and therefore in discrimination prohibited by Title II and Section 504.

The district court appeared to conclude that so long as the school district provided the services necessary for the child's insulin administration or monitoring in some school in the district, all the school district's federal civil rights obligations under Title II and Section 504 were satisfied. That was error. Title II and Section 504 contain broad prohibitions on treating an individual with a disability differently than individuals without disabilities unless such different treatment is necessary. The school district treated R.K. differently than students without a disability by assigning him to a school other than his neighborhood school. The critical question, one the district court did not reach, is whether this different treatment is necessary. The district court addressed a different question – whether

the school to which R.K. was assigned is inferior to the one to which he would have been assigned absent his disability.

ARGUMENT

I

THE DISTRICT COURT PROPERLY CONCLUDED THAT R.K. NEED NOT PURSUE ADMINISTRATIVE REMEDIES UNDER THE IDEA BEFORE BRINGING HIS SECTION 504 AND TITLE II NONDISCRIMINATION CLAIMS

The IDEA, 20 U.S.C. 1400 *et seq.*, requires States that receive federal IDEA funds to ensure that children with disabilities receive a FAPE that meets their "unique needs." 20 U.S.C. 1412(a)(1) and (5)(B)(i). R.K. was not eligible for services under the IDEA; to be eligible under the IDEA, the child must have a disability that requires special education and related services. 20 U.S.C. 1401(29); 34 C.F.R. 300.34, 300.39. The IDEA defines a "Child with a disability" as a child:

> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. 1401(3).

Under the IDEA, the child's parents and school personnel meet to establish an Individualized Education Program (IEP) for the child. 20 U.S.C. 1414(d)(1)(A). That program describes the special education and related services

the child will receive. See 20 U.S.C. 1401(29); 34 C.F.R. 300.34, 300.39. The goal of the IEP is to provide the child with the FAPE to which he or she is entitled under the IDEA. If the parents want to challenge the school's proposed IEP, the parents must request a due process hearing held before an administrative hearing officer. 20 U.S.C. 1415(f)(1)(A).

The IDEA does not occupy the field for disputes between parents of children with disabilities and public schools. The IDEA states that "[n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available" under the ADA, Section 504, or other "[f]ederal laws protecting the rights of children with disabilities." 20 U.S.C. 1415(l). The IDEA does require, however, that the IDEA due process procedures first be exhausted in cases involving IDEA-related services. The IDEA states that, "before the filing of a civil action under such laws [the ADA, Section 504, or 42 U.S.C. 1983] *seeking relief that is also available under [the IDEA]*, the procedures under subsections (f) and (g) [of this section] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. 1415(l) (emphasis added).

As the IDEA states, so long as a plaintiff neither sues under the IDEA nor seeks relief available under the IDEA, nothing in this provision requires exhaustion of the IDEA procedures prior to filing a suit under Title II or Section 504. To the contrary, the IDEA forbids courts from construing the IDEA to restrict the rights

and remedies available under other laws. This Court has concluded that a student need not exhaust administrative procedures if the "IDEA did not provide a remedy for the type of harm allegedly suffered by plaintiff." *Gean* v. *Hattaway*, 330 F.3d 758, 774 (2003). This Court established that such is the case where, as here, the plaintiff does not claim he was denied special education and related services to meet his unique educational needs and instead alleges "injuries [that] are non-educational in nature and cannot be remedied through the [IDEA's] administrative process." *F.H.* v. *Memphis City Sch.*, 764 F.3d 638, 644 (2014). Nor, as this Court held, is exhaustion required if it would be "futile or inadequate to protect the plaintiff's rights." *Covington* v. *Knox Cnty. Sch. Sys*., 205 F.3d 912, 917 (2000), amended on denial of reh'g (May 2, 2000).

As this Court observed in the prior appeal of this case, "the IDEA was not at issue" here. *R.K.* v. *Board of Educ. of Scott Cnty*., 494 F. App'x 589, 598 n.9 (2012). The school district nevertheless argued, on remand, that administrative exhaustion under the IDEA was required. (Motion for Summary Judgment, R.84-1, PageID#891-893). The district court correctly rejected that argument. R.K. is not requesting special education to meet unique educational needs; indeed, the school district acknowledged that there is no record of any "unique educational needs." (Affidavit, R.84-5, PageID#1164). Instead, R.K. relies on Section 504, Title II of the ADA, and their regulations calling for students with disabilities to

receive an "equal opportunity" to use or have access to any benefit or service provided to other students, and baring a school district from providing "different or separate aids, benefits, or services" to students "unless * * * necessary." 28 C.F.R. 35.130(b)(1). R.K. claims that these equal treatment provisions and requirements for reasonable modifications allow him to attend the same school he would attend if he did not have diabetes. As the district court correctly stated, "where the child's claims have no nexus to the IDEA, as here, exhaustion is not required. R.K.'s claims are not related to the manner in which his education was provided." (Opinion, R.121, PageID#1398) (citation omitted).

II

THE DISTRICT COURT FAILED TO APPLY THE CORRECT LEGAL STANDARDS IN ANALYZING WHETHER DEFENDANT COMPLIED WITH TITLE II'S AND SECTION 504'S EQUAL TREATMENT REQUIREMENTS

The school district claims that it was required to assign R.K. to a school with a nurse during his kindergarten and first-grade years because he has diabetes and an insulin pump and was unable to operate the pump independently. R.K.'s parents claimed that, because a trained layperson could provide the assistance R.K. needed, he did not require a nurse and could not legally be treated differently than

students without a disability: like them, he should attend his neighborhood school.[2]

A. The Nondiscrimination Provisions Of Title II And Section 504 Require Equal Treatment And Access, Unless Separate Benefits Are "Necessary"

The "main thrust of the ADA and [Rehabilitation Act] is to assure [individuals with disabilities] receive the same benefits" as those without disabilities. *CG* v. *Pennsylvania Dep't of Educ*., 734 F.3d 229, 236 (3d Cir. 2013) (citation and internal quotation marks omitted). Title II, which applies to public entities (including public schools), provides 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

[2] The Department of Education's Section 504 regulations require recipients who operate public elementary and secondary education programs to provide FAPE to every school-aged student with a disability. 34 C.F.R. 104.33. Even if a student with a disability does not require special education, school districts must provide any related aids and services needed by a student with a disability so that the student's individual educational needs are met as adequately as the needs of students without a disability. 34 C.F.R. 104.33. This is often referred to as Section 504 FAPE. Implementation of an IEP developed in accordance with the IDEA is one means of meeting the Section 504 FAPE requirement. 34 C.F.R. 104.33(b)(2). Second, as must be applied in this case, Title II and Section 504 also contain additional broad prohibitions on treating an individual with a disability differently than individuals without disabilities unless such different treatment is necessary. As discussed *infra*, the court erred in not making this analysis.

be subjected to discrimination by any such entity." 42 U.S.C. 12132.[3] Section 504 imposes similar requirements: "No otherwise qualified individual with a disability * * * shall, solely by reason of his or her disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

Title II regulations require that people with disabilities be provided access to local government programs that is equal to the access people without disabilities have. An entity may not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. 35.130(b)(1)(ii). Nor may an entity provide "different or separate" benefits to people with disabilities "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) (emphasis added); see also 28 C.F.R. 35.130(b)(1)(vii) (stating an entity may not "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"). One of the major purposes of the ADA was to eliminate the

[3] The protections of Title II can be greater, but not less, than those provided by the Section 504 regulations. 28 C.F.R. 35.103(a); see also 42 U.S.C. 12134(b).

unnecessary segregation of individuals with disabilities. See 42 U.S.C. 12101(a)(5); 135 Cong. Rec. 19,811 (1989).

Section 504 imposes similar requirements: "No otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a); see also *Sandison* v. *Michigan High Sch. Athletic Ass'n, Inc*., 64 F.3d 1026, 1035 (6th Cir. 1995) (explaining evaluation of ADA claim "closely tracks" "section 504 analysis"). A covered entity 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)(1)(iv) (emphasis added). The Department of Education has stated that, although different or separate services may sometimes be justified, "the provision of *unnecessarily* separate or different services is discriminatory." 34 C.F.R. Pt. 104, App. A, Subpt. A, No. 6 at 373 (emphasis added).

In this case, summary judgment was incorrectly entered under both statutes, because R.K. was denied access that was "equal" to the access "afforded others" without disabilities. 28 C.F.R. 35.130(b)(1)(ii). The school district allows students without disabilities to attend neighborhood schools together with children who live

nearby, and attendance at a neighborhood school therefore constitutes a "benefit" that was denied to R.K. The court should have determined whether provision of "different or separate aids, benefits, or services" was "necessary." 28 C.F.R. 35.130(b)(1)(iv); see also 28 C.F.R. 35.130(b)(1)(vii). Unless it is *necessary* to exclude R.K., it must permit him to attend as well. Cf. *Jones* v. *City of Monroe*, 341 F.3d 474, 479 (6th Cir. 2003).

Here, whether the provision to R.K. of separate benefits was "necessary" turns on whether he *required* the services of a nurse. If a trained layperson could have properly attended to R.K.'s needs, R.K.'s exclusion from the neighborhood school was unnecessary. Because the district court did not apply the nondiscrimination and equal treatment requirements of Title II and Section 504, it considered only the educational services provided to R.K. by the school district, and never made the critical and dispositive factual determination of whether a nurse was necessary.

One of the major goals of the ADA is to prevent people with disabilities from being removed from their local communities, and from the community activities that people without disabilities enjoy with friends and neighbors. Unnecessary and stigmatizing exclusion of people with disabilities from the activities that people without disabilities engage in is among the wrongs the ADA was enacted to address. In the education context, one goal of the ADA is to permit

children with disabilities "to utilize the same * * * schools * * * they would normally utilize, in their communities, if they were not disabled." 135 Cong. Rec. 19,811 (1989) (statement of Sen. Dodd, the ADA's co-sponsor).

The convenience of "congregat[ing] services for children with disabilities in a centralized location" will often be "outweighed by the benefits" of educating children "in their neighborhoods with their friends and family around." 135 Cong. Rec. at 19,811. In enacting the ADA, Congress recognized that "overprotective rules and policies" had resulted in unnecessary "segregation" of individuals with disabilities. 42 U.S.C. 12101(a)(5). If, as the district court held here, a school district need only provide a public education somewhere in the system for a student with a disability, a school district could routinely remove children from their assigned school, away from friends and family, even when it is not necessary to exclude these students from neighborhood schools or to provide congregate services. This runs contrary to the integration goal that lies at the heart of the ADA. See, *e.g.*, 28 C.F.R. 35.130(b)(1)(ii), (b)(1)(iv), and (b)(2); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 597 (1999). In R.K.'s case, his parents felt he was "being singled out" by the school's treatment, and they worried that it would be harder for him to "fit in." (Affidavit, R.12-2, PageID#59; Declaration, R.124-2, PageID#1441).

The district court's mistake in this case arose, at least in part, from its conflating requirements for a FAPE with requirements for equal treatment and nondiscrimination. The IDEA, and the Department of Education's Section 504 FAPE regulations, both require that protected students with disabilities be given a FAPE, albeit under different legal standards. However, Section 504 also includes equal treatment requirements similar to those of the ADA. The equal treatment provisions of Section 504 and the ADA have distinctly different goals from FAPE. The "IDEA sets only a floor of access to education for children" with disabilities that impede learning. *K.M.* v. *Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013), cert. denied, 134 S. Ct. 1493, and 134 S. Ct. 1494 (2014). Title II, in contrast, requires a school "to take steps towards making existing services not just accessible, but *equally* accessible" to students with disabilities. *Ibid*. Similarly, Section 504's nondiscrimination and equal treatment claims are "not precluded by a determination that the student has been provided" a FAPE. *Id*. at 1099.

For example, in *Tustin*, a child with severe hearing loss received assistance under her IEP that satisfied the IDEA standard of providing a meaningful educational benefit. 725 F.3d at 1098. The parents also sued under Title II, arguing that the regulatory standards of Title II requiring equal access to the school's educational program might mandate different assistance. The district

court rejected the parents' Title II argument by holding that compliance with the IDEA automatically satisfied any Title II obligation.

The Ninth Circuit reversed, holding that equal treatment requirements of Title II, in some instances, may be additional to or different from the assistance provided under the IDEA's FAPE requirements. *Tustin*, 725 F.3d at 1100. See also *Ellenberg* v. *New Mexico Military Inst.*, 478 F.3d 1262, 1281-1282 (10th Cir. 2007) ("[O]ur precedent does not hold that a party's discrimination claims under the [Rehabilitation Act] and the ADA must automatically be dismissed if an IDEA claim fails.").

In both of its opinions in this case, the district court erroneously concluded that if the school district provided R.K. with an education equal to that provided students without disabilities, albeit at a separate school, it has, as a matter of law, satisfied its obligations under Section 504 and the ADA. In its first opinion, the district court conflated the equal treatment and nondiscrimination requirements of Title II and Section 504 with the IDEA obligation to provide a FAPE. (See Opinion, R.39, PageID#339-340) (citing IDEA cases and noting that "IDEA regulations indicate [a] preference not [a] mandate for [the] neighborhood school"). In its second opinion, the district court acknowledged that IDEA precedent was inapplicable, but it nevertheless cited the IDEA cases and cases applying Section 504's FAPE requirements, and did not consider the equal

treatment and nondiscrimination requirements of Title II and Section 504. (Opinion, R.121, PageID#1402-1404).[4] The FAPE cases shed no light on the equal treatment requirements of Section 504 and the ADA. By focusing solely on the fact that Anne Mason Elementary provided the same curriculum as R.K.'s neighborhood school, the court failed to recognize that it must assess whether R.K.'s exclusion from his neighborhood school and concomitant denial of the benefits he would have received by attending there was *necessary* given the circumstances.

B. Access To The Neighborhood School Is A Benefit The District Denied R.K.

The district court also committed error in presuming that it was R.K.'s burden to show that public schools are not fungible and by assuming that attending a neighborhood school could not be a benefit protected by Title II and other federal civil rights laws. Here, R.K. claims he is being denied what he considers one of the significant "benefits" or "services" of the educational program the school

[4] For example, the district court cited *Urban* v. *Jefferson County School District R-1*, 89 F.3d 720, 728 (10th Cir. 1996), which involved a child's claim that IDEA services, in his case extensive job training programs and special physical education classes, should be moved to his neighborhood school. (Opinion, R.121, PageID#1403); see *Urban*, 89 F.3d at 722. The district court also cited *Barnett* v. *Fairfax County School Board*, 927 F.2d 146, 154-155 (4th Cir.), cert. denied, 502 U.S. 859 (1991), which held that the school district was not required to provide a cued speech program, part of the student's special education program, at the neighborhood school when it was already offered at a nearby school. The court held that duplicating the cued speech program at the neighborhood school would require a "substantial modification" of the district's educational program. *Ibid*.

district provides all of its students – the opportunity to attend his neighborhood school. 34 C.F.R. 104.4(b)(1)(ii), (iv), and (vii). Once a record establishes that the district's policy or practice is to assign children to their neighborhood school, it cannot apply that rule in a discriminatory manner.

Although a school district may offer virtually the same curriculum in all its schools, it still matters to a child and to the child's family which school a child attends. Attending a neighborhood school can "minimize the safety hazards to children in traveling to school, reduce the cost of transporting students," and "increase communication between the family and the school." Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 Cornell L. Rev. 1, 35 (1992). Moreover, in a neighborhood school environment, it may be that the "cost of communication and cooperation among the parents of school children is reduced" and information about student, teacher, and administrator behavior can be more easily shared. Peter F. Colwell and Karl L. Guntermann, *The Value Of Neighborhood Schools*, 3 Economics of Education Review 177-182 (1984).

R.K. valued the chance to attend his neighborhood school with friends, rather than being singled out for a different school assignment. His parents also wanted him to attend with neighbors, bought their house in part because of the school boundaries, and felt Eastern Elementary was a better school. (Affidavit,

R.83-1, PageID#739; Opinion, R.121, PageID#1386). Compared to others in the neighborhood who got to attend the neighborhood school, R.K. was deprived of a "benefit[]" given to students without disabilities, 42 U.S.C. 12132, and his "opportunity to participate in or benefit from the aid, benefit, or service" was "not equal to that afforded others." 28 C.F.R. 35.130(b)(1)(ii).

C. The Court Should Have Considered Whether Reasonable Modifications Would Have Permitted R.K. To Attend His Neighborhood School

Title II regulations also require a public entity to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). In the education context, a student with a disability may prove discrimination under Title II by showing that the school "could have reasonably accommodated his disability, but refused to do so." *McPherson* v. *Michigan High Sch. Athletic Ass'n, Inc*., 119 F.3d 453, 460 (6th Cir. 1997) (en banc).

In this case, asking and training a volunteer at Eastern Elementary to help R.K. monitor his pump and calculate his carbohydrate intake easily could be a reasonable modification to the district's policies, practices, or procedures. The modification would allow R.K. to attend his neighborhood school, and may be fully consistent with the "reasonable costs and * * * modest, affirmative steps" a

local government must undertake under the ADA. *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003).[5] Therefore, unless it is necessary to exclude R.K., the school district must permit him to attend that neighborhood school as well.

According to most diabetes experts, lay people can be trained without great difficulty to safely and effectively give insulin injections to students and to assist them with monitoring and operating insulin pumps, checking glucose levels, and calculating carbohydrate intake. See, *e.g.*, National Diabetes Education Program, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* 3, 16-17, 143 (2010), available at http://ndep.nih.gov/publications/PublicationDetail.aspx?PubId=97#main.[6] See also *AP* v. *Anoka-Hennepin Indep. Sch. Dist. No. 11*,

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[5] It would be inappropriate to define the school district's service or benefit as merely "education" when it offers the additional advantage of neighborhood schools. "Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is collapsed into one's definition of what is the relevant benefit." *Alexander* v. *Choate*, 469 U.S. 287, 301 n.21 (1985) (citation and internal quotation marks omitted). In any event, even if "education" were the benefit at issue, neighborhood schooling would plainly be a "right, privilege, advantage, or opportunity enjoyed by others" that the school district may not deny to a student with a disability by refusing to provide reasonable modifications. 28 C.F.R. 35.130(b)(1)(vii).

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

538 F. Supp. 2d 1125, 1142 (D. Minn. 2008) (finding plaintiffs were likely to establish (a) that employees at a day care can be trained and would be willing to operate a child's glucose meter and insulin pump and (b) that these would be reasonable modifications).[7]

Because the district court did not recognize Title II's requirement that R.K. not be unnecessarily singled out for exclusion from his neighborhood school, it never assessed whether his requested modifications were reasonable. The question of a reasonable modification "is a highly fact-specific inquiry." *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 542 (6th Cir. 2014) (citation and internal quotation marks omitted). In this case, asking for a volunteer employee at Eastern Elementary to help R.K. monitor his pump and help R.K. calculate his carbohydrate intake easily could be a reasonable modification to the "policies, practices, or procedures" (such as supervision, protection, and meals) that the district offers its students, or could be considered a reasonable modification to the district's nursing policy. Either construct would allow R.K. to attend his neighborhood school. If the services of a nurse are not necessary, the court on

[7] Accord American Association of Diabetes Educators Position Statement on the Management of Children with Diabetes in the School Setting (Aug. 2012), http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/aade-ps-diabetes-school-care.pdf; Appellant's Opening Br. at 9, *American Nurses Ass'n* v. *Torlakson*, 304 P.3d 1038 (Cal. 2013) (No. S184583).

remand might determine that permitting R.K. to attend his neighborhood school would be a reasonable modification required under Title II and Section 504.

CONCLUSION

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

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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 6332 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 10.0) and is virus-free.

s/April J. Anderson
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Date: December 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, 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	DOCUMENT DESCRIPTION	PAGE ID# RANGE
1	Complaint	3-7
12-2	Affidavit of J.K.	59
14-1	Defendants' Memorandum of Law in Response and Opposition to Motion for Preliminary Injunction – Attachment 1 – Diabetes Medicine Management Plan	94, 96
26-2	Defendants' Motion for Summary Judgment – Attachment 1 – Affidavit of James A. (Tony) Harrison	214
32-1	Affidavit of J.K.	253-254, 268-269
37	Defendants' Pretrial Memorandum	321
39	Opinion filed Dec. 15, 2010	326-328, 330-334, 338-340
41	Notice of Appeal	348-349
59	Amended Complaint	450-462
83	Interrogatories	736
83-1	Exhibit B – Affidavit of Joel Knight	739, 741-744, 747-758
83-2	Exhibit C – Expert Report of Dr. Leslie Scott	774-777
83-3	Exhibit D – Deposition of Tony Harrison dated Aug. 27, 2013	804-805, 817-818, 824, 834, 841, 852
84-1	Motion for Summary Judgment	891-893
84-5	Affidavit of Patricia Putty	1164
84-6	Exhibit A to Affidavit of Patricia Putty	1166
84-15	Defendant's Motion for Summary Judgment – Exhibit J – Section 504 Individual Accommodation Plan	1196, 1199
90	Statement of Interest	1040-1080
121	Opinion filed Aug. 28, 2014	1382-1383, 1386-1387, 1389, 1391,1397-1398, 1402-1406
124-2	Declaration of Joel Knight	1441