

ADMINISTRATION OF EMERGENCY SEIZURE MEDICATION DISCONTINUED

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The Americans with Disabilities Act (ADA) is a comprehensive civil rights law enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA is intended to apply to all programs, activities, and services provided or operated by State and local governments. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Liability under Title II of the ADA need not be premised on an intent to discriminate; rather, discrimination may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable accommodation, or (3) the defendant's rule disproportionately impacted disabled people.

RECTAL SYRINGE

In the case of *United States of America v. Northern Illinois Special Recreation Association*, No. 12 C 7613, 2013 U.S. Dist. LEXIS 52100 (N.D. Ill. 4/11/2013), the issue was whether NISRA had effectively "refused to provide a reasonable accommodation." In this particular instance, NISRA had made a policy decision to no longer administer an emergency seizure medication which used a rectal syringe at NISRA's summer camp. This policy prompted the United States, through the Department of Justice (DOJ), to pursue a discrimination claim in federal court under the Americans with Disabilities Act.

NISRA filed a motion to dismiss the ADA claim. Pursuant to the Federal Rules of Civil Procedure, the federal court would only grant NISRA's motion to dismiss if it appears beyond doubt that the United States could not prove a set of facts that would support a claim under the ADA. Moreover, in reviewing NISRA's motion to dismiss, the federal court would "accept as true the allegations of the complaint and draw all reasonable inferences in favor of plaintiff."

Arguably, the fact that NISRA had been able to provide the requested accommodation in the past would appear to raise an inference that the accommodation had been reasonable and its discontinuation, without further explanation, would seem unreasonable in violation of the ADA.

FACTS OF THE CASE

NISRA provides year-round recreational activities for children and adults with disabilities in northern Illinois. (<http://www.nisra.org/>) NISRA serves residents with disabilities in thirteen communities in northern Illinois through a partnership of member cities and public park districts. As a result, NISRA was considered a "public entity" under Title II of the ADA which includes "any department, agency, special purpose district, or other instrumentality of a State or local

government.”

NISRA does not employ medical personnel, but employs a staff experienced who work with people with disabilities. Typically, one counselor is responsible for the supervision of two to four participants, but at times, NISRA provides one-on-one service for its participants. Also, NISRA staff is trained in administering epinephrine auto-injector (Epi-pen) shots, dispensing asthma medication, and feeding children with gastroonomy feeding tubes. Moreover, staff is trained in responding to seizures pursuant to NISRA's seizure management policy.

Participants of NISRA's programs with a history of seizures submit a seizure plan in which their doctor describes the type of seizures they experience, the medications they currently take, and the protocol to follow in the case of a seizure. M.M. and N.R., both diagnosed with epilepsy, are former participants of NISRA's summer camp program. Because of their epilepsy, M.M. and N.R. have a history of experiencing tonic-clonic seizures (also known as grand mal seizures) and, because of such history both M.M. and N.R. were prescribed Diastat AcuDial (Diastat).

Diastat is the only FDA-approved medication for out-of-hospital treatment of emergency seizures. Diastat and Valium are brand names for generic diazepam. Diazepam is commonly used to treat anxiety, panic attacks, as well as seizures. Diastat is a Schedule IV controlled substance which indicates that it has a low potential for abuse, but is only available by prescription for a currently accepted medical treatment in the United States.

In treating seizures, the sooner Diastat is administered, the more effective it will be. Diastat is injected rectally with a pre-filled plastic syringe. Diastat was developed so people without medical training can administer the medication.

After its 2008 summer-camp session, NISRA changed its policy to no longer administer Diastat. M.M. has since experienced a recent onset of tonic-clonic seizures. Attendance at the camp, coupled with NISRA's refusal to administer Diastat, makes participation in NISRA's programs a risk to her health and life if an emergency presented itself. Similarly, N.R.'s parents requested N.R.'s personal aide (already provided by the camp) to be allowed to administer Diastat if needed. NISRA refused and replied the aide would only monitor for seizures and call 911 if a seizure occurred.

ON THE BASIS OF DISABILITY

In its motion to dismiss, NISRA asserted “the complaint does not allege a denial of benefits on the basis of disability” as required by the ADA. On the contrary, NISRA claimed “no individuals were denied access to NISRA's programs because of their disability.” Specifically, in this particular instance, NISRA pointed to the fact that M.M. and N.R. have participated in NISRA's programs. Moreover, NISRA relied upon the “facial neutrality of NISRA's policy not to administer drugs in contradiction to established medical guidelines.” In other words, the drug administration policy treated everyone alike, without any regard for the nature or severity of any disability. As a result, NISRA contended any discrimination was not “on the basis of disability” as required by the ADA.

In response, the United States asserted it was not claiming that “NISRA denied M.M. and N.R. admission to its programs or that NISRA employs a policy that facially discriminates against epileptic participants.” Instead, the United States alleged NISRA was in violation of the ADA because “NISRA could have reasonably accommodated M.M. and N.R., but refused to do so.” In so doing, the United States cited Title II regulations which require “reasonable modifications in policies” when “necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). Moreover, as noted by the federal district court, “[f]ailure to make a reasonable accommodation, regardless of discriminatory intent, is sufficient to demonstrate a causal connection between a disability and the denial of a benefit” in violation of the ADA.

In this particular instance, the court found the complaint had alleged a presumably reasonable accommodations, which were available, but discontinued. In so doing, the court noted NISRA “staff members are trained specifically to respond to participants' seizures.” Moreover, “participants submit a seizure plan in which their doctors describe the type of seizures they experience, the medications they currently take, and the proper protocol to follow in the case of a seizure.”

As a result, as characterized by the court, “NISRA *could* reasonably accommodate those participants,” but chose not to, implementing a new policy that “exposes its epileptic participants to a risk of serious injury and death.” (*Emphasis of court*) The federal district court, therefore, found that the complaint had sufficiently alleged a violation of the ADA because “the refusal to accommodate, by administering Diastat, effectively denied a benefit ‘on the basis of’ M.M.'s, N.R.'s, and other epileptic participants' disability.”

REASONABLE ACCOMMODATION

NISRA further claimed the accommodation requested by the United States, which would include administration of emergency medication with a rectal syringe, was “unreasonable as a matter of law.” The federal district court, however, noted no court had previously held “the request for a service-providing entity to administer an emergency prescription drug, like Diastat, [was] an unreasonable accommodation as a matter of law.” In this particular instance, the court stated it would “decline to be the first to do so.” In so doing, the court noted NISRA’s reliance on case law which had held “a requested accommodation unreasonable as a matter of law,” in particular *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754, 757 (8th Cir. 1998). In this case, the court found the requested accommodation was unreasonable because “plaintiffs were requesting the administration of drugs in excess dosages.”

See: “[Prescription Medication Policies Prompt ADA Claims](http://classweb.gmu.edu/jkozlows/lawarts/01JAN02.pdf)”
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<http://classweb.gmu.edu/jkozlows/lawarts/01JAN02.pdf>

In the opinion of the court, none of the case law cited by NISRA “carry weight” within the context of this particular ADA complaint by the United States. On a procedural basis, these cases relied upon by NISRA were “decided at the motion for summary judgment stage, and not on the pleadings alone.” Summary judgment would have considered all of the pretrial evidence offered by both sides and lead the court to conclude there was no issue left to decide which

would necessitate further proceedings at trial. In contrast, granting a motion to dismiss would occur at a much earlier stage in the proceedings. It would find the allegations in plaintiff's complaint, even if accepted, would fail to establish a legal basis for a claim under the ADA.

In this case, the federal district court found the complaint by the United States had alleged sufficient facts which "could support a conclusion that the requested accommodation is reasonable under Title II."

Plaintiff alleges Diastat was developed so people without medical training can administer the medication. The complaint also suggests that any training required to administer Diastat is comparable to the training already provided by NISRA: staff learn how to properly respond to seizures, feed children with gastroonomy feeding tubes, and to administer other prescription and emergency drugs.

NISRA had also asserted that "the requested accommodation is unreasonable as a matter of law" based upon "the Food and Drug Administration, Physician's Desk Reference ("PDR"), and drug manufacturer standards." The federal district court rejected this argument. In so doing, the court found existing NISRA staff training was in fact consistent with PDR standards:

PDR standards do not make Plaintiff's request patently unreasonable, especially when NISRA staff already have training related to seizures and certain staff members already provide constant one-on-one care for participants...The PDR requests the person administering Diastat to receive instruction from the prescribing physician, distinguish certain types of seizures, and provide post-administration monitoring of the individual receiving Diastat.

NIRSA had also relied on a claim previously litigated by the United States in which the Department of Justice had found it would not be a "reasonable accommodation for Army staff to administer Diastat." In that instance, the court had found "Diastat accommodations sought are unduly burdensome and are not required by law." The federal district court, however rejected NIRSA's argument that administration of Diastat was necessarily an unreasonable accommodation in every instance.

[W]hat is reasonable in a particular situation may not be reasonable in a different situation - even if the situational differences are relatively slight...[A]dministration of Diastat may very well be a reasonable accommodation in one situation and yet unreasonable in another situation... [W]hat constitutes a reasonable accommodation under Title II depends on a variable mix of factors; factors not entirely obtainable at the pleading stage [i.e. on a motion to dismiss based only on alleged facts in the complaint].

As a result, the federal district court concluded the complaint itself had alleged sufficient facts to establish a violation of the ADA and overcome NIRSA's motion to dismiss the claim.

UNDUE BURDEN

NISRA had also argued “the accommodation requested would impose an undue administrative burden, fundamentally alter the nature of NISRA's services, and subject NISRA to an undue amount of liability.” As cited by the federal district court, “Title II regulations require reasonable modifications in policies when necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, or would create undue financial and administrative burdens.” 28 C.F.R. § 35.130(b)(7).

According to the court, to prove “undue burden” within the context of the ADA, NISRA would have to “show the costs are excessive in relation either to the benefits of the modification or to the entity's financial survival or health.” Similarly, the court noted that “the fundamental alteration defense” would allow NISRA to “avoid making modifications to accommodate disabled individuals” if it could “show that adapting existing institution-based services to a community-based setting would impose unreasonable burdens or fundamentally alter the nature of its programs or services.”

At this preliminary stage in the litigation (i.e., a motion to dismiss based solely on the complaint), the court found NISRA had not yet had an opportunity to show that the complaint should be dismissed on the basis of undue burden. On the contrary, based on the allegations in the complaint, the court found “the requested accommodation is reasonable” since NISRA already had “seizure related training and procedures” already “in place.”

In reaching this determination, depending on the circumstances, the court acknowledged that “an undue hardship for one entity may not be an undue hardship for another entity.” As a result, before issuing a ruling on “undue burden,” the federal district court would require “more knowledge as to the nature of NISRA's services provided and the actual financial and administrative burdens the requested accommodation would impose.” This would require further court proceedings beyond NISRA’s motion to dismiss based solely on allegations in the ADA complaint by the United States.

STATE LAW

NISRA also claimed “the requested accommodation would cause NISRA to violate state law.” While not cited in the opinion of the federal district court, presumably, NISRA’s argument was based on regulations in the Illinois Administrative Code governing the “Administration of Medication in Community Settings.” 59 Ill. Adm. Code 116.50 (2013) These regulations apply to “all programs for individuals with a developmental disability in settings of 16 persons or fewer that are funded or licensed by the Department of Human Services and that distribute or administer medications.” In pertinent part, this state regulation prohibits the administration of any medication in an injectable form by non-licensed staff, which could presumably include injection of Diastat through a rectal syringe.

a) Medications shall be administered in accordance with the Mental Health and Developmental Disabilities Administrative Act [20 ILCS 1705] and the Illinois Nursing and Advanced Practice Nursing Act [225 ILCS 65].

b) Non-licensed staff shall not administer any medication in an injectable form.

c) A registered professional nurse, advanced practice nurse, physician licensed to practice medicine in all of its branches, or physician assistant shall be on duty or on call at all times in any program covered by this Part [20 ILCS 1705/15.4(j)].

d) Authorized direct care staff shall not administer PRN medications unless there is a written protocol approved by a nurse-trainer and prescribing practitioner for each individual and for each medication.

Assuming “a conflict exists between state and federal law,” as NISRA alleged in this particular instance, the federal district court acknowledged that “state laws can be preempted by federal regulations and statutes.” As a result, the alleged conflict with state law would not necessarily bar the United States from obtaining the resumption of the requested reasonable accommodation under the ADA. That being said, at this preliminary stage of the proceedings, the court acknowledged that its review of the legal sufficiency of the ADA complaint on a motion to dismiss would not consider “whether preemption applies to this case.”

In practical terms, it is not an “either/or” proposition when it comes to complying with federal law and state regulations. On the contrary, the ongoing challenge for NISRA would be to comply with state regulation of medication administration consistent with reasonable accommodations required by the ADA. Pursuant to the Illinois Administration of Medication regulation, this might involve inclusion of a “nurse-trainer” to ensure NISRA has “authorized direct care staff” on site at their summer camp to administer Diastat as necessary, using a rectal syringe.

CONCLUSION

As a result, based solely on the facts alleged in the complaint, the federal district court found the United States had adequately stated a “legal claim under Title II of the Americans with Disabilities Act.” Accordingly, the federal district court denied NISRA’s motion to dismiss and allowed the United States to pursue the ADA claim in further proceedings.

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