school, because they were boys, were subject to hair-length policies, while girls at the school were not, meaning the Hayden's "plainly made out a prima facie case of discrimination."

The school's defense that the policy was not discrimination because only two boys' teams were subject to it was ineffective. For the majority, the fact that the policy was not universally applied to every boy did not mean it was not based on sex. Simply put, only boys were subject to it and the Equal Protection clause protects individuals, not only groups, meaning boys that wanted to play basketball and baseball were discriminated against based on their sex. The majority similarly rejected the school's argument that no discrimination took place since it was not intentional discrimination. Because the case concerned disparate treatment and not disparate impact, the intent to treat boys differently from girls was "evident from the one-sided nature of the policy."

The Title IX claim was reversed for the same reasons as the Equal Protection claim. A noteworthy difference however is that to recover damages under Title IX, the Hayden's had to prove intent to discriminate. The court found there was no intent to discriminate on the part of the school since the policy was implemented by a coach and only applied to some boys. For the majority, damages were appropriate since the Hayden's contested the policy up the chain of command at the school and the district superintendant ultimately sustained the policy.

DISSENT: The primary problem for the dissent was that the majority decided the "school los[t] by default because the record was missing *some* of the grooming standards that [were] applicable to female athletes." The dissent held the stipulated facts provided all the evidence the court needed to determine that comparable grooming standards applied to each gender, and the majority's insistence on deciding the case based on an "equal protection argument A.H. did not make [and] rooted in authority he did not cite" was inappropriate. The wedge issue between the dissent and majority was the amount of proof a court needs to determine whether grooming policies applicable to all students at a school are comparable – e.g. how much of the content of the policy must be in the record?

http://www.ca4.uscourts.gov/Opinions/Published/131492.P.pdf (last accessed Mar. 6, 2014).

Education: School District not Liable under ADA and Rehabilitation Act for Alleged Failure to Accommodate Student's Disability

CTL v. Ashland School District, No. 13-1790 (7th Cir. Feb. 19, 2014).

The Seventh Circuit has denied claims of disability discrimination and failure to accommodate where a public school deviated marginally from an agreed-upon protocol to accommodate a diabetic student requiring an insulin pump and glucose monitoring.

CTL is a diabetic student who manages his condition with an insulin pump, a personal diabetes manager, and a continuous glucose monitor. Prior to entering kindergarten, CTL's parents met with the Ashland School District to develop a plan with the school to accommodate CTL's disability. The agreed-upon plan incorporated CTL's doctor's orders and required his school to train three adult staff on how to administer insulin and monitor and respond to the alarms on his

glucose monitor. In addition to hiring a licensed nurse to oversee CTL's diabetes care, the school also provided two training sessions regarding CTL's diabetes equipment and care, which the majority of staff who would be interacting with CTL attended.

CTL's parents believed that the licensed nurse was the only school staff member who was properly trained under the plan's requirements and they therefore believed that the school was not adhering to the plan to accommodate CTL by having three trained staff members. The following year, the school hired a new nurse supervisor, Pam Weber, and disputes commenced between Weber and CTL's parents over CTL's care. Weber believed that the law prohibited any deviations from the insulin dosage recommendations by the doctor's orders, whereas the parents preferred to allow the licensed nurse to occasionally assess the child's situation and vary the dosage as needed.

Because they continued to be frustrated by the school's failure to deviate from the specific doctor's instructions, the parents, with their doctor's approval, sent CTL to school with edible fast-acting glucose, allowing him to self-treat when needed. As a result of a mix-up, however, the school did not receive the doctor's order regarding self-treating right away. Prior to receiving the doctor's order, Weber confiscated CTL's fast-acting glucose. A few days later, the parents met with the school and alleged a number of violations of the plan. They pulled CTL out of public school the next day and sent him to private school.

Thereafter, the parents filed suit in district court, alleging the school discriminated against CTL in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Rehabilitation Act) and section 202 of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132. They sought an injunction against the school and damages for private school costs. The district court granted summary judgment in favor of the school, and the parents appealed.

HELD: The Seventh Circuit upheld the district court's grant of summary judgment, finding no evidence of intentional discrimination or failure to reasonably accommodate CTL's diabetes.

DISCUSSION: As a preliminary matter, the school district challenged the plaintiffs' ability to recover under the ADA or Rehabilitation Act, arguing that their claim was moot because they had transferred CTL to a private school. The Seventh Circuit concluded that because damages are available under the ADA and Rehabilitation Act, the fact that the child's parents moved him to private school did not moot their cause of action.

The Rehabilitation Act and ADA both prohibit discrimination against the disabled. Specifically, Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. Section 202 of the ADA similarly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Due to the statutes' similarities, the Seventh Circuit's analysis was identical under both.

There was no dispute that CTL is a qualified individual with a disability, so the only issue was whether the school discriminated against CTL. To prove disability discrimination under the statutes, a plaintiff must show that "'(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's

rule disproportionally impacts disabled people.'" *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006). Here, the plaintiffs alleged both intentional discrimination and a failure to accommodate CTL.

Under a failure to accommodate theory, plaintiffs must show that the school failed to ensure access to a "free, appropriate public education." 34 C.F.R. § 104.33(a). In order to meet the requirement under the Rehabilitation Act, the school must provide "regular or special education and related aids and services that … are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." *Id.* § 104.33(b).

Plaintiffs argued that the school's violations of the agreed-to plan were sufficient to sustain their claim on a failure to accommodate theory. The Seventh Circuit, however, held that in order for a plan violation to constitute disability discrimination, it must be "significant enough to *effectively* deny a disabled child the benefit of a public education." Although the facts that the child regularly attended school, performed well, and suffered no adverse health consequences at school cut against a finding of a failure to accommodate claim, those facts alone did not preclude such a claim, and parents should not have had to wait until something unsafe occured before removing their child from a school environment.

However, the school district's violations of the plan in this case were not "anywhere near" what is necessary to prove the environment was unsafe. The only violations plaintiffs pointed to were: (1) the school's failure to provide three trained staff, per the plan's requirements; (2) the school's refusal to adjust the insulin dose as needed and instead strictly following the doctor's order; and (3) the school's failure to allow CTL to "self-medicate" with the fast acting glucose.

As to the school's failure to provide three trained staff members, the Seventh Circuit agreed that this could amount to a violation of the plan, but that it was at most a minor violation and "in no way made [CTL] unsafe or denied him the benefit of a public education." The plaintiffs' other arguments for violations equally unpersuasive as there was no evidence that the school's actions (whether or not they amounted to violations of the plan) made the child unsafe. Accordingly, the Circuit Court held that the parents were unable to demonstrate the school failed to reasonably accommodate CTL.

The Seventh Circuit also found that the plaintiffs' intentional discrimination theory failed. At most, there may have been evidence that the school staff was difficult to work with or communicated poorly, but that evidence was insufficient "for a jury to conclude that the school intentionally discriminated against [CTL]."

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-19/C:13-1790:J:Sykes:aut:T:fnOp:N:1293462:S:0 (last accessed Mar. 6, 2014).