

PINELLAS COUNTY, FLORIDA

ADMINISTRATIVE HEARING UNDER SECTION 504, REHABILITATION ACT OF 1973

29 U.S.C. 701 *et seq.*

B.A.T.M.

Petitioner,

Vs.

SCHOOL BOARD OF PINELLAS COUNTY

Respondent,

_____ /

FINAL ORDER

Hearing Officer, Mark S. Kamleiter, by agreement of the parties, heard this cause, as noticed, on August 1, 2011 through August 2, 2011 at the Administration Building of the School Board of Pinellas County.

APPEARANCES

FOR PETITIONER: Kathryn R. Dutton-Mitchell, Esquire
Ann Siegel, Esquire
Catalina Urquijo, Esquire
Disability Rights of Florida, Inc.
1930 Harrison Street, Suite 104
Hollywood, Florida 33020

FOR RESPONDENT: David Koperski, Esquire
School Board of Pinellas County
301 Fourth St. S.W.
P.O. Box 2942
Largo, Florida 33779-2942

REFERENCES TO TESTIMONY AND EXHIBITS

The following examples are to explain format for references to testimony and exhibits in this Final Order.

Testimony: T (refers to the transcript page(s)). L (refers to the particular line(s) on the referenced transcript page. Example: **T-352, L-15 to T-353, L-11**

Exhibits: These are referred to with reference to the party offering the exhibits and the number of the exhibits given by the hearing officer. Example: **Petitioner's Exhibit #12 or Joint Exhibit #3**

STATEMENT OF ISSUES

Whether Respondent school district has and is discriminating against Petitioner on the basis of her and violating her rights under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulation found at 34 C.F.R. Part 104.

FINDINGS OF FACTS

1. B.A.T.M. is presently a nine year old child, fourth (4th) grade student at her home zoned school, San Jose Elementary School (hereinafter SJES), in Pinellas County. (Joint Stipulation) She has attended this school since August 2007, when she entered as a kindergarten student, receiving gifted services.¹ At the time of filing this complaint, San Jose was an "A" rated school. It is now a "B" rated school. T-195, L-25; 196, L-1-18.
2. For Kindergarten, First, and Second grade B.A.T.M. was transported one day a week to Dunedin Elementary School in order to receive her gifted services. Prior to her third grade year, SJES established its own gifted program, in which B.A.T.M. has fully participated up to the time of the hearing. T-207, L-9-25 through T-208, L-1-4; Joint Statement #12

¹ Florida Administrative Code 6A-6.03019

3. In July 2008, B.A.T.M. was diagnosed with Type 1 Diabetes Mellitus and requires blood glucose testing (finger prick) and administration of insulin several times a day, including at school. The parents informed the school of the diagnosis and that the child required glucose testing and possibly insulin administration prior to lunch. They provided the appropriate documentation from the child's physician. T-197, L-8-24; (See Joint Stipulation)
4. At this time they requested that the School Board of Pinellas County(hereinafter PCSB) accommodate the child's needs, as a person with a disability, by assuring a trained adult to perform the blood glucose testing, and the insulin administration, including having another trained adult as a back-up. This person would have to be trained in Diabetes, blood glucose testing, insulin administration, including recognizing the signs and symptoms of both low and high glucose levels. (See Joint Stipulation) T-197, L-17-25; T-198, L-1-10
5. The School Board of Pinellas County(hereinafter PCSB) notified the parents that PCSB policy held that only registered nurses were permitted to administer insulin to students. Students who are unable self-manage their diabetes are required to go to a school with a full-time RN, if the parents desire the school district to provide for the administration of the insulin. T-198, L-4-24; (See Joint Statement #5) Respondent's Exhibit #1, Joint Statement #5.
6. Except for one day per week, there are no RNs at SJES. T-198, L-4-24; T-475. L-13-14 (R. Brecchetti)
7. The child was offered a place at Palm Harbor Elementary School, where there was a full-time registered nurse. T-198, L-4-24
8. The parents declined the transfer to Palm Harbor Elementary School. They consulted with the child's physician and then decided to change her medication schedule so that it would not be

necessary to administer insulin at school. T-200, L-1-16; T-201, L-17-25; T-202, L-1-4, (See Joint Statement #7)

9. The child was determined by her school to be a person with a disability as defined § 504 of the Rehabilitation Act of 1973 in the fall of 2008 and was provided with a § 504 Plan at that time. She has had a § 504 Plan since that time. T-228, L-19-22; (See Joint Statement #8)
10. The child's § 504 Plan did not, however, include all required accommodation, diabetes-related services, or insulin administration despite the parents' advocacy. T-228, L-19-22; (See Joint Statement #8)
11. At the beginning of the 2010-2011 school year it was medically determined that the child's diabetes could no longer be sufficiently managed without administering insulin during the school day. T-205, L-16-23; (See Joint Statement #9)
12. B.A.T.M. presently receives her insulin by syringe. T-219, L-18-20. There was some testimony that administering insulin through injection has a higher risk of error than the other administration methods. (Dharamraj, T-582, L 14-20); (P. Jameson T-128, L-10-13).
13. At this time B.A.T.M. was unable to self-administer her insulin and she has remained unable to self-administer the insulin though the hearing on this matter. T-203, L-5-6; T-253, L-20-24; Joint Statement #10 There was some testimony that at one point B.A.T.M. had at one time self-administered her insulin, but she apparently did not feel comfortable doing this and has asked that someone assist her with this process. T-246, L-3
14. The parents once again made a request that the necessary diabetes services (glucose testing, insulin administration, and glucagon administration) be provided at SJES. T-206, L-16-25, PE-19
15. Again the district declined to offer diabetes services at SJES, other than on the one day a week where a nurse was on duty at SJES.

16. There was a conflict in testimony as to whether the district again offered diabetes services at another school. The parents argue that the district did not make this offer at the time when it refused to provide the diabetes services at SJES. The district argues that the parents always knew that their child could receive diabetes services at a school where there was an RN on duty all week. It seems that at least by November 30, 2010 the District did affirm that it was offering the diabetes services in a school with a full-time RN. Joint Stipulation In a letter from school district counsel to the parents' legal counsel the following statement was made:

“Accordingly, as the district has done in the past, we would offer Mrs. M the opportunity to reenroll her children in a school with a full-time registered nurse.” RE-1

17. The parties agree, however, that the district was clear that if the parents wished for B.A.T.M to continue attending SJES, then they would have to provide for the diabetes services personally, except for the one day when the district's RN was on duty at SJES. Furthermore, if for any reason the RN was not able to come to SJES on the one day she was scheduled, the parents would be expected to provide “back up” diabetes services. T-206, L-4-25; PE – 20; PE-21

18. The parties agree that student safety is a primary concern in determining whether non-licensed school personnel can provide health care services to students in schools. See Response # 19 to Respondent's Request for Admissions.

19. The mother testified that B.A.T.M. is thriving academically and socially at SJES and does not want to leave SJES. T-208, L-1-2; T-218, L-11-19, T-612, L-1-8.

20. The parents testified that they then told the district that they would accept the provision of the diabetes services through trained non-medical district personnel. T-244, L-2-5; Joint Statement #11

21. The parents' position on the non-medical personnel administration of insulin was approved of by B.A.T.M.'s treating physician as indicated by documentation provided to the school district.

Dr. Frank B. Diamond wrote to the principal of SJES stating that he “approved the delegation of B.A.T.M.’s diabetes care to trained, adult, non-licensed personnel. Joint Statement - 11 Dr. Diamond testified that “I think it (delegation of insulin administration by a UAP) would be satisfactory if the Nurse or the individual were adequately trained, prepared, and experienced.” T-299, L-24-25 thru T-300, L-1-2.

22. Respondent’s witnesses, P. Jameson and Dr. Dharamraj, testified that the administration of insulin, including determination of the dosage size is a nursing task. T-133, L-9-11; T-583, L-11-25; T-584, L-1-4.
23. Ms. Rita Becchetti, Supervisor of School Health Services for the district’s schools, testified that in any delegation of nursing tasks the “responsibility always remains with the nurse and their license.” T-469, L-10-17. Ms. Karen Wiggins, Director of the Child and Adolescent Health Unit of the Florida Department of Health, also testified that decision as to whether to delegate insulin administration is a decision which belongs to a registered nurse. T-350, L-20-21. Ms. Wiggins further testified, however, that the decision to delegate according to the guidelines (“Nursing Guidelines for Delegation of Care for Students with Diabetes in Florida) the decision as to the delegation of insulin administration should be made on a case-by-case basis. T-332, L-20-21.
24. Respondent elicited testimony from Donna Finegold, Respondent’s nurse educator (T-393, L-3-12), Rita Becchetti (T-468, L-18-20; T-469, L-21-25; T-470, L-1-8), and Dr. Dharamraj (T-580, L-7-25; T-581, L-15-18) that it may be unsafe to delegate the administration of insulin to non-licensed personnel.
25. Rita Becchetti testified that the dosages for young children are very small, “so even a very, very small deviation from that for a child who is 40 or 50 pounds or whatever can have a significant impact on that child.” T-489, L-1-6.

26. In response to the hearing officers questions, Rita Becchetti, responded as follows:

HO – “... do you have any idea what the youngest children are who might administer (insulin) in the schools?

RB – “... In the school district probably grade two because the standard in the community is that most of the endocrinologists believe that grade three is the time that they should become independent or working on it.”

...

RB – “They may have an adult who helps with that calculation and double checks whatever ---“

HO-“What would the qualifications of that be?”

RB-“It can be a trained school staff person.”

...

HO-“...So, if you have a school personnel that’s been properly trained and he’s supervising self-administration, what does he do as part of that supervision ...?

RB-“He watches the student to make sure that they’re doing what they’re supposed to be doing because they have received training as to what that student needs to do ... and double-checks any calculations as far as, you know, how many carbs and any calculations they need to do to determine what dose they need to administer. ...”

HO-“So would it be fair to say that this person monitors the taking of the blood sugar levels?”

RB-“Yes. They watch them do that.

HO-“And monitors the calculation to determine the dosage?”

RB-“Correct.

HO-“And the monitors the dialing up of the dosage or the drawing of the dosage?”

RB-“Right”

HO-“And then what the child does is he sticks himself?”

RB-“Correct.”

T-560, L-5-25 through T-563, L-22

27. Karen Wiggins, testified that it would not be unreasonable for a nurse to decide either to delegate the administration of insulin to non-licensed personnel (T-352, L-19-24), or to not delegate these tasks (T-351, L-13).

28. Nurse Sharon Warnecke ARNP, retired Coordinator of Health Services for the Lee County Schools, (T-151, L-10-11) testified that the Lee County follows district guidelines, which are based upon the guidelines for delegation of insulin administration provide by the state of Florida. T-156, L-13-20 They allow delegation of the administration of insulin by non-licensed personnel. When questioned about the safety of the practice, Ms. Warnecke testified that:

I think it is a necessary practice. I think it is safe as long as the people who are being trained are being trained properly and are willing to do it.

29. Ms. Warnecke testified as to how they train UAPs in Lee County:

We developed skilled checklists, and those skilled checklists were followed with every UAP. They had to demonstrate proficiency in all of those procedures that were written in that or that were delegated. T-170, L-10-14

30. Ms. Warnecke testified that she believed that it was safer for a licensed nurse to administer insulin than a UAP. T-181, L-23-25

31. There was testimony by Donna Finegold that a serious error in the administration of insulin for high blood sugar can be fatal. T-397, L-23-24

32. The National Association of School Nurses stated an official position that:

[T]he school nurse is the only staff member who has the skills, knowledge base and statutory authority to fully meet the health needs of students with diabetes in the school setting. Joint Exhibit #1

33. The American Academy of Pediatrics holds the position that insulin administration should not be delegated to a UAP. Respondents Exhibit #3.

34. The Florida Department of Health has a policy which permits the delegation of insulin administration to appropriately trained UAP and has memorialized this policy in published guidelines concerning the delegation of diabetes care in the school setting. T-332, L-8-15; Petitioner's Exhibit #11; Joint Exhibit #2; Joint Exhibit #3; Petitioner's Exhibit #17.
35. The Florida Department of Education has a policy which permits the delegation of insulin administration to UAPs and has published guidelines concerning the delegation of diabetes care in the school setting. Petitioner's Exhibit #11; Petitioner's Exhibit #17; Joint Exhibit #2; Joint Exhibit 3; T-332, L-8-15.
36. The United States Department of Education policy permits the delegation of insulin administration to appropriately trained UAPS and has published guidelines relative to the delegation of this responsibility in the school setting. Petitioner's Exhibit #18.
37. Paula Jameson, ARNP, an endocrine nurse practitioner, testified as an expert. She spoke relative to an article she had written entitled "Developing Diabetes Training Programs for School Personnel." Petitioner's Exhibit #2 She testified as follows:
- That school caregivers can be trained to give insulin and assist students with blood glucose monitoring and other diabetes self-care tasks at school given the appropriate circumstances and the right resources and to put that training in place. It (the article) was based on my experience in Orange County Public Schools, as well as a survey I did of other diabetes educators across the country prior to writing the article. T-62, L-3-11.
38. Ms. Jameson, a member of the American Diabetes Association, also worked on the National Advocacy Committee and the Safe School Work Group, within that association.
- She testified that it is the position of the American Diabetes Associate that:
- [D]iabetes care can be delegated safely to properly trained unlicensed assistive personnel (UAP) under the supervision and monitoring of a Registered School Nurse who is felt as the coordinator and the expert on diabetes care at school, actually in the school setting. T-67, L-1-6

39. Ms. Jameson, testified relative to the position of the National Association of School Nurses that “when in the opinion of the school nurse it is safe that delegation is a way of meeting the needs of a child with a chronic disease in school, including diabetes and others. T-69, L-7-10; Joint Exhibit #1.
40. Ms. Jameson is a member of the American Association of Diabetes Educators (AADE) and served on the position statement writing team relative to the “Management of children with Diabetes in the School Setting.” She testified that there was no evidence that the delegation of diabetes care to UAPs is not a safe practice. T-72, L-7-12; Petitioner’s Exhibit #6 (AADE Position Statement); Petitioner’s Exhibit #7 (ADA Request for Reconsideration).
41. The American Diabetes Association published its position statement on this issue in the “Diabetes Journal.” The article was entitled “Diabetes Care in the School and Day Care Setting.” Petitioner’s Exhibit #5; T-67, L-7-16.
42. Beyond the issue of student safety, the respondent school district also presented evidence of the potential expense of providing full-time nurses to all students in the district who would potentially return to their home-zoned schools. Rita Becchetti testified that each nurse would cost Respondent between \$40,000.00 to \$45,000.00. T-497, L-24-25 & T-498, L-1-8. She also testified that due to budget constraints the district had no funds to employ nursing staff. T-499, L-22-25 & T-500, L-1-10. Furthermore part-time nurses are very hard to find in the local employment market. T-500, L-12-15 & T-501, L-1-4.

43. The numbers of children with diabetes has increase by three percent (3%) among all children and by five percent (5%) among children under the age of five. T-473, L-19-25 & T-474, L-1-4.
44. After parental request for the administration of insulin by a UAP (See above paragraph 18) Respondent declined to train non-licensed personnel to administer insulin and to provide diabetes services. T-206, L-4-25; Petitioner's Exhibit #21. Respondent has, however, trained non-licensed personnel to monitor B.A.T.M.'s health and insulin levels and to provide emergency injections of Glucagon. T-486, L-16-25 & T-87, L-1-9.
45. Accordingly, B.A.T.M.'s mother has been obligated (if she desired B.A.T.M. to continue attending SJES) to go to SJES four (4) times a week (between 11:45-12:15) to monitor B.A.T.M.'s insulin levels and administer her insulin. T-200, L-24-25; T-201, L-2-13; Joint Statement #12
46. B.A.T.M. has a younger brother, who at the time of the hearing was entering into the second grade. This brother is in the Exceptional Student Education program, with eligibility categories of Autism Spectrum Disorder, OHI, Language Impairment, O.T., and P.T. He also has diabetes.
47. B.A.T.M.'s brother was also denied diabetes services at SJES and the Respondent told his parents that he would have to go to a school with a full-time RN and an Autism program. According to Mrs. M., the district wanted him to go to a different school than the school which had been recommended for B.A.T.M. She testified that she did not want her children to go to different schools. Joint Statement #14
48. After this due process complaint was filed, the district offered for both B.A.T.M. and her younger brother to attend either Ozona Elementary School or Plumb Elementary School,

with district transportation provided. Both Ozona Elementary School and Plumb Elementary School has a full-time RN and an Autism program for B.A.T.M.'s brother. Ozona is approximately three (3) miles from B.A.T.M.'s residence, while Plumb Elementary School is eight (8) miles from her home. Respondent's Request of Admissions # 12 and # 13. SJES is approximate one (1) mile from home. T-205, L-11

49. It was apparent from the testimony of the mother and the school principal that they have maintained what appears to be an excellent and collaborative relationship throughout the period where the parents were in dispute with the Respondent school district. T-607, L-5-12; T-608, L-2-15; T-609, L-1-6
50. Respondent has made no effort to seek out and designate appropriate UAPs who would be willing to serve as UAP, with appropriate training and supervision.
51. Respondent's policy that the administration of diabetes care, including the injection of insulin, be provided only by licensed nurses is clearly a long standing district policy, which is applied without reference to or consideration of the individual needs and circumstances of the student. Respondent's Answers to Interrogatories #19 & #23.
52. In applying its diabetes care policy, Respondent does not consider the possible availability of school staff, who might also be diabetic and who would naturally be a perfect candidate for serving as a UAP. No poll was taken of other school staff, who would have the maturity, intelligence, sensitivity and disposition to serve as a UAP for Petitioner. There was no individual discretion exercised in the decision not to delegate diabetes care to a UAP. Respondents Answers to Interrogatories #29.

SUMMARY OF FACT FINDINGS

53. Parents have a host of reasons for wanting their children to attend school near to their home. Clearly the proximity of the school allows parents to more easily participate in the school activities. With their children attending school along with their neighborhood friends, they are able to carryover their developing neighborhood relationships to the school environment. In school they can build upon and reinforce the social skills and experiences being learned among their neighborhood circle of friends.
54. Specific to this present situation, SJES is proximately one (1) mile from Petitioner's home. Ozona Elementary School and Plumb Elementary School, the two schools offered by Respondent due to their full-time RN and an Autism program, are three (3) and eight (8) miles respectively from Petitioner's home. T-205, L-11 Probably more important that the relative distances is the fact that Petitioner would be leaving her neighborhood friends behind if she is obligated to attend either Ozona or Plumb Elementary School.
55. In addition to these proximity issues, B.A.T.M. has a younger brother with Autism and who requires Exceptional Student Education and may depend upon the support of his sister. Because he also has diabetes, Respondent, at one point, wanted to send the children to different schools, where there are full-time nurses; something Petitioner's parents felt would be detrimental and interfere with the natural supports B.A.T.M. could offer her brother. Although after this complaint was filed, the district offered to send both children to the same school, this would have still meant uprooting the children from their present school. Joint Statement #14

56. By all accounts, B.A.T.M. is very involved at SJES and is experiencing great educational success. The parents have maintained positive collaboration with the administration and the educational staff at SJES. T-607, L-5-12; T-608, L-2-15; T-609, L-1-6
57. There is no question that students can become very rooted in a good elementary school. They become comfortable and familiar with the school, the teachers, and the administration. They develop opportunities, assume responsibilities, and to have unique experiences which are essential to their successful educational and social growth. These are not inconsequential considerations when doing educational planning for young children.
58. Initially, after consultation with B.A.T.M.'s physician, they parents adjusted the B.A.T.M.'s medication schedule, so that it would not be necessary to administer insulin at school, thus avoiding the need of a transfer. T-200, L-1-16; T-201, L-17-25; T-202, L-1-4, (See Joint Statement #7) When it was medically determined that the child's diabetes could no longer be sufficiently managed without administering insulin during the school day T-205, L-16-23; (See Joint Statement - #9), Petitioner's mother went to SJES four (4) times a week to monitor B.A.T.M.'s insulin levels and administer her insulin. T-200, L-24-25; T-201, L-2-13; Joint Statement #12
59. When considering any request for accommodation due to disability, the reasonableness of the requested accommodation is always at issue.
60. A large part of the testimony relative to the reasonableness of the requested accommodation of UAP administration of insulin, centered upon the safety issue. Obviously, it would not be reasonable to require Respondent to permit an accommodation which would be unsafe for the student or others.

61. Probably the issue of safety is the one area of testimony where there was the most direct conflict between the parties. At least three Respondent witnesses testified that it would be unsafe to delegate the administration of insulin to non-licensed personnel. (Donna Finegold, nurse educator, T-393, L-3-12), Rita Becchetti (T-468, L-18-20; T-469, L-21-25; T-470, L 1-8), and Dr. Dharamraj (T-580, L-7-25; T-581, L-15-18). Donna Finegold testified that a serious error in the administration of insulin for high blood sugar can be fatal. T-397, L-23-24 The American Nurses Association and the National Association of School Nurses have an expressed preference for insulin administration by licensed nurses. Petitioner's response to Respondent's Request for Admissions, #18; Joint Exhibit #1. According to Dr. Dharamrai (T-570, L-17-25; T-571, L-25) American Academy of Pediatrics presents an opinion that administration of insulin should not be delegated to UAPs.
62. The safety argument aside, Respondent makes a strong argument that the administration of insulin is simply a nursing task and as such should not be done by another. Respondent's witness, Dr. Dharamraj, testified that the administration of insulin, including determination of the dosage size is solely a nursing task. T-133, L-9-11; T-583, L-11-25; T-584, L-1-4. This testimony seems to imply that only nurses should monitor and administer insulin. The totality of evidence, however, does not really support that argument. It was apparent from the testimony that many individuals, other than registered nurses, in fact, administer insulin.
63. On the other hand Ms. Warnecke, ARNP, retired Coordinator of Health Services for the Lee County Schools, testified that administration of insulin by a UAP "is safe as long as the people who are being trained are being trained properly and are willing to do it." T-181, L-23-25. She further testified as how Lee County allows delegation of the administration of

insulin by non-licensed personnel, detailing their processes developed so that the delegation could be done safely. T-170, L-10-14

64. Paula Jameson, ARNP, an endocrine nurse practitioner, testified that “school caregivers can be trained to give insulin and assist students with blood glucose monitoring and other diabetes self-care tasks at school given the appropriate circumstances and the right resources and to put that training in place.” T-62, L-3-11. She testified further that there was no evidence that the delegation of diabetes care to UAPs is not a safe practice. T-72, L-7-12; Petitioner’s Exhibit #6 (AADE Position Statement); Petitioner’s Exhibit #7 (ADA Request for Reconsideration).

65. Ms. Jameson worked on the National Advocacy Committee and the Safe School Work Group, within the American Diabetes Association and testified that

[D]iabetes care can be delegated safely to properly trained unlicensed assistive personnel (UAP) under the supervision and monitoring of a Registered School Nurse who is felt as the coordinator and the expert on diabetes care at school, actually in the school setting. T-67, L-1-6

66. The Florida Department of Health, the Florida Department of Education and the U.S. Department of Education have policies which permit the delegation of insulin administration to appropriately trained UAP and have each published guidelines for such delegation of diabetes care in the school setting. T-332, L-8-15; Petitioner’s Exhibit #11; Joint Exhibit #2; Joint Exhibit #3; Petitioner’s Exhibit #17; Petitioner’s Exhibit #18.

67. With such opposing testimony offered by the parties, it is necessary to test or evaluate the force and consistency of each party’s respective positions.

68. Looking first at Respondent's position that the delegation of the administration of insulin to a UAP is dangerous and thus an unreasonable accommodation the following findings of fact must be considered:

- a. Respondent has trained non-licensed personnel (UAP) to monitor B.A.T.M.'s health and insulin levels and to provide emergency injections of Glucagon. T-486, L-16-25 & T-87, L-1-9.
- b. Respondent allows children as young as in the second grade (approximately eight years of age) to self-administer insulin. T-561, L-1-6
- c. Rita Becchetti testified that these younger students are supervised in their self-administration of insulin. In fact, these UAPs in Pinellas County monitor or supervise every aspect of the administration of insulin, including blood glucose level assessment, dosage determination, syringe draw, and injection preparation. This is true even though Respondent's testimony was to the effect that the danger in insulin administration was in the determination of the right dosage determination and the drawing of the correct dosage into the syringe. Respondent already trusts UAPs to supervise and monitor these determinations by young students. T-562, L-2-25 through T-563, L-22.

69. Looking at Petitioner's position that insulin administration by UAPs is safe and thus is a reasonable accommodation, the following finding of facts is pertinent:

- a. The parents, who are not medically-licensed regularly administer insulin safely to their daughter. Furthermore, B.A.T.M.'s mother has been permitted to administer insulin to her daughter at school, in order to allow her to remain at SJES.

- b. There is no question that the parents are very careful with their daughter's health and safety and they are willing to have insulin administration services provided through trained non-medical district personnel. T-244, L-2-5; Joint Statement #11
- c. B.A.T.M.'s treating physician, Dr. Frank B. Diamond, has stated that he "approved the delegation of B.A.T.M.'s diabetes care to trained, adult, non-licensed personnel. Joint Statement #11

70. The totality of the evidence leads to the conclusion that the administration of insulin requires a certain maturity and carefulness, as well as specific training in how to measure blood glucose levels, caloric intake, and the precise dosage to be administered. The science of this process has, however, been refined to the point where parents and other family members routinely administer insulin to children who are unable to self-administer. Children as young as eight and nine are allowed by schools to self-administer insulin, albeit probably with supervision by a UAP.

Without doubt the administration of insulin requires serious attention, appropriate training, good medically established procedures, and close nursing supervision. I do not think that one could deny that it would be relatively safer for insulin to be administered by a trained medical professional. That said, I do not think that Respondent has overcome Petitioner's evidence that insulin is routinely and safely administered to children with diabetes by individuals who are not licensed medical professionals.

71. The fact is that most parents and others in the natural supports of young children with diabetes learn how to safely administer insulin to young children. Then, those children, with diabetes, at a relatively young age learn to safely self-administer insulin. In addition, a growing number of trained non-medical individuals are being used to administer insulin to

children who cannot self-administer the insulin. P. Jameson testified and presented several articles where she discusses how UAPs can safely administer insulin, drawing from her experience in Orange County and from a survey she did with diabetes educators “across the county” “[t]hat school caregivers can be trained (and are) to give insulin and assist students with blood glucose monitoring ...” T-62, L-3-11.

72. As common as the administration of insulin by non-medical personnel may be, there was no dispute in the evidence that the delegation of the responsibility for the administration of insulin remains the responsibility of the licensed nurse or doctor. T-469, L-10-17 (Becchetti) and T-350, L-20-21 (Wiggins).
73. What would seem to be more pertinent to the issues of this case would be the factors which a nurse should use in making the delegation determination. The determination, to delegate or not, is to be an exercise of an informed professional judgment applied to the precise, specific facts and circumstances of an individual case. Karen Wiggins, Director of the Child and Adolescent Health Unit of the Florida Department of Health, testified that according to the “Nursing Guidelines for Delegation of Care for Students with Diabetes in Florida,” the decision as to the delegation of insulin administration should be made on a case-by-case basis. T-332, L-20-21.
74. That the determinations relative to the delegation of the administration of insulin are intended to be professional judgments specific to each unique and individual situation is reinforced by reference to 64B9-14.002 F.A.C., which provides the actual factors which the nurse is expected to consider in making such determinations. These factors require the “case-by-case” determination described both by Ms. Wiggins and the “Nursing Guidelines for Delegation of Care for Students with Diabetes in Florida.”

75. The total weight of the testimony demonstrates that Respondent did not permit its nurses to make individual assessment and judgment as to the appropriateness of delegating the administration of insulin. There was a long standing district policy that only nurses could administer insulin. While there was testimony by Ms. Becchetti, Supervisor of School Health Services, and Dr. Dharamraj, defending this policy, there was no evidence that this policy was developed due to any recent in depth medical review. The evidence was that this policy was simply a long held and firmly entrenched administrative policy.
76. In the instant case, there was no individual consideration of the possibility of allowing administration of insulin by a UAP either by a § 504 team or by the district administration itself. The matter was decided by the district administrative policy, as discussed above.
77. Cost may be a relevant factor in determining the reasonableness of Petitioner's requested accommodations. Respondent provide convincing evidence of the high cost of providing nurses in every school and stated that there was no money for hiring. T-497, L-24-25 & T-498, L-1-8. The relevance of that evidence is questionable however. In effect, Petitioner has specifically requested that the insulin administration be effected by a UAP, which might not cost Respondent anything more than the cost of training and supervision. Petitioner also elicited testimony from Rita Becchetti that LPNs would cost \$10,000 less than an RN and a CAN far less than that. T-525, L-10 through T-526, L-6.

CONCLUSIONS OF LAW

78. Under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulation found at 34 C.F.R. Part 104. (hereinafter - § 504), the Respondent school district is required to have in place an impartial hearing process for the purpose of providing an evidentiary hearing for disputes arising under § 504.² Accordingly, the Respondent school district has developed its policy entitled PCSB 2260.03, which provides for a fair hearing, with a hearing officer agreed to by the parties. This policy further states:

The hearing officer shall have the power to issue a binding order relating to requested relief other than money damages and attorneys fees, which must be sought in Federal Court. Appeals of the hearing officer's decision shall be in Federal Court.

79. The undersigned hearing officer has been agreed to by both parties to act as a hearing officer in the trial and determination of the issues present herein. Under this delegated authority this hearing office has jurisdiction and authority, after hearing of the evidence and consideration of the proposed final orders of counsel for the parties, to make the Findings of Fact provided above, to make Conclusions of Law, to decide the issues, and to present a Final Order accordingly.

80. Petitioner brought this claim under § 504. In addition, Petitioner has cited violations of the Americans with Disabilities Act of 1990 (Title II); 43 U.S.C. §12131 et. seq. and its implementing regulations found at 28 C.F.R. Part 35 (hereinafter – ADA)

81. The ADA provides that a public entity such as Respondent may not afford a qualified individual with a disability an opportunity to participate in or benefit from any aid,

² 34 C.F.R. § 104.36 “... a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.”

benefit or service that is not equal to that afforded others, and may not provide such an individual with an aid, benefit or service that is not as effective in affording equal opportunity.

82. Respondent has noted correctly, however, that the § 504 petition or complaint did not specifically allege a violation of the ADA and thus Respondent argues that Petitioner may not advance the ADA claim. Beyond the issue of appropriate notice, there is also the question of jurisdiction. This hearing officer is necessarily limited by the authority granted under the School Board Policy PCSB 2260.03 to hearing issues and facts related to the § 504 claim.

That said, Respondent in its Proposed Final Order recognizes that the § 504 claims and issues are “closely linked” or entwined and therefore offers an answer to those claims as well. This hearing officer will thus hear and make factual and legal determinations relative to those issues, but will limit the Order portion of this Final Order to the § 504 issues. To the extent exhaustion is required for the ADA issues, this hearing and its determination should provide such exhaustion, at least as concerns a hearing of the relevant facts.

83. Congress has found that “individuals with disabilities constitute one of the most disadvantaged groups in society.” 29 U.S.C. § 701(a)(2) and that “individuals with disabilities continually encounter various forms of discrimination in such critical areas as ... education.” 29 U.S.C. § 701(a)(5).

84. § 504 was implemented in order to assure:

that no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be

subjected to discrimination under any program or activity which receives Federal financial assistance. 34 C.F.R. §104.4

85. § 504 is essentially a *civil rights law* and its focus is more upon providing equal and appropriate access to educational services, than upon the provision of appropriate educational services.

The act and its regulations provide that a “free appropriate public education” is “the provision of regular or special education and related aids and services that ... are designed to meet individual educational needs of persons with disabilities *as adequately as the needs of persons without disabilities are met ...*” (emphasis added) 34 C.F.R. § 104.33(b)(1)

86. More precisely the § 504 regulations, in pertinent part, prohibit discriminatory actions which:

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is *not equal to that afforded others*;

...

(iv) Provide *different or separate aid, benefits, or services* to handicapped persons or to any class of handicapped persons *unless such action is necessary* to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others; (Emphasis added) 34 C.F.R. § 104.4(b)(1)(ii) & (iv)

87. In order to sustain a claim under § 504 the petitioner is required to establish four elements:

- a. That Respondent school district is receiving federal funds.
- b. That Petitioner is a student with a qualifying disability under § 504.
- c. That Petitioner is qualified for participation in the relevant program. In the instant cause, the program is a regular elementary education, with gifted components and was clear at trial that Petitioner is fully qualified to participate in her present educational program.
- d. That Petitioner was denied the benefits of the subject educational program due to her disability. This is the issue at dispute in the present complaint.

88. The Respondent school district, a public school system, receives financial assistance from the Florida Department of Education and through said financial assistance is a recipient of federal education funds and therefore is subject to the requirements of § 504, its implementing regulations. Joint Statement # 20. This is undisputed between the parties.
89. § 504 regulations at 34 C.F.R. 104.3(j) define a disabled person to include a person with a physical or mental impairment, which substantially limits a major life activity, including learning. A qualified individual with a disability in reference to elementary educational services, includes an individual with a disability of an age, during which nondisabled persons are provided such service. 34 C.F.R, § 104.3(k)(2)
90. Petitioner, B.A.T.M., with Type 1 diabetes mellitus, is a qualified individual with a disability for the purposes of Section 504 and Title II of the Americans with Disabilities Act and this legal determination was acknowledged by both parties. Joint Statement #21. Again it is undisputed that B.A.T.M. is eligible for the educational programs in which she is enrolled, including her gifted eligibility.
91. It is the forth requirement or element of the § 504 requirements which is the center of the dispute between the parties. Petitioner claims that she was “denied the benefits of the subject educational program due to her disability.” More precisely, Petitioner claims that the following policies of the Respondent deny her the benefits of her educational program due to her disability:
- a. Respondent only provides nursing services at certain schools and Petitioner’s home-zoned school is not one of those schools; and

- b. Respondent does not allow the delegation of the administration of insulin to LPNs, CNAs, or UAPs.

92. The consequential effect of Respondent's above defined policies is that Petitioner is left with two choices:

- a. Respondent will bus Petitioner to one of two selected schools with a registered nurse, who would be responsible for administering Petitioner's insulin; or
- b. Petitioner may remain in her present home-zoned school, but her mother or family-designated adult (not a school board employee) would have to come to school in order to administer Petitioner's insulin injections, regardless of personal expense or inconvenience.

93. Under § 504 regulations found at 34 C.F.R. §104.33(a) & (b) the Respondent must provide students with disabilities with a free and appropriate public education (FAPE), including regular or special education and related aids and services designed to meet the individual needs of the student with disabilities as adequately as non-disabled students.

94. Furthermore the § 504 regulations provide that:

[D]espite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services *that are not separate or different*. (Emphasis added) 34 C.F.R. §104.4(b)(2)

95. Essentially, Petitioner is arguing that the two choices presented to her by Respondent due to her disability, have the effect of denying her the same access to her education that a child without a disability would enjoy.

96. Generally, children, without diabetes, have the freedom and the choice to attend their home-zoned school, with their siblings, friends, and neighbors. § 504 provides that when it is necessary to place a student with a disability in a school other than the regular educational environment, the district shall consider the proximity of the alternative setting to the student's home. 34 C.F.R. § 104.34(a). This regulation presumes, of course, that there is a defensible reason for providing the services in another school other than the student's home-zoned school.
97. In making a determination relative to the issue of discrimination in this instant matter it is necessary to decide two issues:
- a. Did Respondent's policies cause a disparate treatment of Petitioner, as compared to her non-disabled peers? If so, then
 - b. Could Respondent have avoided such disparate treatment, by taking **reasonable** measures to change or amend its policy?
98. Considering the findings of facts already made (above), it seems clear that Respondent's policies have caused a disparate treatment of Petitioner, as compared to her non-disabled peers. While her circle of non-disabled neighborhood friends can go to school together, traveling only a mile from their home, she must mount a bus which will take her to a school from 3 to 8 miles from her home. While the distances are not great, she must leave her established friends. She must leave the school and teachers where she has been successful.
99. These considerations are not inconsequential. In considering the location for the provision of related aids and services, it has been generally recognize that there should be a consideration of where that child would attend if not for the disability. This is a clear

recognition that it does matter where the child would have been placed if not for the disability. This should be an individualized § 504 process, considering the child's unique needs and circumstances. 34 C.F.R. § 104.4 (vi); 34 C.F.R. § 104.34(a); see also 34 C.F.R. §300.116(c).³

100. While placement in a neighborhood school is not an "absolute right" under IDEA, McLaughlin v. Holt Public School Board of Education, 320 F.3d 663, 670 n.2 (6th Cir. 2003), such placement is the presumed placement if the student's disability needs can reasonably be met at that location.

"The regulations provide only that "[t]he educational placement of each child with a disability [shall be] as close as possible to the child's home," 34 C.F.R. § 300.552(a)(3), and that "[u]nless 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." 34 C.F.R. § 300.552(c). As we concluded in *Hudson*, we reiterate that these two regulations should be read, as their plain language indicates, to provide that a child should be educated in the neighborhood school (the school he or she would attend if not disabled) except when the goals of the child's IEP plan require a special education placement not available at that school, and in a situation when placement elsewhere is required, the geographic proximity of schools that offer that placement to the child's home should be considered. See *Hudson*, 910 F. Supp. at 1304; *accord Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T.*, 91 F.3d 689, 693-94 (5th Cir. 1996) (emphasizing that the consideration of proximity is not a presumption that a disabled student attend his or her neighborhood school); *Murray*, 51 F.3d at 929; *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153 (4th Cir.1991)." *McLaughlin v. Holt Public Sch.Bd. of Ed.*, 320 F.3d 663 (6th Cir. 2003)

101. Neither party has presented, nor has this hearing officer found, any legal precedence from this circuit relative to the primary issue of this case.
102. Respondent presents the case of R.K. v. Bd. of Ed., Scott County, Kentucky, 755 F.Supp.2d at 800 (December 15, 2010). While this is a federal district case in the Sixth

³ While this regulation is an IDEA regulation, the expression of the intent of the Least Restrictive Environment principle, as to the "location" of services, is a relevant consideration in the instant case. "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;"

Circuit, this might be considered instructive relative to these issues, even if it is not precedential. This case, at least at first glance, is very similar to the instant matter. In R.K. the Kentucky school district required the Plaintiff, a child with diabetes, to attend a school where Defendant school district had a nurse to administer the insulin injections. The federal district court held that the district acted reasonably and did not discriminate in providing the nursing services at a different school. The court held further that the district was not required to either place a nurse at Plaintiff's home-zoned school or to train a non-medical person to administer the insulin.

103. In R.K. the court considered whether placing a nurse at Plaintiff's school would require modifications which would "fundamentally alter the nature of the service, program, or activity."

A public entity must "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 modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7) (regulation promulgated with respect to ADA). The accommodation must not "impose an undue hardship on the operation of [an entity's] program." 28 C.F.R. § 41.53 (regulation promulgated with respect to Rehabilitation Act). The failure to provide reasonable accommodations can constitute disability discrimination. *See Alexander v. Choate*, 469 U.S. 287, 295 (1985); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999); *see also Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007).⁴

104. Given the above, the R.K. court held:

The Court is not persuaded that either the ADA, § 504, or the Kentucky Civil Rights Act require school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free and appropriate education are available at another site within the district. *See Urban by Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727-28 (10th Cir. 1996) (construing IDEA, ADA, and Rehabilitation Act) (*citing Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 410-11 (1979); *Barnett*, 927 F.2d 146, 154-55; *Schuldt*, 937 F.2d at 1362-63).

⁴ The R.K. court noted "While the Rehabilitation Act and the ADA are not identical, the Sixth Circuit has held that "because the purpose, scope, and governing standards of the acts are largely the same, cases construing one statute are instructive in construing the other." *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 925 (6th Cir. 2000) (*quoting McPherson v. Mich. High School Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir. 1997))"

105. There are, however, some important differences between the above the above case and the instant cause. In this Kentucky case, it seems that Kentucky law forbids the administration of insulin by non-medical personnel. We cannot know what the Court's decision might have been if Kentucky law had not forbidden the use of UAPs in the administration of insulin. As can be seen above, the Court notes that "[t]he failure to provide reasonable accommodations can constitute disability discrimination." *See Alexander v. Choate*, 469 U.S. 287, 295 (1985); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999); *see also Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007)

106. This reference to "reasonable accommodations" occurred immediately after the Court had discussed how requiring a school district to place nurses at every school where there was a child with diabetes, would be too great a burden upon the district and would thus, fundamentally modify the district's programs. Might the Court have found that the provision of UAPs to be a much milder burden and thus not a fundamental change in the district's programs?

107. As opposed to Kentucky, Florida does not specifically forbid the UAP administration of insulin to students. Florida specifically permits and holds harmless districts for the use of school district UAPs in the administration of emergency injected medication. With the authorization of a medical doctor the injection of insulin is authorized. The statute is provided in pertinent part:

Administration of medication and provision of medical services by district school board personnel.—

- (1) Notwithstanding the provisions of the Nurse Practice Act, part I of chapter 464, district school board personnel may assist students in the administration of prescription medication when the following conditions have been met:

- (a) Each district school board shall include in its approved school health services plan a procedure to provide training, by a registered nurse, ...
- ...
- (2) There shall be no liability for civil damages as a result of the administration of the medication when the person administering the medication acts as an ordinarily reasonably prudent person would have acted under the same or similar circumstances.
- (4) Nonmedical assistive personnel shall be allowed to perform health-related services upon successful completion of child-specific training by a registered nurse ... All procedures shall be monitored periodically by a nurse, advanced registered nurse practitioner, physician assistant, or physician, including, but not limited to:
 - ...
 - (c) Monitoring blood glucose.
 - (d) Administering emergency injectable medication.
- (5) For all other invasive medical services not listed in this subsection, a registered nurse ... shall determine if nonmedical district school board personnel shall be allowed to perform such service. Florida Statute 1006.062

108. Even more directly to the point, in listing student rights in Florida schools, Florida

Statutes provide specifically that, “[a] school district may not restrict the assignment of a student who has diabetes to a particular school on the basis that the student has diabetes, that the school does not have a full-time school nurse, or that the school does not have trained diabetes personnel.”

K-12 student and parent rights.—Parents of public school students must receive accurate and timely information regarding their child’s academic progress and must be informed of ways they can help their child to succeed in school. K-12 students and their parents are afforded numerous statutory rights including, but not limited to, the following:

- ...
- (3) HEALTH ISSUES.—
 - ...
 - (j) Diabetes management.— *A school district may not restrict the assignment of a student who has diabetes to a particular school on the basis that the student has diabetes, that the school does not have a full-time school nurse, or that the school does not have trained diabetes personnel.* Diabetic students whose parent and physician provide their written authorization to the school principal may carry diabetic supplies and equipment on their person and attend to the management and care of their diabetes while in school, participating in school-sponsored activities, or in transit to or from school or school-sponsored activities to the extent authorized by the parent and physician and within the parameters set forth by State Board of Education rule. The written authorization shall identify the diabetic supplies and equipment that the student is authorized to carry and shall describe the activities the child is capable of performing without assistance, such as performing blood-glucose level checks and urine ketone testing, administering insulin through the insulin-delivery system used by the student, and treating hypoglycemia and hyperglycemia. *The State Board of Education, in cooperation with the Department of*

Health, shall adopt rules to encourage every school in which a student with diabetes is enrolled to have personnel trained in routine and emergency diabetes care. The State Board of Education, in cooperation with the Department of Health, shall also adopt rules for the management and care of diabetes by students in schools that include provisions to protect the safety of all students from the misuse or abuse of diabetic supplies or equipment. A school district, county health department, and public-private partner, and the employees and volunteers of those entities, shall be indemnified by the parent of a student authorized to carry diabetic supplies or equipment for any and all liability with respect to the student's use of such supplies and equipment pursuant to this paragraph.
Florida Statutes §1002.20(3)(j)

109. The above statute goes on to provide that “[t]he Florida Department of Education, in cooperation with the Florida Department of Health, shall adopt rules to encourage every school in which a student with diabetes is enrolled to have personnel trained in routine and emergency care.” § 1002.20(3)(j), FL Statutes
110. While the above portion of this statute may arguably be interpreted as stating a legislative preference, i.e. that schools “have personnel trained in routine and emergency (diabetes) care,” the first part of the statute is clearly and affirmatively stated as a student right, i.e. for a student not to be restricted in school assignment due to the lack of a nurse or “trained diabetes personnel.” Any consideration of the R.K. decision, would have to be done in the light of the very clear pronouncements and preferences of the Florida legislators. It is well established law that while states may expand upon the rights of their citizens, they may not limit or reduce those rights. Any consideration of Petitioner’s § 504 rights must be undertaken from the perspective of Petitioner’s rights under Florida law.
111. While Respondent argues that because the bill (House Bill 747), which eventually became Florida Statute 1002.20(3)(j) used the word “encourage” rather than the Senate Bill 88’s word “ensure” is evidence of the intent to make the statute provision permissive, rather than mandatory. It is not clear how this advances Respondent’s argument. No one is really arguing that Respondent must assure “that every school in which a student with

diabetes is enrolled to have personnel trained in routine and emergency diabetes care,” as long as the student is not restricted in school assignment due to the lack of a nurse or trained diabetes personnel.

112. Respondent also cites an OCR Letter Ruling to the Duval County School District (2009). Respondent’s Exhibit 14. Again, this determination may be instructive to the issues under consideration in the instant matter. In somewhat similar fact circumstances that “the evidence is insufficient to support a finding of noncompliance with Section 504 and Title II with regard to the issue alleged in the complaint.” In other words the Office of Civil Rights of the U.S. Department of Education stated its opinion that the School Board of Duval County, Florida, did not violate Section 504 by sending children with diabetes to “magnet” schools with full-time nurses where they could receive the administration of insulin or by refusing to train and permit UAPs to provide the administration. Respondent’s Exhibit 14.
113. Petitioner argues that this OCR opinion (Duval) is under “reconsideration,” and thus is not “final.” While that is true, it remains an OCR opinion if and until such reconsideration is concluded and amended.
114. Respondent has proffered this OCR Letter Ruling for the proposition that it is not required by § 504 to place Petitioner at her home-zoned school, as long as the school district “determines through a proper Section 504 process that placement at another school is necessary to meet the student’s needs.” See Respondent’s Proposed Final Order, page 10. This appears to be a fair representation of the Duval OCR Letter (April 24, 2009) Ruling. Respondent’s Exhibit 14.
115. Even if one were to grant Respondent’s argument, this leaves for this hearing officer to determine (1) whether the school district determined “through a proper Section 504

process” that placement at another school was necessary, and (2) whether the placement at a school with a full-time licensed nurse “was necessary.” OCR Letter, page 5.

116. What is “a proper Section 504 process?” The totality of the § 504 regulations clearly establishes that an appropriate § 504 process is one that is individualized and specific to the particular student. For example § 104.35(c) provides:

In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

117. Given the above, in the instant matter the Respondent did not give Petitioner the individual consideration required by 34 C.F.R. §104.33. Petitioner has the right to have her unique individual needs assessed seriously and individually, including her social and emotional needs to continue her education in her home-zoned school, with her non-disabled peers. She had the right for Respondent to allow their nurses to seek individuals capable of safely administering the diabetes monitoring and insulin injection to accommodate her by use their professional discretion, as to the ability of the individual to administer the medications safely.

118. The findings of facts above demonstrate clearly that the decision to meet Petitioner’s § 504 needs by offering her transfer to a school with a full-time registered nurse was made by district policy application and not the kind of thoughtful, individualized, personal consideration anticipated by § 504. There was no effort to assess the availability of potential UAPs at Petitioner’s school. The question as to whether there were teachers or other personnel who may

themselves be diabetic and who would thus be very skilled at the processes of insulin administration was never asked.

119. Respondent again cites the Duval OCR Letter (April 24, 2009 for the proposition that “the district could have held a Section 504 Team meeting, and then assigned the student to a nearby school with a full-time nurse.” While it may be that, at least part of that statement, is true, the record does not indicate any evidence that in this instant case Petitioner “held a Section 504 Team meeting...” for these purposes. In fact, there was evidence that that district simply responded to the parents’ request for the administration of diabetes services by letter citing to Respondent’s pertinent Diabetes care policy.
120. Whether there was a “504 meeting” or not, there does not seem to have been any individualized consideration of the specific factual issues related to a determination of Petitioner’s need for diabetes care and the possibility of an accommodation of Petitioner’s need which would allow for her continued education in the least restrictive environment.
121. Petitioner’s mother testified that, in fact, her efforts to have the § 504 team consider and record Petitioner’s full extent of diabetes service needs, was met with frustration despite her advocacy.
122. The law, regulations, and court interpretations of § 504 treat § 504 procedures and processes very seriously. The failure of Respondent to give Petitioner her procedural safeguards and process distinguishes this case in a very important way from the OCR Letter in Duval (2009).

123. There is, however, another very important distinguishing consideration. Since the Duval Letter was promulgated and this instant cause was filed, the Florida legislature enacted Florida Statute 1002.20(3)(j), which, as has been noted above, states in pertinent part:

[A] school district may not restrict the assignment of a student who has diabetes to a particular school on the basis that the student has diabetes, that the school does not have a full-time nurse, or that the school does not have trained diabetes personnel See §1002.20(3)(j) Florida Statutes

124. While this statute does not require a school district to allow the administration of insulin by UAPs, it does speak very directly to the fundamental issue of this case and that is whether Respondent may “restrict” Petitioner’s school assignment “on the basis that the student has diabetes.” Stated as a student right, this statute says that they may not.

125. Respondent argues, however, that because it allows the child to remain in its home-zoned school, with parental administration of insulin, it is not restricting the assignment of the student. Furthermore, the district has offered Petitioners a choice of at least other two schools, which have full-time nurses.

126. Respondent’s argument loses its force when one examines the nature of the student’s rights. First, Respondent is obligated under § 504 to provide Petitioner with a free and appropriate public education. The provision for a “free” education has long been interpreted, as requiring public schools to provide all required related and other services and to not require the parents to assume those responsibilities. The act of requiring Petitioner’s mother to come to school four days a week to administer insulin to her daughter, in order to preserve her daughter’s right to attend the school she would have attended, if she were not disabled, is not providing a “free” education under the law. If

Petitioner has a legal right to attend SJES, then Respondent may not require her parent to come to school and administer the insulin. This principle is established in 34 C.F.R. § 104.33(c)(1).

For the purpose of this section, the provision of a free education is the provision of education and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian.

127. Under § 504 public entities must make the necessary adjustment or amendment of their rules or procedures in order to assure non-discriminatory access to their programs for individuals with disabilities. In the same way the ADA requires reasonable modifications to policies or procedures for qualified persons with disabilities. 28 C.F.R. § 35.130(b)(7)
128. The district “has a ‘real obligation ... to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating it conscientiously carried out this obligation.’ “ See Wong v. Regents of Univ. of Cal., 192 F.3d 807, 817 (9th Cir.1999).
129. Citing R.K. and Alexander v. Choate, 469 U.S. 287, 295 (1985), Respondent argues that the district is not required to make “fundamental” or “substantial” changes to its programs or standards.

A public entity must "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 modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7) (regulation promulgated with respect to ADA). The accommodation must not "impose an undue hardship on the operation of [an entity's] program." 28 C.F.R. § 41.53 (regulation promulgated with respect to Rehabilitation Act). The failure to provide reasonable accommodations can constitute disability discrimination. See *Alexander v. Choate*, 469 U.S. 287, 295 (1985); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999); see also *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007). R.K. v. Bd. of Ed., Scott County, Kentucky, 755 F.Supp.2d at 800 (December 15, 2010).

130. In a similar way, Barnett e rel. Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991), held that a “substantial modification” of the recipient’s program is not required by § 504. This case involves the issue of providing “cued speech” to a student in public school, where the district chose to provide this service by grouping students requiring this service in the same school. Citing the Supreme Court case of Southeastern Community College v. Davis, 442 U.S. at 405, the Court said:

Section 504 by its terms does not compel educational institutions . . . to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reasons of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context. *Southeastern Community College v. Davis*, 442 U.S. at 405

131. Respondent argues that if it were ordered to accommodate Petitioner’s desire to remain at SJES and therefore had to provide for insulin administration at that school, it would be obligated to either provide full-time nursing at SJES or hire nurses who would agree to delegate insulin service administration. This they claim would be a substantial and fundamental change to its program and “impose an undue hardship on the operation of [its’] program.” 28 C.F.R. § 35.130(b)(7)

132. In regulations developed relative to the ADA.

A public entity shall 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)

133. In regulations developed relative to § 504 employment accommodation.

41.53 - Reasonable accommodation.

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the

recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. 28 C.F.R. § 41.53

134. These regulations make it clear that Congress wished to place a rule of “reasonableness” on a federal recipient’s obligation to make significant accommodations or modifications of its programs. This requires an analysis of the burden that providing insulin administration at SJES would place upon Respondent school district.
135. The requirement of “reasonableness” and the prohibition against undue hardship or burden requires a balancing of interests of each party. Clearly § 504 places a high value on equality of access for students with disabilities, while at the same time the law does not wish to unreasonably burden public schools in the search for this equality.
136. This is particularly true, when, as in the instant case, there is not a question of a disparity of educational services. The disparity lies in the fact that children without diabetes are educated in their neighborhood schools, which children with diabetes receive the same education, but in schools with full-time nurses. As has been recognized, there is a real and meaningful value to being educated close to home, along with one’s neighborhood friends.
137. Both the R.K. (6th cir.) case and the OCR Letter to Duval (2009), previously cited, have found that the burden of providing a full-time nurse for each school where a child might require the administration of insulin would be too onerous of a burden. It is not clear to this hearing officer that either the court in R.K. (6th Cir.) or the investigator in the OCR Letter to Duval (2009) even considered the congressional preference for children to attend their neighborhood school.
138. That being as it may, Respondent in this case did present compelling evidence of the cost of hiring each nurse, the numbers of children (and thus schools) that might require a

nurse for diabetes administration, and the difficulty of even finding nurses willing to work for the school district. Petitioner presented evidence of some school districts which do, in fact, provide nurses for each of their schools. Still, if Respondent's only option is to use nurses to provide diabetes services, then such a mandate may well be too heavy and onerous to be placed upon the district.

139. That said, however, Petitioner has presented very strong evidence that Respondent has other viable options from which it may chose. Insulin may be administered safely by LPNs, CNAs, and even UAPs, each less expensive that the precedent. No one has even inquired as to whether there might be a teacher or other educational professional at SJES, who is also diabetic and who would be very knowledgeable and experienced in insulin administration. The use of such person most likely would cost Respondent nothing or at the most very little. These methods of administration are available to Respondent. As has been shown *supra*. there is support in Florida statute for using UAPs and a statutory mandate to not restrict a student's school placement due to diabetes and a lack of a nurse or UAP at that school. The Respondent may not assume the mantle of being overburdened because it has chosen to limit itself to the use of nurses for insulin administration.

140. When one considers the potential use of UAPs to administer insulin, then the pendulum swings back to the side of the Petitioner. If it is within Respondent's means to provide a non-burdensome accommodation, then the Respondent cannot avoid its obligation to provide that accommodation, because it has chosen to limited itself to the more burdensome use of registered nurses for insulin administration.

141. Training UAPs at SJES to administer insulin would not fundamentally alter any aspect of the school's educational program and would not impose an "undue hardship" on Respondent.
142. Respondent argues, however, that the medical decision to delegate the responsibility for the administration of insulin to another person is a decision which resides solely in the person of the registered nurse or other higher medical professional.
143. Actually, there seems to be a consensus as to the above assertion by Respondent, not only among the various medical professionals who testified at hearing, but also among the parties. Petitioner does not deny the fact that the only the supervising registered nurse can make the final medical decision as to the delegation of responsibility for the administration of insulin.
144. Based upon this assertion, Respondent argues that "[t]his hearing officer cannot substitute his judgment for that of a licensed nurse working in the school setting relating to the delegation of a nursing task in the school setting." See Respondent's Proposed Final Order, page 11.
145. This hearing officer agrees that he may not overrule the individual, independent professional judgment of a licensed nurse, assigned responsibility for the care of Petitioner to refuse delegation, in accordance with the legally mandated factors as related in § 64B9-14.002 F.A.C.. (See below). The evidence presented in this case, however, does not showing any "judgment" of the "licensed nurse working in the school setting" relative to the delegation of a nursing task for B.A.T.M.
146. The totality of the evidence makes it clear that the prohibition against the delegation of the administration of insulin was derived from Respondent's administrative policy on the

issue. There was testimony by Respondent's nurses that this has been the policy in the district from since before these witnesses came to this district. There was no evidence presented that this policy was reviewed in light of medical advances in the monitoring of blood glucose, calculating caloric intake, determining appropriate dosage, etc.. While there was some evidence that the issue may have been discussed at various meetings of the district's nurses, this again does not rise to the standard of a reasoned, scientific consideration of the issues involved.

147. Such a policy does not rise to the level of the individualized, case-by-case deliberation anticipated in the laws empowering medical personnel to make a medical judgment whether or not to allow delegation of responsibility for insulin administration in a specific, unique situation.

148. Consider the Florida Administrative Code, which describes the factors that a nurse should consider when exercising the nursing judgment as to whether to delegate a nursing task.

64B9-14.002 Delegation of Tasks or Activities.

In the delegation process, the delegator must use nursing judgment to consider the suitability of the task or activity to be delegated.

(1) Factors to weigh in selecting the task or activity include:

- (a) Potential for patient harm.
- (b) complexity of the task.
- (c) Predictability or unpredictability of outcome including the reasonable potential for a rapid change in the medical status of the patient.
- (d) Level of interaction required or communication available with the patient.
- (e) Resources both in equipment and personnel available in the patient setting.

(2) Factors to weigh in selecting and delegating to a specific delegate include:

- (a) Normal assignments of the UAP.
- (b) Validation or verification of the education and training of the delegate.

- (3) The delegation process shall include communication to the UAP which identifies the task or activity, the expected or desired outcome, the limits of authority, the time frame for the delegation, the nature of the supervision required, verification of delegate's understanding of assignment, verification of monitoring and supervision.
- (4) Initial allocation of the task or activity to the delegate, periodic inspection of the accomplishment of such task or activity, and total nursing care responsibility remains with the qualified nurse delegating the tasks or assuming responsibility for supervision.

Specific Authority 464.006 FS. Law Implemented 464.003(3)(a), (b), (d), (e), 464.018(1)(h) FS. History—New 1-1-96, Formerly 59S-14.002.

149. A major case in California involving the same issues (administration of insulin) was resolved through settlement, with a Legal Advisory. The conclusions in this settle are very instructive relative to the issues of this case.

**LEGAL ADVISORY ON RIGHTS OF STUDENTS WITH DIABETES IN CALIFORNIA'S K-12
PUBLIC SCHOOLS**

Pursuant to the recent Settlement Agreement in *K.C. et al. v. Jack O'Connell, et al.*, Case No. C-05-4077 MMC, in the United States District Court for the Northern District of California, the California Department of Education (CDE)

An LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will only be provided by district personnel at one school in the district or will always require removal from the classroom in order to receive diabetes related health care services. For example, in *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004), the Ninth Circuit Court of Appeals noted that OCR has repeatedly held that blanket policies that preclude individual evaluation of a particular child's educational and health related services needs violate Section 504. (See also *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR (LRP) 1276, 1280 (OCR 1993) (district violated Section 504 by failing to perform an evaluation that was individualized by proposing changes in placement based upon a generalized district policy regarding who could perform injections without regard to student's individual education needs); *Irvine (CA) Unified Sch. Dist.*, 23 IDELR 1144, 1146 (OCR 1995) (district's "unwritten policy" prohibiting blood glucose testing in classroom violated 34 CFR sec. 104.35(c)(3) requiring that a team of persons give careful consideration to all of the information available and makes determinations based upon the individual needs of the disabled student).) See further discussion below in the section of this advisory discussing IDEA entitled *Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI*.

150. It seems clear that both §504 and F.A.C. 64B9-14.002 required a case-by-case, individualized, deliberate consideration of the unique factors and circumstances required for the accommodation of Petitioner in her home school. There are many factors that might have been considered, such as:

- a. Is Petitioner's diabetes stable? How complex are her blood glucose calculations?
- b. How difficult is it to calculate her dosage and to draw the correct amount?
- c. Are there responsible adults in her school who are, themselves, diabetic, with knowledge and experience in insulin administration?
- d. Are there other individuals who could be trained as UAPs for the administration of the insulin?

151. Respondent school district's over-arching policy relative to the administration of diabetes care, which fails to consider the individual and unique needs of the student Petitioner on a case-by-case basis, necessarily violates Petitioner's § 504 procedural rights.

152. This hearing officer does acknowledge, however, that without question, deference should be shown to Respondent's administrative decisions. Respondent has the primary responsibility of providing educational services to children within the county's borders. It is generally understood that school districts have responsibility and discretion in determining appropriate educational methodologies. In medical matters, however, schools generally show an important deference to the student's medical doctors. They require doctor's orders before they provide medically-related services. They require very precise orders providing the exact doses and instructions as to how the services are to be provided. In this matter Petitioner's doctor approved of the administration of insulin by appropriately trained UAPs.

153. This is not to say that a student's private physician has an absolute command over medically-related services, but that the private physician's medical opinion as to how the school should administer diabetes care is very persuasive in this instant case.
154. If all else were equal, there is no question that Respondent has the authority and responsibility to develop policies and procedures for the provision of medical services to the students under its care. This authority is not, however, without some modest limits, in that the policies and procedures developed must not unnecessarily treat students with disabilities differently that Respondent treats children without disabilities.
155. Respondent therefore retains the authority to maintain a policy that only registered nurses should provide insulin injections to students. What Respondent cannot do is use its policy decision to use only nurse administration of insulin, as grounds to defend its position that students, desiring district diabetes services, must transfer to a school where nurses are stationed. This is because Respondent does have alternative options for the provision of these services, which options would not be near as burdensome to Respondent.
156. The legal principle underlying the above statement is found in 34 C.F.R. § 104.10(a), which provides that § 504 and its mandates apply regardless of any state statutes, rules, regulations, or in this case, school board policy to the contrary.

The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limit upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

157. Again the California Legal Advisory very clearly expresses the principles discussed above:

LEGAL ADVISORY ON RIGHTS OF STUDENTS WITH DIABETES IN CALIFORNIA'S K-12 PUBLIC SCHOOLS

Pursuant to the recent Settlement Agreement in *K.C. et al. v. Jack O'Connell, et al.*, Case No. C-05-4077 MMC, in the United States District Court for the Northern District of California, the California Department of Education (CDE)

F. School Placement Decisions

School placement decisions may not be based upon the unwillingness of a district to provide needed related services to a child with OHI-diabetes disability at the school that the child would otherwise attend. A district may not require the parent to waive any rights, hold the district harmless, or agree to any particular placement or related services as a condition of administering medication or assisting a student in the administration of medication at school. (See Comment to IDEA regulations at p. 46587 (federal register) involving 34 CFR sec. 300.116(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.....Public agenciesmust not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff;" see also *Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (blanket waiver of liability as condition to provision of medical services prohibited). For example, a district may not have a blanket policy or general practice that insulin or glucagon administration or other diabetes-related health care service are only going to be provided by district personnel at one school in the district, or that a child will always need to be removed from the classroom in order to receive diabetes related health care services. An IEP developed in the legally-required manner, which takes into account all of the relevant medical and education factors under the IDEA for each disabled child, is the only way to ensure that such a student receives an individualized determination of what constitutes FAPE under the IDEA and relevant state statutes.

158. Finally, Respondent argues that the provision of insulin administration is a “related service” and not an “educational service.” Without question It would be generally accepted that the provision of insulin administration provides the Petitioner “access” to her educational program and, thus is a “related service” and it is not an “educational service. As Respondent argues, the courts have held that under Title II or § 504, where claims do not involve challenges to educational services, the petitioner must show that Respondent acted with “deliberate indifference.” *R.K.*, 755 F.Supp.2d at 808; *Duvali v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); and *A.P. ex rel. Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F.Supp.2d 1125 (D.Minn. 2008).

159. A full reading of the Duvali v. County of Kitsap case cited above by Respondent, however, shows that the requirement of proving “deliberate indifference” arises when the plaintiff is seeking money damages.

To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the defendant. *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998).
Duvali v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001);

160. This means that while the requirement of proving “deliberate indifference” is required for establishing damages, this requirement cannot be raised as a shield against a finding of § 504 discrimination for the purpose of enjoining the practice.

161. In order to act with “deliberate indifference” a respondent must act with a “conscious disregard” for a petitioner’s rights. See Bd. of County Comm’rs v. Brown. 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997), holding that “[a] showing of simple or even heightened negligence will not suffice.” Furthermore, A.P. ex rel. Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11 held that this level of conscious disregard requires either that the defendant knows that its actions will violate the plaintiff’s rights, or that the violation is a “plainly obvious consequence” of such actions. (citing Brown, 520 U.S. 410, 117 S.Ct. 1382); R.K., 755 F.Supp.2d at 810).

162. The court in Duvali helped define the requirement of “deliberate indifference.”

Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the likelihood. *City of Canton v. Harris*, 489 U.S. 378, 389 (1988); see also *id.* at 395 (O’Connor, J., concurring) (deliberate indifference requires both “some form of notice . . . and the opportunity to conform to[statutory] dictates”).

163. The court in B.M. v. Board of Education of Scott, Kentucky, 51 IDELR 5 (2008) also defines “deliberate indifference.

A defendant is deliberately indifferent only if he acts with "conscious disregard" for a plaintiff's rights." *Board of County Comm'rs v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). "A showing of simple or even heightened negligence will not suffice." *Id.* Such conscious disregard exists only if either (1) the defendant actually knows that its actions will violate the plaintiff's rights or (2) such a violation is the "plainly obvious consequence" of the defendant's actions. See *Peterson*, 538 F.Supp.2d at 1147 (citing *Brown*, 520 U.S. at 410).

164. This hearing officer is limited from ordering damages against the school board by the school board policy under which this hearing officer was authorized to hear and decide this matter. In the event that Petitioner may wish to seek damages against Respondent it would be necessary for Petitioner to file suit in federal court.

165. That said, Petitioner has not pleaded facts nor presented evidence that rises to the level of "conscious disregard," as defined above, on the part of Respondent that would permit a finding or conclusion of law that Petitioner should be awarded damages.

166. Reimbursement of actual costs, including time, expended by Petitioner due to the discriminatory actions of Respondent, would not be excluded by the above limitation of damages and it is found that Respondent is responsible for the cost of performing acts, which were the responsibility of Respondent. It is only in this way that Respondent can remediate its failure to provide a free and appropriate education to Petitioner.

167. Petitioner has presented sufficient evidence to establish that Respondent has a district policy, which is applied without the consideration of the individual and unique needs and circumstances of each student seeking accommodation and services. Respondent has presented evidence that it prefers not to allow the administration of insulin by any personnel except for licensed registered nurses. Respondent has failed to provide, however, sufficient evidence to establish that the administration of insulin by UAPs is sufficiently dangerous, that Respondent would be justified in refusing UAP administration of insulin. The resulting effect of this policy has been to deny Petitioner her right to

participate in Respondent's programs, to the extent possible, with appropriate and reasonable accommodations and services, in the same way and in the same school as she would if she were not disabled.

168. This hearing officer is not in any way critical of Respondent's desire to offer to meet Petitioner's insulin administration needs through the services of a licensed medical professional, a registered nurse. This is a very appropriate offer and many parents may happily prefer such services. The district is not obligated to place nurses in every school where there is a child with diabetes. What the district must do is consider the individual, specific needs of each child seeking insulin administration accommodations under § 504 and to provide appropriate and reasonable accommodations, which accommodations may include administration by a registered nurse, a LPN, a CNA, or a UAP, at the district's discretion, that the child, if she wishes, may remain in the school she would have been in if she were not disabled.

169. Respondent has argued that this hearing officer does not have the authority to override a nurse's individual discretion relative to the administration of insulin. This hearing officer agrees that he lacks the authority to order a nurse or any other employee of Respondent to do anything. It is not necessary for this officer to make such an order. It is Respondent's responsibility and obligation to provide reasonable accommodations to students with disabilities being served in the school district. Respondent may provide these accommodations in any way (RN, LPN, CNA, or UAP) Respondent would like, as long as Respondent does not unreasonably withhold appropriate accommodations, as was done in this instant cause. Assigning supervising RNs who are willing to delegate these responsibilities to willing, and appropriately trained LPNs, CNAs, or UAPs, who have a

demonstrated capacity to faithfully and safely administer insulin and provide the diabetes accommodations and services required, is the responsibility of the school district.

CONCLUSION AND ORDER

- A. B.A.T.M. is a student, with a disability as defined under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 784; she attends Respondent’s public schools, which are recipients of federal funds; and she is otherwise qualified for the relevant educational program being offered by Respondent School District at her home-zoned school.
- B. Respondent School District violated B.A.T.M.’s rights against discrimination under § 504, when it refused to individually and specifically consider the viability of reasonable accommodations, which would have permitted B.A.T.M. to receive the administration of her insulin administration at her home school.
- C. Respondent School District shall revise its policies relative to the administration of insulin as an accommodation to children with diabetes, so that they conform to this Order in that:
 - 1. Each student requesting the accommodation of the administration of insulin to students, who are unable to self-administer insulin, shall be provided with individualized and personally specific consideration to determine the extent to which such insulin administration can be reasonably provided in the school he or she would attend if not disabled;
 - 2. In making the individualized assessment above, Respondent shall, both in policy and practice, recognize that it is generally appropriate and reasonable, limited only by the exact personal circumstances of the student and the personnel available for training and service, to provide for the administration of the insulin through the services of RNs, LPNs, CNAs, or trained non-medical personnel (UAPs).
 - 3. The use of LPNs, CNAs, or trained non-medical personnel for the administration of insulin to students, who are unable to self-administer insulin, and who desire to remain in to be educated in their home-zoned school or the school the child would attend if not

disabled, shall not be unreasonably denied, or otherwise discouraged by District policy or practice, written or unwritten.

4. It is a reasonable accommodation for the District to assure that Nurses who might need to supervise LPNs, CNAs, or trained non-medical personnel, be willing to delegate the responsibility of diabetes monitoring and insulin administration, as long as such delegation can be done safely. The requirement of safety is a determination which relates only to the specific medical circumstances of the student and the individual abilities and training of the potential non-medical personnel available, not to the medical professional's personal feelings toward the practice of delegation.
 5. Respondent shall provide notice to the parents of all students, who are unable to self-administer insulin and who thus would be eligible for a reconsideration of their medical or § 504 plans relative to the administration of insulin.
- D. Respondent shall immediately convene a new § 504 meeting for Petitioner and the participants in such meeting shall consider how Petitioner's desire to be educated in her home-zoned school can be reasonably accommodated through the use of either a RN, LPN, CAN, or a trained non-medical adult staff member (UAP), in accordance with the above directive as to the administration of insulin. The accommodations to be provided to Petitioner shall either be detailed on her § 504 plan, or shall be detailed on a medical service plan, which is incorporated by reference on the § 504 plan.
- E. It is appropriate for Respondent to reimburse Petitioner's parents for the cost of the services provided by Petitioner's parents and it is so ordered. Petitioner and Respondent shall agree together as to the exact amount of such reimbursement, or Petitioner may petition the federal court for relief.

F. Petitioner's have substantially prevailed in this cause.

DONE AND ORDERED this 4th day of October, 2011, in St. Petersburg, Pinellas County, Florida.

/s/ Mark S. Kamleiter

Mark S. Kamleiter, Esquire
§ 504 Hearing Officer
2509 First Avenue S.
St. Petersburg, FL 33701
(727) 323-2555
Fax Filing (727) 323-2599
Filed this 4th day of October, 2011.

COPIES FURNISHED:

James A. Robinson, Esquire, and
David Koperski, Esquire
School Board of Pinellas County
301 Fourth St. SW
P.O. Box 2942
Largo, Florida 33779-2942
Co-Counsel for Respondent

Kathryn R. Dutton-Mitchell, Esq.
Ann Siegel, Esq.
Catalina Urquijo, Esq.
1930 Harrison Street, Suite 104
Hollywood, Florida 33020
Co-Counsel for Petitioner

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final, according to the terms providing for this hearing under Pinellas County School Board Policy PCSB 2260.03, unless, within 90 days after the date of this decision, an adversely affected party brings a civil action in the appropriate district court of the United States pursuant to the laws governing federal action on § 504 issues.