U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

January 18, 2017

BY FEDERAL EXPRESS
Shannon L. Tahoe, Esq
New York State Education Department
Office of Counsel, Room 140
Albany, New York 12054

Re: ***Investigation of ADA Complaints Against Pleasantville UFSD and Inquiry Related to NYSED Guidelines***

Dear Ms. Tahoe:

As you are aware, the United States Attorney's Office for the Southern District of New York has received complaints alleging that certain guidelines issued by the New York State Education Department (the "NYSED") violate Title II of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12131-12134, and the Department of Justice's implementing regulation, 28 C.F.R. Part 35. Specifically, our Office has received complaints from parents of students with diabetes that schools located in the Southern District of New York are refusing to comply with physicians' orders authorizing the parents to determine the timing and/or dosage of insulin administered to their children at school. The justification for the schools' refusal to comply with such orders is the NYSED's Guidelines for Medication Management in Schools issued in September 2015. In light of these complaints, our Office has corresponded with you over the past year regarding our concerns about NYSED's obligations to comply with Title II and, in particular, the provisions of the Guidelines we believe to be at issue. I write to follow up on these past communications.

By way of background, Title II states that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. Title II defines public entities to include "any department, agency, special purpose district, or other instrumentality of a State." 42 U.S.C. § 12131(1); *see also* 28 C.F.R. § 35.104 (same). The regulations implementing Title II reflect the statute's broad nondiscrimination mandate. *See* 28 C.F.R § 35.130(a). This mandate requires public entities, including state departments of education, to make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity. *Id.* § 35.130(b)(7).

Title II authorizes the Department of Justice to bring litigation to enforce its requirements. Specifically, Title II provides that the remedies, procedures, and rights set forth in Section 504 of the Rehabilitation Act also shall be available for violations of Title II. *See* 42 U.S.C. § 12133. Section 504 of the Rehabilitation Act, in turn, derives its remedies from Title VI of the Civil Rights Act. *See* 29 U.S.C. § 794a(a)(2). As both Section 504 and Title VI have been interpreted to authorize the United States to bring enforcement litigation, Title II's incorporation of those laws' remedies authorizes the Department of Justice to bring litigation to enforce Title II.

Pursuant to this authority, and in an effort to resolve our concerns prior to commencing litigation, we have investigated the complaints and now provide you with our findings and conclusions.

A. Facts

1. Diabetes is a chronic disease that prevents the human body from properly using food to produce energy. Specifically, diabetes affects the body's ability to produce or use insulin, a hormone produced in the pancreas that transports glucose (a sugar derived from food) through the bloodstream to the body's cells.

2. Type 1 diabetes is a disease of the immune system that affects the insulin-producing cells of the pancreas so that the body either does not produce insulin at all, or does not produce enough insulin to meet the body's needs.

3. Type 2 diabetes is a metabolic disorder in which the body's muscle, liver, and fat cells cannot use insulin properly to meet the body's needs.

4. All persons with type 1 diabetes and some with type 2 diabetes must take insulin to avoid serious short- and long-term health problems.

5. Approximately one quarter of one percent of individuals under the age of twenty have been diagnosed with diabetes (approximately 208,000 across the United States and over 6,500 in New York State), and roughly 80% of cases of diabetes in children are type 1.

6. Many diabetics learn to inject themselves with insulin; however, not all, especially children, are able to do so.

7. The goal of diabetes management for children is to avoid both hyperglycemia (high blood glucose) and hypoglycemia (low blood glucose) by tightly maintaining blood glucose levels within target ranges determined by their physicians, through frequent monitoring and if necessary multiple daily insulin injections.

8. Blood glucose levels are affected by a wide variety of factors: food intake (including the type and amount of food), level of physical activity, dosage of insulin and other medications, physical growth, physical changes during puberty, levels of physical and emotional stress, as well as illness and injury.

9. Students with diabetes who depend on insulin injections typically need them during the school day, both at regularly scheduled times and also when needed to correct for fluctuations in blood glucose levels.

10. The consequences for inadequate treatment for diabetics are severe.

11. For example, hyperglycemia causes symptoms such as blurred vision, fatigue, and can lead to diabetic ketoacidosis, a life-threatening condition characterized by vomiting, sleepiness, difficulty breathing, and, if untreated, coma and death.

12. Poorly managed diabetes may have detrimental effects on the body's blood vessels, eyes, kidneys, nerves, gums, and teeth.

13. Diabetes is the leading cause of adult blindness, kidney failure, and non-traumatic lower-limb amputation. It also increases a person's risk of heart disease and stroke.

14. Intensive management of the disease that keeps blood glucose levels near normal can greatly reduce, delay, or even prevent such risks associated with diabetes.

15. Because blood glucose levels fluctuate depending on a variety of factors, in order to provide optimal care, some physicians issue orders authorizing a student's parents or guardian to adjust the timing and/or dosage of insulin administered in school within a prescribed range.

16. Among the national organizations that recognize the importance of such orders are the following:

a. The National Diabetes Education Program (the "NDEP"), a joint program of the National Institutes of Health and the Centers for Disease Control and Prevention, publishes guidance materials for diabetes management in the school setting. NDEP's publication, "Helping the Student with Diabetes Succeed," includes a model Diabetes Medical Management Plan ("DMMP"). The NDEP model DMMP allows a physician to indicate whether a student's parents or guardian are authorized to adjust the timing and/or dosage of insulin administered in school and, if so, to indicate limits for such adjustment.

b. The American Diabetes Association also recommends use of the NDEP's model DMMP and provides a link to that model plan on its website.

c. The Juvenile Diabetes Research Foundation ("JDRF") publishes a School Advisory Toolkit for Families booklet containing a "High Blood Glucose Help Sheet" that recognizes that a parent may adjust the dosage of insulin pursuant to a physician's authorization.

17. In September 2015, NYSED issued Guidelines for Medication Management in Schools that interpret provisions of New York State's Education Law to preclude a school nurse from complying with a physician's order authorizing the parent or guardian of a student with diabetes to adjust the timing and/or dosage of insulin administered in school within the limits specified by the physician:

> Changes in medication dosages must be ordered by the provider. A parent/guardian cannot direct licensed health professionals to administer medications to their child that are not consistent with the provider's order. *Provider orders instructing schools to check with a parent/guardian for a dosage, when to give a medication etc., are not acceptable orders.* Per Education Law Article 139 § 6902, licensed nurses may only administer medications consistent with orders from a duly licensed provider.

Guidelines at 14 (emphasis added).

18. In the section dealing with students with diabetes, the Guidelines state further, in relevant part:

> For all students, regardless of functional level, the [Diabetes Management Plan] will need to include sufficient details for licensed health professionals to administer insulin as needed based on both carbohydrate intake or blood glucose monitoring results. This is true even for Independent Students should they need assistance during the school day. *Providers may not write orders that state the licensed health professional is to contact the parent for medication or other diabetes management orders.* In NYS a licensed nurse may only administer medications or nursing treatments based on an order from a duly licensed provider.

Guidelines at 31 (emphasis added).

19. In the fall of 2015, upon release of the Guidelines, our Office received complaints from the parents of three unrelated grammar school children whose initials are W.M., J.M., and N.P. that administrators and staff at the Bedford Road School in Pleasantville, New York (the "School"), have discriminated against children because they have Type I diabetes. Among the ways in which the administrators and staff at the School have allegedly engaged in discrimination against children with disabilities is in refusing to permit parental involvement and consultation in the process of administering medically appropriate diabetes treatment to the children. For all three children, the school nurse's office would refuse to accept forms completed by the children's doctors explaining that their parents were authorized to adjust, within a very narrow range, the children's insulin dosages, and would also refuse to make any changes to the children's insulin dosages based upon (physician approved) parental recommendations, which in turn were based upon the parent's intimate knowledge of their children's exercise, sleep, and eating schedule and any changes thereto.

20. In response to the parents' complaints, the School provided parents with the NYSED Guidelines. In response to our investigation and request for School communications on these issues, the School provided us with internal communications demonstrating that the School was acting in reliance upon the NYSED Guidelines, which it believes to be binding upon the School, inasmuch as the NYSED Guidelines purport to authoritatively interpret New York law.

21. According to NYSED, the provisions of the Guidelines quoted above purport to implement New York Education Law § 6902, which states, in relevant part, that "[t]he practice of the profession of nursing as a registered professional nurse [may include] . . . executing

medical regimens *prescribed by a licensed physician*," and that "[t]he practice of nursing as a licensed practical nurse [may include] . . . provision of supportive and restorative care *under the direction of* a registered professional nurse or licensed physician." N.Y. Educ. Law § 6902 ("Section 6902").

22. According to NYSED, the provisions of the Guidelines quoted above also purport to implement New York Education Law § 6509, to the extent that such provision provides that a licensed nurse can be disciplined for varying from an existing medical regimen and/or for administering a medical order from an unlicensed or unauthorized health care provider.

23. A school nurse who administers insulin to a student, pursuant to the instructions of a parent or guardian that are within the timing and/or dosage limitations prescribed by the student's physician in an order that authorizes the student's parent or guardian to give such further instructions, is executing a medical regimen prescribed by a licensed physician.

24. A school nurse who administers insulin to a student, pursuant to the instructions of a parent or guardian that are within the timing and/or dosage limitations prescribed by the student's physician in an order that authorizes the student's parent or guardian to give such further instructions, is providing supportive and restorative care under the direction of a licensed physician.

25. A school nurse who administers insulin to a student, pursuant to the instructions of a parent or guardian that are within the timing and/or dosage limitations prescribed by the student's physician in an order that authorizes the student's parent or guardian to give such further instructions, is not varying from an existing medical regimen or administering a medical order from an unlicensed or unauthorized health care provider.

26. NYSED refuses to make a reasonable accommodation to the Guidelines that would require school nurses to implement a physician's order authorizing a parent or guardian of a student with diabetes to adjust the timing and/or dosage of insulin within the limitations prescribed by the physician.

27. NYSED's refusal to make any reasonable accommodations to the Guidelines has an adverse effect upon the health and safety of children with diabetes in schools across New York State, because schools rely on and apply the Guidelines as a reason to reject physician authorization forms that permit limited parental involvement in dosing decisions.

B. Conclusions

28. Title II requires, among other things, that public entities, such as a state education department like NYSED, must make reasonable modifications to its policies, practices, or procedures when necessary to avoid discriminating against students with a disability (including students with diabetes), unless it can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity. *See* 28 C.F.R. §§ 35.130(b)(2), (b)(7).

29. Through the Guidelines, NYSED has violated and continues to violate the ADA by denying medically necessary treatment to students with diabetes whose physicians have

authorized a parent or guardian to adjust the timing and/or dosage of insulin administered in school within limits specified by the physician.

30. Through the Guidelines, NYSED has violated and continues to violate the ADA by denying meaningful access to a public education to students with diabetes whose physicians have authorized a parent or guardian to adjust the timing and/or dosage of insulin administered in school within limits specified by the physician.

31. The Second Circuit has recognized that, although "the ADA does not contain an express preemption provision," implied preemption may be found where "Congress has manifested an intent to occupy the field in a certain area" (field preemption), as well as where state law actually conflicts with federal law (conflict preemption). *Mary Jo C. v. New York State & Local Retirement Sys.*, 707 F.3d 144, 162 (2d Cir. 2013) (same). In *Mary Jo C.*, the Second Circuit concluded that Congress intended Title II to have preemptive effect, reasoning that "[t]he natural effect of Title II's reasonable modification requirement . . . requires preemption of inconsistent state law when necessary to effectuate a required reasonable modification." *Id.* at 163.

32. To the extent that New York Education Law §§ 6902 and 6509 conflict with the ADA, such state law is preempted by federal law.

33. To the extent that the Guidelines have interpreted provisions of New York State law in a manner conflicting with the ADA, such interpretation is preempted by federal law.

C. Remedies

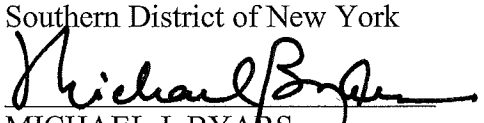
We are willing to resolve this matter without litigation provided that NYSED (i) satisfactorily amends its Guidelines to require school nurses to implement a physician's order that authorizes a parent or guardian of a student with diabetes to adjust the timing and/or dosage within the limitations prescribed by the physician and (ii) communicates such amendments to all schools under its jurisdiction as soon as practicable. If the matter proceeds to litigation, we intend to seek declaratory and injunctive relief to require that the Guidelines be amended and disseminated, as amended, as set forth above, and also may seek compensatory damages to the extent appropriate on behalf of any individual students who have been adversely affected by NYSED's current Guidelines.

Please provide us with your written response no later than February 15, 2017. If we do not receive anything from you by February 15, 2017, we may pursue litigation without any further notice to you.

Thank you for your attention to this matter.

Very truly yours,

PREET BHARARA
United States Attorney
Southern District of New York

By: 

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