

NOs. 11-5070 and 11-5700

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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

PLAINTIFF-APPELLANT

v.

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

DEFENDANTS-APPELLEES

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

***AMICUS CURIAE* BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION AND
THE KENTUCKY SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF APPELLEES**

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST OF
NATIONAL SCHOOL BOARDS ASSOCIATION**

Pursuant to FRAP 25.1, the Amicus Curiae, the National School Boards Association, make the following disclosures:

- 1) Are said parties a subsidiary or affiliate of a publically owned corporation?**

No.

- 2) Is there a publically owned corporation, not a party to the appeal, that has a financial interest in the outcome?**

No.

s/ Guy R. Colson
Signature of Counsel

October 14, 2011
Date

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AND FINANCIAL INTEREST OF
KENTUCKY SCHOOL BOARDS ASSOCIATION**

Pursuant to FRAP 25.1, the Amicus Curiae, the Kentucky School Boards Association, make the following disclosures:

- 1) Are said parties a subsidiary or affiliate of a publically owned corporation?**

No.

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No.

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STATEMENT OF IDENTITY AND INTERESTS OF THE AMICI CURIAE

1) The National School Boards Association

The National School Boards Association (“NSBA”), founded in 1940, is a not-for-profit organization representing state associations of school boards and their over 14,500 member districts across the United States which serve the nation’s 50 million public school students.

2) The Kentucky School Boards Association

The Kentucky School Boards Association (“KSBA”) is the largest organization of elected officials in the Commonwealth of Kentucky, representing nearly 900 members of local boards of education and their district superintendents. Established in April 1936, KSBA is a voluntary membership organization with 100 percent participation by the state’s 174 local boards of education. Throughout its 75-year history, KSBA has earned the status as one of the advocacy, consultation, and professional development organizations working on behalf of quality public education for all students. KSBA is managed by a professional staff overseen by a statewide board of directors consisting of 27 local school board members. KSBA supports the vital responsibility of the local school districts to maintain authority for assigning students to specific schools and the efficient management of public resources.

SOURCE OF AUTHORITY TO FILE

Both parties have consented to the filing of this brief.

FRAP 29(c)(5) DISCLOSURES

- (A) Neither party's counsel authored this brief in whole or in part.
- (B) Neither party's counsel contributed money intended to fund preparing or submitting this brief.
- (C) No person or entity other than the amici curiae contributed money intended to fund preparing or submitting this brief.

ARGUMENT

The instant case concerns provisions of Section 504 of the Rehabilitation Act of 1973 (“Section 504”), codified at 29 U.S.C. § 794, et. seq. and Title II of the Americans with Disabilities Amendments Act of 2008 (“ADA”), codified at 42 U.S.C. § 12132, et. seq.. The Appellant (the “Student”) argues the Board of Education of Scott Count and Superintendent Patricia Putty (the “District and Superintendent”) discriminated against him because of his disability in violation of his federal rights under Section 504 and the ADA. *See* Appellant’s Brief at 12.

To support his claims, the Student references 29 U.S.C. § 794 and 42 U.S.C. § 12132, the most general provisions prohibiting discrimination on the basis of disability in each act. The crux of the Student’s argument is that the District violated his rights under these general provisions; however, the Student and the United States, the author of an amicus curiae brief in his support, fail to mention a plethora of regulations promulgated under these statutes and the Individuals with Disabilities Education Act (“IDEA”), codified at 20 U.S.C. § 1400 et. seq.,¹ that are applicable to his situation and support the actions of the District and

¹ Since Section 504 and IDEA requirements in regard to the issues in the instant case are substantially similar, this brief will reference case law, agency interpretations, and regulations interpreting both statutes. *See Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir. 1996). Moreover, the Department of Education has revised its regulations pertaining to IDEA as recently as 2006, and did not alter provisions relating to the issues in this case.

Superintendent. Moreover, as the United States admits in its brief, these specific provisions are “consistent with the [general] non-discrimination requirements under Section 504.” United States’ Brief at 9.

Specifically, Section 504 requires students with disabilities be educated in the “least restrictive environment” (“LRE”). 34 C.F.R. § 104.34(a) (2011). LRE requires public school districts to ensure all children with disabilities are educated alongside nondisabled children to the maximum extent possible. 34 C.F.R. § 300.550(b)(1)-(2) (2011).² The Student does not allege he has been removed from education with his non-disabled peers; his sole allegation is that he was denied assignment to his neighborhood school.

To understand the legal issues in the instant case, it is vital to distinguish between educational placement and the physical location where the disability-related service will be provided. Educational placement refers to how often a student will be removed from the regular educational setting. *See* Letter from Patricia J. Guard, Acting Director, Office of Special Education Programs³ to Trigg (November 30, 2007), *published at* 108 LRP 16391 and 50 IDELR 48 [hereinafter

² *See supra* note 1, describing the similarity between the requirements of Section 504 and the IDEA.

³ The Office of Special Education Programs (“OSEP”) is a division of the United States Department of Education. *See* United States Department of Education, *Office of Special Education and Rehabilitative Services*, <http://www2.ed.gov/about/offices/list/osers/osep/policy.html> (last modified Aug. 31, 2011).

“Letter to Trigg”].⁴ The child's individualized education program (IEP) or Section 504 plan, which sets forth the individualized and appropriate program of special education and related services to be provided to the child, constitute the basis for the IEP team or Section 504 team's⁵ placement decision. Regulations promulgated under Section 504 and the IDEA discuss LRE as relating to removal of a student from nondisabled peers. This is a “placement decision.” The physical location where those services will be provided is **not** part of the placement decision and is at the discretion of the school district. *See* Letter to Trigg (November 30, 2007), *published at* 108 LRP 16391.

As this brief will discuss in detail below, the United States Department of Education has long advised public school districts that if a child's IEP requires a service not provided at the school he would attend if he did not require disability-related services (the “neighborhood school”), the school district can place the child in the school building where the district has determined to locate that service to

⁴ The United States Department of Education, Office for Civil Rights, issues private letter opinions to school districts and parents after administrative civil rights complaints are filed. These opinions are collected and published by private companies and made available to school districts and attorneys. These letters reflect direct statements made by the Department and are often relied upon by school officials in their decision-making. All such letters cited in this brief are available from LRP Publications and on file with counsel for NSBA and KSBA and can be provided to the Court upon request.

⁵ An IEP or Section 504 team is a group of individuals who are knowledgeable about the specific child's needs, including district employees and the child's parents.

best serve its population of students. *See* Letter to Trigg (November 30, 2007), *published at* 108 LRP 16391 and 50 IDELR 48. (“[D]istricts are ‘strongly encouraged’ to place students with disabilities in the schools and classrooms they would attend if they did not have disabilities. However, if more than one school offers a service that comports with a child's IEP, the district has the discretion to assign the child to any of those locations.”). It has long been recognized that the intent of the IDEA and Section 504 is to allow school districts to retain the ability to determine in which buildings to locate specialized services serve its student population in the most effective and efficient manner, while protecting already strained fiscal and human public resources.

1) THE DISTRICT AND SUPERINTENDENT SHOULD NOT BE LIABLE TO THE STUDENT FOR THEIR RELIANCE ON ESTABLISHED LAW.

a) School districts are entitled to rely on longstanding interpretations of applicable law.

i) The United States Department of Education has promulgated regulations contemplating special education students might receive services at schools other than the ones they would attend if they did not require disability-related services.

Regulations interpreting both Section 504 and the IDEA are promulgated by the United States Department of Education (the “Department of Education”). In particular, two regulations interpreting Section 504 contemplate that a school district might not serve a student who qualifies for Section 504 in his neighborhood

school. First, 34 C.F.R. § 104.22 specifically allows “reassignment to...accessible buildings” as a means of achieving program accessibility. 34 C.F.R. § 104.22(b) (2011). Second, 34 C.F.R. 104.33(c)(2) expressly provides that disabled students who are provided services under Section 504 in a location other than on a recipient’s premises must be transported to the other location. 34 C.F.R. § 104.33(c)(2) (2011). Given the language of these regulations, it is clear the law does not require districts to provide disability-related services at a disabled student’s neighborhood school to satisfy the requirements of Section 504.

Furthermore, the Department of Education has provided even more specific regulations as to whether a child must be provided services at his neighborhood school in its interpretations of IDEA. The Department of Education’s interpretations of IDEA make it obvious districts are not required to honor a parent’s request for his child to attend his neighborhood school.

At 34 C.F.R. § 300.116, the Department of Education explicitly states that districts may place disabled students at schools other than their neighborhood schools. This regulation states, in pertinent part:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –

...

(a) The child’s placement --

...

(3) Is as close as possible to the child's home;

(c) **Unless the IEP of a child with a disability requires some other arrangement**, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

34 C.F.R. § 300.116 (2011) (emphasis added).

Moreover, this section's regulatory history reflects that parents of students with disabilities are not entitled to dictate which school within the district their child will attend. A proposed version of 34 C.F.R. § 300.116(b)(3) and (c) included the qualifier "unless the parent agrees otherwise." IDEA Regulations concerning Placements, 71 Fed. Reg. 156,46587, 156,46588 (August 14, 2006) (later codified at 34 C.F.R. § 300.116).

During revisions of this section, it came to the attention of the Department of Education that readers were misconstruing this part of the regulation as granting parents the absolute power to demand their children be provided services at their neighborhood schools. The regulatory history of 34 C.F.R. § 300.116 states specifically:

Comment: We received a number of comments regarding the phrase, 'unless the parent agrees otherwise' in proposed § 300.116(b)(3) and (c). As proposed, § 300.116(b)(3) requires the child's placement to be as close as possible to the child's home, 'unless the parent agrees

otherwise,’ and § 300.116(c) requires that, unless the child’s IEP requires some other arrangement, the child must be educated in the school that he or she would attend if nondisabled, ‘unless the parent agrees otherwise.’

...

Discussion: The phrase “‘unless the parent agrees otherwise’” in proposed § 300.116(b)(3) and (c) was added to clarify that a parent may send the child to a charter, magnet, or other specialized school without violating the LRE mandate. A parent has always had this option; a parent who chooses this option for the child does not violate the LRE mandate **as long as the child is educated with his or her peers without disabilities to the maximum extent appropriate. However, we agree that this phrase is unnecessary, confusing, and may be misunderstood to mean that parents have a right to veto the placement decision made by the group of individuals in § 300.116(a)(1). We will, therefore, remove the phrase.**

IDEA Regulations concerning Placements, 71 Fed. Reg. 156,46587, 156,46588 (August 14, 2006) (to be codified at 34 C.F.R. § 300.116) (emphasis added).

The language included in the commentary unequivocally shows parental preferences are not determinative of any disabled child’s school assignment.

Furthermore, courts have often held compliance with the substantive requirements of the IDEA is substantive compliance with Section 504. *See Urban v. Jefferson County School District*, 89 F.3d 720, 728 (10th Cir. 1996). In *Urban v. Jefferson County School District*, the Tenth Circuit specifically discussed the issue of neighborhood school assignment. In *Urban*, the Tenth Circuit held, “[I]f a disabled child is not entitled to a neighborhood [assignment] under the IDEA, he is not entitled to such a[n] [assignment] under section 504.” *Urban*, 89 F.3d at 728.

Given the language in *Urban* and the commentary to 34 C.F.R. § 300.116, *supra*, it is apparent the Student's parents are not entitled to choose the school the Student will attend, and the Student is not entitled to attend his neighborhood school.

Additionally, the Department of Education Office for Civil Rights ("OCR") has issued decision letters interpreting Section 504 pertaining to the instant case on numerous occasions. OCR has repeatedly issued opinions stating the provision of a free appropriate public education ("FAPE") is the obligation of the school district, not of an individual school. In particular, several recent OCR opinions plainly state student 504 plans may be implemented in a school other than the school nearest to the student's home if the 504 team determines the student needs services not available in the building nearest to the child's home.

In a letter resolving a complaint filed against the Anne Arundel County Public Schools, OCR stated specifically that centralizing students who need the same disability-related services is permissible. Letter from Office for Civil Rights, U.S. Department of Education, to Dr. Carol S. Parham, Superintendent, Anne Arundel County Public Schools (September 15, 2000), *published at* 34 LRP 119 and 34 IDELR 125 [hereinafter "Letter to Anne Arundel"]. In Letter to Anne Arundel, the parents of a hearing impaired student were dissatisfied with the school

district's choice to assign their child to a school other than her neighborhood school. *Id.* OCR held this was permissible and notified the student's parents that there was "insufficient [evidence] to support a finding that the District is not in compliance with either Section 504 or Title II of the ADA." *Id.*

Similar to Letter to Anne Arundel, in the instant case, students who need the services of a school nurse are centralized at only a few of the elementary schools in the District. Just like the student in Letter to Anne Arundel, the District requested that the Student attend the centralized school so that he could utilize one of these nurses. Thus, under the guidance of OCR, as stated in Letter to Anne Arundel, the District did not violate Section 504 or Title II of the ADA by requesting the Student attend a school other than his neighborhood school.

Further, in Letter to Trigg, the Department of Education was asked, "Is the district able to comply with § 300.522(b)(3) if they (sic.) have mandated the child travel past two or more schools to obtain the same services because of staffing availability or would they be required to remedy the staffing at one of the institutions in proximity?"

In response, acting Director Patricia J. Guard wrote:

Historically, we have referred to 'placement' as points along the continuum of placement options available for a child with a disability and 'location' as the physical surrounding, such as the classroom, in

which a child with a disability receives special education and related services.

Letter to Trigg (November 30, 2007), *published at* 108 LRP 16391 and 50 IDELR 48.

Further, Guard noted districts are ‘strongly encouraged’ to place students with disabilities in the schools and classrooms they would attend if they did not have disabilities; **however, if more than one school offers a program that comports with a child's IEP, the district has the discretion to assign the child to any of those locations.** *Id.*

Guard went on to say: (1) with regard to the questions regarding staffing of programs and the assignment of a child to a school that is not closest to the child's home, the Department of Education has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location; (2) the IDEA does not require that each school building in a single public school district be able to provide all the special education and related services for all types and severities of disabilities; (3) each district only has an obligation to make available a full continuum of alternative program options for its children with disabilities to be educated with nondisabled peers; (4) the Department Education cannot speculate as to the appropriateness of a particular program, based on the proximity

of that program to the child's home; and (5) if a child's IEP requires services that are not available at the child's neighborhood school, the child may be placed in another school that can offer the services that are included in the IEP. *Id.*

ii) The United States Department of Justice regulations interpreting the ADA contemplate students with disabilities attending schools other than their neighborhood schools.

Under the Americans with Disabilities Amendments Act of 2008 (the "ADA"), school districts must make "reasonable modifications" for students to access district programs. 28 C.F.R. § 35.130(b)(7) (2011). These modifications, however, do not require students to be educated at their neighborhood schools.

If a district complies with Section 504 for student services, it is in compliance with the ADA for student services. In *Urban*, the Tenth Circuit noted that Title II of the ADA "adopts the substantive standards of section 504." *Urban*, 89 F.3d at 727. Furthermore, 34 C.F.R. § 35.103(a), states specifically:

Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to that title.

34 C.F.R. § 35.103(a) (2011).

Thus, compliance with the ADA actually requires less program modification than compliance with Section 504. As is discussed at length above, the District and

Superintendent did everything necessary to comply with Section 504 and the regulations promulgated thereunder. By complying with Section 504, the District and Superintendent, have by definition complied with the ADA.

iii) Applicable Kentucky law requires insulin injections to be given by and carbohydrate counting to be performed by a licensed nurse.

The Student, and amici curiae in support, argue the District and Superintendent's provision of health services in compliance with K.R.S. §§ 156.501 and 156.502 and 704 K.A.R. 20:020 is unnecessary. This, however, is incorrect. Kentucky law governing the provision of health services by the District and Superintendent is applicable to the instant case. These laws are not preempted by the federal laws cited by the Student; the District and Superintendent were required to provide health-related services to the Student pursuant to them. These laws mandate that all insulin injections and carbohydrate counting done in public schools be performed by a licensed nurse.

The United States argues *Hillsborough County v. Automated Medical Laboratories, Inc.* stands for the proposition that 34 C.F.R. § 104.10(a) overrides the District and Superintendent's obligation to abide by these state law mandates. However, the regulatory commentary to 34 C.F.R. § 104.10(a), opinions of the Department of Education, and *Hillsborough* itself belie this assertion. *See* 34

C.F.R. § 104.10(a) (2011); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985).

First, the regulatory commentary to 34 C.F.R. § 104.10(a) states “The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.” Section 504 Regulations concerning Inconsistent State Laws, 55 Fed. Reg. 52141 (December 19, 1990) (later codified at 34 C.F.R. § 104 App. A). The Kentucky laws applicable to the instant case do not “differentiate on the basis of handicap.” The requirements of the cited Kentucky laws and regulations are not conditioned upon a student’s identification as entitled to services under Section 504 or the IDEA. Since these statutes and regulations are applicable even to students without disabilities, 34 C.F.R. § 104.10(a) is by its own language not applicable. Thus, 34 C.F.R. § 104.10(a) does not serve to preempt the Kentucky laws at issue.

Second, In Letter to Bosso, the Office of Special Education and Rehabilitative Services made it clear federal law regarding students with disabilities is not intended to preempt state law in regard to qualifications of service providers. Letter from Alexa Posny, Assistant Secretary, Office of Special Education and Rehabilitative Services to Bosso (August 23, 2010), *published at*

111 LRP 13109 and 56 IDELR 236. In that letter, the Office of Special Education and Rehabilitative Services states:

The IDEA regulations, at 34 CFR § 300.156, specify that the State educational agency is responsible for establishing and maintaining qualifications to ensure that personnel necessary to make FAPE available are appropriately and adequately prepared and trained consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing related services.

Id.

Third, although *Hillsborough* held that in appropriate cases, federal regulations may preempt conflicting state law, the Court emphasized the proponent of preemption must overcome “the presumption that state or local regulation of matters related to health and safety [are] not invalidated under the Supremacy Clause.” *Hillsborough*, 471 U.S. at 715; *cf. King v. Ford Motor Co.*, 209 F.3d 886, 891 (6th Cir. 2008) (holding historic state police powers are not preempted unless clearly intended by Congress). In *Hillsborough*, the county adopted ordinances and regulations regarding blood plasma donor testing that were more strenuous than similar measures in federal regulations. *Hillsborough*, 471 U.S. at 710. A blood plasma center operator challenged the county ordinances and regulations, arguing they were preempted by the Supremacy Clause of the United States Constitution (Article VI, clause 2). *Id.* at 711. The Supreme Court unanimously

held the county's ordinances and regulations were not preempted since the federal regulations at issue did not show Congressional intent to preempt the entire field of regulation and there was no conflict between the county's laws and federal law. *Id.* at 716-723.

The state requirements at issue in the instant case are precisely the sort of health and safety standards which may not be cast aside absent a clear expression of preemptive intent. The case against preemption is much stronger in the instant case than it was in *Hillsborough*. The Student and amici curiae in support of his position have failed to call any federal laws concerning the administration of medication in the school setting to the Court's attention. Therefore, the District and Superintendent were required to comply with state law.

Each of these sources unequivocally point to a determination that Kentucky law governing the District and Superintendent's provision of health services to the Student is not preempted by the federal laws on which the Student's complaint rests. Thus, the District and Superintendent were bound to follow applicable Kentucky law mandating that only licensed nurses administer injectable insulin and assist students with carbohydrate counting in the school setting.

Furthermore, all applicable Kentucky law required the Student's insulin to be administered by and assistance with his carbohydrate counting to be performed

by a licensed nurse. The District and Superintendent were not free to ignore these mandates, as doing so could have subjected the District to untold financial liability.

Health services provided to students by school districts must comply with K.R.S. § 156.502. Ky. Rev. Stat. Ann. § 156.502 (LexisNexis 2010 Supp). This statute provides public school districts are responsible for providing school related health services to students using licensed physicians, advanced practice nurses, registered nurses, licensed practical nurses, or school employees who have been “delegated the responsibility to perform the health service by a physician, advanced practice registered nurse, or registered nurse.” *Id.* Non-licensed school employees performing health services under KRS § 156.502(2)(c) must be trained to perform the services and must agree to perform said services. *Id.* Additionally, the licensed professional who delegates the service must agree in writing that the non-licensed individual is competent to perform the service. *Id.*

Moreover, decisions rendered by the Kentucky Board of Nursing (the “KBN”) stating insulin must be administered by and that carbohydrate counting must be performed by licensed nurses are also applicable to public school districts.⁶ In K.R.S. § 314.021 the General Assembly declared “the practice of

⁶ In its interpretations of its regulations, the KBN states the administration of medication by any injectable route cannot be delegated to non-licensed personnel except in cases of life threatening emergencies. R. 26-4, KBN Advisory Opinion Statement #15. Furthermore, the KBN has

nursing should be regulated and controlled as provided herein and by regulations of the [KBN].” Ky. Rev. Stat. Ann. § 314.021 (LexisNexis 2009); *see also* Ky. Rev. Stat. § 314.011 (LexisNexis 2009) (defining “board” as used in K.R.S. § 314.021 as the KBN). Furthermore, K.R.S. § 156.501(1)(a)(1) mandates in-school delegation of nursing services be consistent with administrative regulations promulgated by the KBN. Ky. Rev. Stat. Ann. § 156.501(1)(a)(1) (LexisNexis 2009).

In addition to K.R.S. § 156.502 and § 314.021, last year the Kentucky Department of Education⁷ adopted a new regulation, consistent with its previous guidance to public school districts, at 704 K.A.R. § 4:020(Section 4)(3)(g), which states:

(3) A local board of education shall establish and maintain:

(g) Beginning with the 2010-2011 school year, proof that all unlicensed school personnel who have accepted delegation to perform medication administration in school have completed a training course provided by the Kentucky Department of

issued a separate opinion concerning counting carbohydrates and operating insulin pumps. R. 26-5, Teaching and Delegating Carbohydrate Counts and the Administration of Insulin via an External Pump in a School Setting. This opinion states that it is not appropriate for nurses to teach or delegate counting carbohydrates or operating insulin pumps to non-licensed school employees. *Id.*

⁷ The Kentucky Department of Education has the authority to regulate Kentucky’s public school districts. *See* K.R.S. § 156.070(1) (“The Kentucky Board of Education shall have the management and control of the common schools and all programs operated in these schools.”). Ky. Rev. Stat. Ann. § 156.070(1) (LexisNexis 2009).

Education. This course shall be developed in consultation with the Kentucky Board of Nursing to ensure compliance with 201 KAR 20:400.

704 Ky. Admin. Regs. § 4:020(4)(g) (2011).

The training course developed pursuant to this regulation states that one of the goals of the course is for “the non-licensed school employee to demonstrate competency in administration of **emergency** medications for students with diabetes.” Kentucky Department of Education, *Medication Administration Training Manual for Non-Licensed School Personnel* 8 (March 2011 rev.), available at [http://www.etown.k12.ky.us/pdf/](http://www.etown.k12.ky.us/pdf/MEDICATIONADMINTRNGMANUAL_KDESG031811_KE_2_.pdf)

MEDICATIONADMINTRNGMANUAL_KDESG031811_KE_2_.pdf (emphasis added).

Under these statutes and KBN opinions, the District and Superintendent reasonably believed that if they delegated this responsibility to non-licensed personnel they could be subject to liability under K.R.S. §§ 156.501 and 156.502, particularly in light of the Kentucky legal authority cited above.

iv) Several federal circuits have considered whether a student requiring disability-related services is entitled to attend his neighborhood school and have consistently held students do not have any such right.

The Fifth Circuit rejected the argument that a student has a federal right to attend his neighborhood school in *Murray ex rel. Murray v. Montrose County*

School District RE-1J. Murray ex rel. Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921 (5th Cir. 1995). The Fifth Circuit held the LRE provision of IDEA does not address the removal of students from neighborhood schools, and thus does not require districts to educate students with disabilities in their neighborhood schools if more appropriate facilities are found elsewhere in the district. *Id.* at 928-929.

Similarly, in *White ex rel. White v. Ascension Parish School Board* and *Flour Bluff Independent School District v. Katherine M. ex rel. Lesa T.*, the Fifth Circuit held it is permissible for districts to provide disability-related services and programs at a centralized location within the district. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380-381 (5th Cir. 2003). *Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T.*, 91 F.3d 689, 693-94 (5th Cir. 1996).

In *Flour Bluff*, the Fifth Circuit stated directly:

State agencies are afforded much discretion in determining which school a student is to attend...The regulations, not the statute, provide only that the child be educated ‘as close as possible to the child’s home.’ However, this is merely one of many factors for the district to take into account in determining the location where the student will get services. **It must be emphasized that the proximity preference or factor is not a presumption that a disabled student [will] attend his or her neighborhood school.**

Flour Bluff, 91 F.3d at 693-94.

Moreover, after surveying the decisions of all federal circuits, the Fifth Circuit noted in *White*, “[N]o federal appellate court has recognized a right to a neighborhood school assignment under the IDEA.” *White*, 343 F.3d at 381.

The Student concedes “[c]ourts have held [] school districts [can] transfer a student with a disability to a school with a specialized academic program whe[n] the child’s academic needs require highly trained instructors.” Appellant’s Brief 19 (citing *White*, 343 F.3d at 380). The Student attempts to distinguish these cases on the basis that the centralization allowed in *White* was necessary because the student required the services of a highly trained disability-service provider, a speech transliterator. The Student implies that since he does not require a highly trained provider to administer his insulin shots or assist him in counting carbohydrates the precedent set in *White* does not apply to him.⁸ However, the Student’s argument ignores two crucial points. First, as is discussed at length above, under Kentucky law, a nurse was required to administer the Student’s shots and assist the Student with carbohydrate counting. Second, in *White*, the Fifth Circuit based its holding on the Section 504 and IDEA regulations repeatedly cited by the District and Superintendent. These regulations apply equally to all students

⁸ The Student’s attempt to distinguish the instant case from *White* is misleading. ***White* does not hold that districts are required to provide less specialized services to students in their neighborhood schools**, rather it notes the district in that case chose to provide those services in the students’ neighborhood schools. *White*, 343 F.3d at 376.

who qualify as disabled under these statutes, regardless of the severity of the child's needs.

b) The District and Superintendent did not show deliberate indifference to the Student's rights.

To recover compensatory damages in discrimination cases brought under the ADA and Section 504, plaintiffs must show a defendant acted with "deliberate indifference." *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001); *A.P. ex rel. Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1125, 1146 (D. Minn. 2008). A person or entity acts with deliberate indifference if he acts with a "conscious disregard" for another's rights. *Board of County Comm'rs v. Brown*, 520 U.S. 397, 407 (1997). A conscious disregard exists only if the defendant actually knows its actions will violate the plaintiff's rights or a violation will be the "plainly obvious consequence" of the defendant's actions. *See A.P.*, 538 F. Supp. 2d at 1147 (citing *Brown*, 520 U.S. at 410).

The Department of Education and the Department of Justice are not at liberty to change their longstanding interpretations of their regulations. In *Ohio Fast Freight, Inc. v. United States*, this Court held, "an administrative agency either must conform with its own precedents or explain its departure from them." *Ohio Fast Freight, Inc. v. U.S.*, 574 F.2d 316, 318 (6th Cir. 1978). Therefore, the

District and Superintendent's reliance on the law stated above was inherently reasonable.

In the instant case, the Student has wholly failed to introduce any evidence that the District and Superintendent knew their actions would violate the Student's rights or that a violation of the Student's rights would be the "plainly obvious consequence" of their actions. Thus, the Student is clearly not entitled to monetary damages for his claims.

2) PUBLIC SCHOOL DISTRICTS CANNOT AFFORD THE CONSEQUENCES OF A PRECEDENT MANDATING THE PROVISION OF ALL DISABILITY-RELATED SERVICES IN STUDENTS' NEIGHBORHOOD SCHOOLS.

The Student focuses on how simple insulin injections and carbohydrate counting are; however, the Student's simplistic depiction of the facts belies the importance of this case. In his attempt to distort the issues, the Student draws the Court's attention away from the realities of what a decision in his favor will mean. Put simply, a decision in favor of the Student in this case will set a completely unworkable precedent potentially requiring school districts within the Court's jurisdiction to provide nurses and every type disability-related service provider in every school building.

A decision in favor of the Student would leave public school districts in the unenviable position of being required to follow the Court's mandate requiring

nurses in every school building but having inadequate funding to fulfill that demand. Districts simply cannot afford to provide nurses in every school building. The median annual earnings of a registered nurse were \$62,450 in May 2008. Bureau of Labor Statistics, U.S. Department of Labor, *Registered Nurses, in Occupational Outlook Handbook 4* (2010-11 ed.), available at <http://www.bls.gov/oco/cg/>. The middle fifty percent earned between \$51,640 and \$76,570. *Id.* The costs of hiring additional nurses would be staggering and put an unnecessary financial strain on public school districts.

Even if expense were no object, there are not enough licensed nurses to fulfill such a mandate. A 2009 study conducted by the Foundation for a Healthy Kentucky found there are only 11.2 Registered Nurses per 1,000 Kentucky residents. Foundation for a Healthy Kentucky, *Health Care Providers (per 1,000 population) 2009*, <http://www.kentuckyhealthfacts.org/data/topic/show.aspx?ind=18> (last visited Oct. 13, 2011). The Trust for America's Health estimates that Kentucky had a shortage of approximately 1,200 nurses in 2010. Trust for America's Health, *Nursing Shortage Estimates* <http://healthyamericans.org/states/?stateid=KY#section=1,year=2011,code=nursingshortage> (last visited Oct. 13, 2011). *See also* Bureau of Labor Statistics, U.S. Department of Labor, *Registered Nurses, in Occupational Outlook Handbook 4*

(2010-11 ed.), available at <http://www.bls.gov/oco/cg/> (“Some employers report difficulty in attracting and retaining an adequate number of RNs.”); Heather Janiszewski Goodin, *The Nursing Shortage in the United States of America: An Integrative Review of the Literature*, 43 J. Adv. Nursing 335, 335 (2003) (“Although some areas of the country are being affected at different rates and in various nursing specialty areas, it remains largely undisputed that there is [a] national shortage of Registered Nurses (RNs). Furthermore, this trend is anticipated to worsen within the next decade.”).

Moreover, such a mandate would lead directly to a similar requirement that all special education services be provided to students at their neighborhood schools. The shortage of special education service providers in the United States has been well documented. The National Center for Educational Evaluation and Regional Assistance, a division of the Institute of Education Sciences in the U.S. Department of Education, reports that many districts routinely have difficulty finding qualified secondary school special education applicants. National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences,

U.S. Department of Education, *National Assessment of IDEA Overview* 21 (July 2011), available at <http://ies.ed.gov/ncee/pubs/20114026/pdf/20114026.pdf>.⁹

Courts, including this Court, have previously recognized the cost of providing disability-related services and the number of service providers available may be taken into account when deciding which school within a district a student who requires disability-related services should attend. In *Hudson ex rel. Hudson v. Bloomfield Hills Public Schools*, the plaintiff, a special needs student, wished to be placed at her neighborhood school despite the fact that her IEP called for her to be educated in a “special education basic classroom” and her neighborhood school did not have such a classroom. *Hudson ex rel. Hudson v. Bloomfield Hills Pub. Sch.*, 910 F. Supp. 1291, 1305 (E.D. Mich. 1995), *aff’d* 108 F.3d 112 (6th Cir. 1997), *cert. denied*, 522 U.S. 822 (1997). In *Hudson*, the United States District Court for the Eastern District of Michigan noted that it would be “cost-prohibitive” for the district to build a special education basic classroom at the plaintiff’s neighborhood school and that the district should not be ordered to fulfill the plaintiff’s request.

⁹ Pursuant to 34 C.F.R. § 300.34, school districts must provide in addition to teachers, the following services to disabled students: speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, medical services for diagnostic or evaluation purposes, school health services and school nurse services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.34 (2011).

Id. The Fifth Circuit, in both *White* and *Flour Bluff*, considered the scarcity of service providers in the Court's decisions not to require the districts in those cases to provide services to students at their neighborhood schools. *White*, 343 F.3d at 382; *Flour Bluff*, 91 F.3d at 694.

The Student's request could set a precedent wherein public school districts would be required to provide all disability-related services to students at their neighborhood schools. Such a mandate would unquestionably and unnecessarily strain the financial and physical resources of districts, as public school budgets are continually shrinking and disability-related service providers are in short supply. Courts in this circuit and others have previously recognized the financial and human capabilities of the districts are an appropriate consideration in cases like the one at bar.

CONCLUSION

While the Student here may regrettably be inconvenienced by not attending his neighborhood school, however that inconvenience is legally justified. The Student has wholly failed to provide citation to any legal authority to buttress his bald assertion that his rights were breached or that he is entitled to any redress whatsoever. Conversely, a large number of legal authorities, both state and federal, uphold the conduct of the District and Superintendent. Moreover, a

decision in favor of the Student in this instance could set an implausible precedent that would force public school districts to provide all disability-related services to students in their neighborhood schools, causing the number of providers public school districts would be required to employ to skyrocket to an unmanageable level. This would unquestionably adversely impact public school districts' ability to provide needed disability-related services to qualified students.

WHEREFORE, the amici curiae, the National School Boards Association and the Kentucky School Boards Association, request the Court AFFIRM the judgment of the court below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 6,833 words, excluding parts exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirement of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief was prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this the 14th day of October, 2011, electronically in accordance with the method established under this Court's CM/ECF service, upon all parties in the electronic filing system in this case.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R. 26-4, Kentucky Board of Nursing Advisory Opinion Statement #15

R. 26-5, Kentucky Board of Nursing Teaching and Delegating Carbohydrate Counts and the Administration of Insulin via an External Pump in a School Setting