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PRESCRIPTION MEDICATION POLICIES PROMPT ADA CLAIMS

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The Americans with Disabilities Act (ADA) prohibits discrimination “on the basis of disability.” Moreover, federal regulations implementing the ADA require public entities to make reasonable modifications to their policies when such modifications are necessary to avoid discrimination on the basis of disability.

On the other hand, as illustrated by the *DeBord* and *Davis* cases described herein, the application of a neutral rule or policy that applies equally to disabled and non-disabled individuals alike does not necessarily discriminate on the basis of disability. In these particular situations, the prescription medication policies at issue did not violate the ADA because these rules did not distinguish between disabled and non-disabled children. Further, the application of these otherwise neutral policies to disabled children was not done in a discriminatory fashion, nor was their enforcement a mere pretext for discrimination on the basis of disability. Instead, the federal courts found there was a good faith effort on the part of both agencies to make the required modifications in their policies and procedures to reasonably accommodate the needs of disabled individuals.

MOTIVATION UNRELATED TO DISABILITY?

In the case of *DeBord v. Board of Education of the Ferguson-Florissant School District*, No. 96-4280EM (U.S.C.A. 8th Circuit, 1997), the parents of an 8-year-old child with attention deficit hyperactivity disorder (ADHD) alleged that the District’s written policy regarding the administration of prescription drugs violated the Americans with Disabilities Act (ADA). The facts of the case were as follows:

Allen and Debra DeBord’s eight-year-old daughter, Kelly, has attention deficit hyperactivity disorder (ADHD). To treat her condition, Kelly’s doctor prescribed one hundred milligrams of sustained release Ritalin when Kelly arises in the morning, and forty milligrams of the drug at 3:00 in the afternoon while Kelly is still at school. The school district provides health services to students, including administration of prescription drugs during school hours, but the school district has a written policy against administering prescription drugs in an amount exceeding the recommended daily dosage listed in the Physicians’ Desk Reference (PDR).

Joyce Dreimeier, the nurse at Kelly’s elementary school, refused to give Kelly her afternoon dose because Kelly’s daily intake of Ritalin exceeds the sixty milligram daily

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recommendation listed in the PDR.

The DeBords appealed to the Board of Education, providing a letter from Kelly's doctor confirming her prescription, some medical information about high dose use of Ritalin, and an offer to sign a waiver of liability.

The school board declined to direct administration of Kelly's prescription by the school, even though Kelly's higher dosage is necessary to treat her effectively, Kelly suffers no side effects, and no studies show whether higher dosages are harmful. Instead, the school board offered several alternatives, including alteration of Kelly's class schedule to permit early dismissal and home administration of both of Kelly's doses, or administration of Kelly's afternoon dose at school by one of her parents or someone designated by them.

Unhappy with the school district's stance, the DeBords filed a claim in federal district court alleging the school district's refusal violated Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. Section(s) 12131-12165 (1994).

The federal district court granted summary judgment to the school district. In so doing, the district court concluded the school district's refusal was not based on Kelly's disability, but on the district's policy stemming from concerns about potential harm to students and liability. The district court also concluded the school district had attempted to reasonably accommodate the DeBords. The DeBords appealed.

As cited by the federal appeals court, Title II of the ADA, applicable to public entities including public schools, states that "no qualified individual with a disability shall, by reason of such disability, be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. Section(s) 12132 (1994).

Furthermore, the court noted that Title II regulations require a public entity to "make reasonable modifications in policies 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." 28 C.F.R. 35.130(b)(7) (1996).

Accordingly, to prove their ADA claim, the DeBords had to establish that the school district refused to administer Kelly's medication because of her disability. However, in this particular instance, the court found "the policy does not discriminate against the severely disabled, as the DeBords assert." On the contrary, the court found that "the policy here contains an objective standard limiting administration of prescription medication only when the prescription exceeds the maximum dosage recommended in the PDR":

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There is no evidence that the school district had disabilities in mind when formulating or implementing its policy. The DeBords do not question the truthfulness of the school district's expressed motivations of fear of student harm and potential liability. Instead, the DeBords say the fears are invalid.

Whether or not ill-founded, however, the school district's fears are unrelated to disabilities or misperceptions about them. The policy is neutral; it applies to all students regardless of disability. A student's excess prescription, not the student's disability, prevents the student from receiving medication from the school nurse.

Although Kelly requires Ritalin to treat her disability, it is undisputed that the reason for Kelly's high dosage is probably her metabolism, not the severity of her disability. Kelly's own doctor and others stated the amount of Ritalin needed to treat ADHD is unrelated to the severity of the disorder in any particular patient.

The federal appeals court, therefore, rejected the DeBords' contention that "Kelly was treated differently than other students" because of her disability. In so doing, the court noted that "students who received their medication at school did not have prescriptions exceeding the PDR's recommended daily dosage":

It is undisputed that the school district did not knowingly administer prescription drugs to any student, disabled or not, in excess of the PDR's recommendation. Disparate treatment is not the only way to prove unlawful discrimination, but the record here offers no other basis to infer the school board's actions were based on Kelly's disability.

The DeBords have not tried to show the policy has the effect of discriminating against the disabled or the severely disabled. On the record here, the school board's facially neutral policy does not distinguish between those who will receive their full prescription dose and those who will not on the basis of any trait that the disabled or severely disabled are less or more likely to possess. In other words, the DeBords have not shown disabled students are more likely than nondisabled students to require prescription dosages exceeding the PDR's recommendation.

Citing the legislative intent of the ADA, the federal appeals court acknowledged that "Congress was concerned about the discriminatory effects of 'overprotective rules and policies' on the disabled. 42 U.S.C. Section(s) 12101(a)(5). However, under the circumstances of this particular case, the court found "nothing here [which] suggests the policy or its application has the purpose or effect of discriminating against disabled students." Rather, in the opinion of the court, "the school board's

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proposals to establish workable schedules so Kelly's family can give her the prescribed dosages of Ritalin" was not an overprotective rule which discriminated on the basis of Kelly's disability. Moreover, the court found that "the waiver requested by the DeBords is not a reasonable modification or accommodation":

There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program.

Although the school district has not made the assertion, adjudication of waiver requests would impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case.

At this time, no one knows what the long term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply. These concerns may be speculative, but they are not unreasonable.

Further, in determining whether the school district had provided a reasonable modification or accommodation, the federal appeals court found it significant that "the school district is not preventing Kelly from receiving the medicine she needs for learning." On the contrary, the court found that "[t]he school district offered to alter Kelly's class schedule to permit home administration of Kelly's medicine, or to allow Kelly's parents or their designee to administer her medicine at school. Kelly's parents are able to give Kelly her schooltime dose." In so doing, the federal appeals court concluded that "the school district reasonably accommodated Kelly's ADHD as a matter of law."

Having found that "the school district did not discriminate against Kelly on the basis of her disability as a matter of law," the federal appeals court affirmed the summary judgment of the district court rejecting the DeBords' ADA claim against the school district.

DISABILITY REASONABLY ACCOMMODATED?

Similarly, in the case of *Davis v. Francis Howell School District*, No. 97-2379, 138 F.3d 754 (U.S.C.A. 8th Cir. 1998), Mary and Bobby Davis sued the Francis Howell School District, claiming that "the district's refusal to administer to their son Shane his prescribed dose of Ritalin SR to treat an attention deficit hyperactivity disorder (ADHD) violates Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131 et seq." The facts of the case were as follows:

Shane's treating physician has prescribed a daily dosage of 360 milligrams of Ritalin SR to control his symptoms of ADHD, up to 120 milligrams of which must be administered during the school day in one or two doses. The nurse at Shane's elementary school,

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Joan Powlishta, had been administering his school time dose for over a year when she expressed concern to Mrs. Davis that his prescription might be dangerous or harmful because it far exceeded the recommended maximum of 60 milligrams in the Physician's Desk Reference (PDR).

Powlishta's predecessor administered Shane's Ritalin from January until August 1994, when she was replaced by Powlishta. Powlishta's recollection was that she first raised her concerns with Mrs. Davis sometime during the 1995-96 school year.

After hearing a news story in March 1996 about a nurse in a nearby school district who had refused to administer a high dosage of Ritalin prescribed by the same doctor, Powlishta consulted the district's Nurse Coordinator and its regular consulting pediatrician about the safety of Shane's prescription; both agreed with Powlishta that the prescription was excessive.

Although the Davises provided a second doctor's opinion that the prescribed amount of Ritalin was not having any harmful effects on Shane, Powlishta notified them on April 12, 1996 that she would no longer administer his school time dose because his prescription exceeded the maximum recommended in the PDR, and the Assistant Superintendent supported her position when the Davises appealed to him.

According to the district's policy on medication procedures, the school nurse has the right and obligation to question and verify potentially inappropriate prescriptions and "to refuse to give any medication that he/she feels does not meet the criteria established in Board Policy for giving medications." The school district offered to allow one of the Davises or their designee to come to the school to administer the medicine, and Mary Davis, who is a trained nurse, rearranged her work schedule in order to do so or else arranged for Shane's grandmother to give him his school time dose.

The federal district court granted summary judgment to the school district on the basis that "the plaintiffs had not produced evidence that Shane had been discriminated against because of a disability and that the alternative arrangement was a reasonable accommodation as a matter of law." Davis appealed.

On appeal, the school district argued that summary judgment was proper because there was no evidence that Shane was treated differently on the basis of his disability. In so doing, the district contended that it "decided to stop administering Shane's Ritalin because the size of his prescribed dosage conflicted with its policy of administering medication in conformity with the PDR in order to protect student health and minimize potential liability." Moreover, the district claimed its policy was nondiscriminatory because it treated disabled and nondisabled students alike:

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Under the policy many students with disabilities receive Ritalin from the school nurse in doses below the PDR maximum, and requests by nondisabled students for the administration of prescriptions in conflict with PDR recommendations are denied.

In response, Davis argued further court proceedings were necessary to determine “whether the school district discriminated against Shane by refusing to modify its policy and whether the alternatives it offered reasonably accommodated his disability.” Specifically, Davis claimed that “the district’s refusal to give Shane his medication because his ADHD requires a dosage above the PDR recommendation amounts to disability-based discrimination.” In so doing, plaintiffs argued that “Shane’s need for a high dosage of Ritalin to control his ADHD symptoms cannot be distinguished from his disability.”

As cited by the federal appeals court, Title II of the ADA requires a plaintiff to show that he/she is “a qualified individual with a disability and that he was denied the benefits of a program, activity, or services by reason of that disability.” See 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

Citing extensively from the *DeBord* opinion described above, the federal appeals court found that “[t]he Davises have not offered evidence that the school district’s action was taken because of Shane’s disability rather than because of its policy and underlying concerns about student health and potential liability”:

Although the Davises question the wisdom of the district’s policy and its rationale, they have not challenged the truthfulness of its stated reasons for its decision. They cannot show that the district’s policy is discriminatory because it applies to all students regardless of disability and rests on concerns unrelated to disabilities or misperceptions about them... [T]he school district’s refusal to administer Shane’s Ritalin was based on the conflict between the size of his prescribed dosage and the district’s neutral policy, rather than on the type of disability Shane has or its severity.

As a result, the federal appeals court determined that summary judgment was properly granted on the Davises’ ADA claim. As in *DeBord*, the federal appeals court similarly found that the school district’s “offer to allow the Davises or their designee to give Shane his Ritalin during the school day is a reasonable accommodation as a matter of law”:

The Davises’ alternative proposal that the district waive its policy is not reasonable because it would impose undue financial and administrative burdens on the district by requiring it to determine the safety of the dosage and the likelihood of future harm and liability in each individual case.

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[I]ndividual waiver of an essential eligibility requirement is not required due to administrative and financial burdens involved... [W]aiver is unreasonable where case-by-case determinations are near-impossible and would impose an immense financial and administrative burden.

By offering an alternative arrangement the district did not prevent Shane from receiving his medication and reasonably accommodated his disability as a matter of law.

As noted by the court, plaintiffs in this particular instance had attempted to “distinguish the *DeBord* decision on the ground that the DeBords were seeking to have the school nurse administer an excess dose for the first time while Shane had previously received his prescribed dosage for over two years without incident or complaint.” In the opinion of the court, “[t]his factual difference is not sufficient to distinguish this case from *DeBord*”:

Both there and here the school districts set forth the same neutral concerns in support of their refusal to administer medication in excess of the PDR maximum and the plaintiffs failed to produce evidence that the refusal was actually based on the students' ADHD.

As a result, the federal appeals court affirmed the summary judgment of the lower court dismissing Davis' ADA claim.