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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: ML

Date of Birth: xx/xx/xxxx

Dates of Hearing:
September 15, 2008, December 5, 2008, December 12, 2008

CLOSED HEARING

ODR Case # 9184-08-09-KE

Parties to the Hearing:

Representative:

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Director of Special Education
Fort Cherry School District
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Date Record Closed:

January 14, 2009

Date of Decision:

January 29, 2009

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

("student") is a 12-year old student residing in the Fort Cherry School District ("District") who has been identified as a student with a disability under Section 504 of the Rehabilitation Act of 1973 ("Section 504")¹ and Chapter 15 of the Pennsylvania education regulations ("Chapter 15")². The student's parents and the District disagree over the necessity of air conditioning for the student under the terms of the student's Section 504 plan/Chapter 15 service agreement.

For the reasons set forth below, I find in favor of the parents.

ISSUES

Should air conditioning be provided by the District as an accommodation under the student's Section 504 plan/Chapter 15 service agreement?

FINDINGS OF FACT

¹ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the Rehabilitation Act of 1973 at 34 C.F.R. §§104.1-104.61.

² 22 PA Code §15.1-15.11.

1. The parties do not dispute that the student qualifies as a child with a disability under Section 504/Chapter 15. (Parent Exhibit ["P"]-11).
2. The student has a history of respiratory problems. The student was hospitalized as a newborn with breathing difficulties. Over the years of early childhood the student continued to exhibit respiratory issues, eventually being diagnosed by age five with allergies and asthma. (P-13, P-19, P-20, P-21; Notes of Testimony ["NT"] at 20-24, 352-354, 387-389, 400-402.)
3. The student's asthma is largely triggered by allergies, specifically to dust mites, dogs, cats, molds, and spring and fall pollens. Other potential asthmatic triggers include respiratory infection, weather change, exercise, and odors. (P-19; NT at 353.)
4. The student also exhibits flushing and suffers from migraine headaches. (P-21; NT at 364 , 403-404.)
5. The student's allergy antibody level is 1,800. The allergy antibody level in children treated by the student's allergist range from 100 to 700. As described by the allergist, the "upper limit of normal" for these levels is 160. The allergist described the student's level as

over ten times the “upper limit of normal”, characterizing the student as “an extremely allergic child.” (NT at 364.)

6. The student has suffered asthma attacks, resulting in wheezing, shortness of breath, low oxygen level, and coughing. The school nurse testified to her experience witnessing severe asthma attacks in children. The student has not, however, suffered an asthma attack in school. (NT at 239, 242-243, 325, 402.)

7. To treat the student’s asthma, the student uses a nebulizer at home for the administration of liquid Albuterol intermittently on an as-needed basis. The nebulizer is a misting device where the medicine, in mist form, is breathed through a mask. At times, the nebulizer has been brought into the school by the student’s parents. (NT at 23, 30, 98-99.)

8. The student is also administered Albuterol through an inhaler before physical education class and to control potential elevated asthmatic symptoms. Additionally, the student takes Flovent as a preventative/maintenance asthma medication and Zyrtec for allergies. (District Exhibit [“D”]-10, D-11, D-12, D-13; NT at 99-101, 216, 220-221, 234-235.)

9. The student began attending District schools in kindergarten in the 2002-2003 school year. The District was aware at that time of the student's asthmatic condition. The kindergarten day was a half-day program, which, given the nebulizer administration requirements, did not allow for the use of the nebulizer. The student missed 22 days of school in kindergarten, mostly related to respiratory issues. (D-8; NT at 24-25, 79, 175-176, 255-256, 321, 390-393, 440.)

10. In 1st grade (2003-2004 school year) through 3rd grade (2005-2006 school year), the student attended District schools. The student missed 21.5 days of school in 1st grade and 17 days in 2nd grade, to the point that the District communicated with the parents about these levels of absenteeism. The student missed 14 days of school in 3rd grade. Many of these absences were related to respiratory issues. (D-16; NT at 26-31, 440-482.)

11. In 1st-3rd grade, the student received generalized accommodations outside of any plan or document. The student was seated near doors or near wastebaskets because of bouts of vomiting. The student was given flexibility to leave class to drink water or to use the restroom. (NT at 176-177.)

12. Beginning in 1st grade and continuing through 3rd grade, the student received Albuterol treatments from the school nurse, both as needed and regularly before gym class. (D-9, D-10, D-11; NT at 258-261, 265, 266.)
13. In the summer of 2006, before the student began 4th grade, the student's allergist performed more extensive testing. As a result of that testing, the student's parents approached the District about more formal interventions to treat the student's allergy-triggered asthma. (NT at 33, 152-153, 359-360.)
14. The parents met with the District superintendent who recommended a follow-up meeting with the District's director of special education. In August 2006, the director of special education convened a meeting with the elementary school principal, the parents, and certain teachers. (P-2, P-3; NT at 37-40, 152-153, 174-176.)
15. On August 28, 2006, the District offered, and the parents accepted, a Chapter 15 service agreement. The student's "handicapping condition" was listed as "marked allergy sensitivity to pollens and mold – asthma". The major life activity impacted was listed as "learning". The educational impact was listed as

“(student’s) ability to participate in classroom activities and the learning process is adversely affected.” The agreement references an attached list of accommodations, which in actuality is only one: “environmental modifications as needed to manage marked allergy sensitivity to pollens and molds.” (P-3.)

16. The student’s allergist recommended that an air-conditioned environment in the fall and spring would be best-suited for the student to “decrease (the student’s) exposure to...allergens.” From the outset, the parents and the District disagreed on the specific issue of air conditioning. (P-2; NT at 40-50, 178-184.)

17. The District supplied parents with a list of portable air conditioning units that might be adaptable for the windows in the elementary school building. The elementary principal indicated that the District was unwilling to supply air conditioning as an accommodation. Parents purchased two air conditioning units on their own and the units were installed. (P-4; NT at 48-50, 178-182.)

18. The two air conditioning units were portable and located in classrooms. A duct from the unit ran to the open window where it attached to a Plexiglas insert that was fitted to the open space and

- allowed the unit to vent through a hole in the Plexiglas. This configuration allowed the unit to operate and also allowed for the window to be secured (NT at 50-51.)
19. The two air conditioning units purchased by parents were used in 4th grade (the 2006-2007 school year). Due to a change in the class schedule for 5th grade (the 2007-2008 school year), parents purchased a third air conditioning unit. The student missed 13 days of school in 4th grade and missed 11 days of school in 5th grade. While these days of absence are somewhat consistent with the number of absences in 3rd grade, the student's parents felt that the student's respiratory health improved in 4th and 5th grades. (D-16; NT at 53-59, 482-489.)
 20. The administration of Albuterol as needed and before gym class continued in 4th and 5th grades. (D-12, D-13.)
 21. In the June 2008, parents approached the District about having the District assume responsibility for providing the air conditioning units. (P-8; NT at 60-62.)
 22. The parties met in July 2008 to consider the Chapter 15 service agreement for 6th grade, the upcoming 2008-2009 school

year. The service agreement proposed by the District was the same as the agreement in 4th and 5th grades. Parents indicated they wanted to request a meeting because of concerns about the offered service agreement, specifically that the parents felt that the student's accommodations were the District's responsibility, not the parents'. (P-11.)

23. The student's allergist's opinion is that the student requires an air conditioned environment (P-2, P-6, P-12, P-19, P-20; NT at 358-362.)

24. An independent allergist's opinion, based on record review and an interview with the student and parents (but no testing), concurred with the student's allergist's opinion. Specifically, the independent allergist opined "In a sentence, I completely concur with (the student's allergist's) recommendations concerning a controlled environment at (the student's) school and I would reference both the letter of May 2007 to the parents as well as the most recent communications from (the student's allergist) in August in this regard." On direct examination, however, the independent allergist indicated that this did not mean an air conditioned environment. (P-22; NT at 429-430.)

25. The May 2007 letter sent by the student's allergist to the student's parents referenced by the independent allergist refers to the use of air conditioning to reduce allergens. (P-6).
26. The August communication by the student's allergist referenced by the independent allergist states, in the words of the student's allergist, "I...feel that it is imperative that air-conditioning be used in (the student's) school room during the spring and fall months." (P-12).
27. While the independent allergist testified that his "complete concur(rence) with (the student's allergist's) recommendations concerning a controlled environment at (the student's school)", it is an explicit finding of fact by this hearing officer that the independent allergist's report strongly supports the opinion of the student's allergist that air conditioning is a vital part of appropriately modifying the student's school environment. (P-22).
28. The District maintains that the "environmental modifications" referenced in the Chapter 15 service agreements refer to the student moving to air conditioned environments in the building, such as the library or the principal's office (NT at 178-179, 190-191.)

DISCUSSION AND CONCLUSIONS OF LAW

The provision of accommodations for students with disabilities who do not require special education is addressed in federal law (Section 504) and Pennsylvania law (Chapter 15).³

Section 504 defines a handicapped person, the qualifying term for Section 504 eligibility, as an individual having “a physical or mental impairment which substantially limits one or more major life activities”.⁴

Likewise, a “protected handicapped student” under Chapter 15 must be of school age, must have a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program, and must not qualify under 22 PA Code §14.⁵ Furthermore, Chapter 15 requires:

A school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to

³ 34 C.F.R. §§104.1-104.61; 22 PA Code §15.1-15.11.

⁴ 34 C.F.R. §104.3(j)(1).

⁵ 22 PA Code §15.2.

the maximum extent appropriate to the student's abilities.⁶

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability.⁷

In the instant case, the student qualifies under the provisions of Section 504 and Chapter 15. By the District's own admission in its service agreements (FF 1, 15), the student clearly qualifies under Section 504 as an individual with a respiratory impairment⁸ which impacts the major life activity of learning⁹.

In terms of the Chapter 15 definitions, the student's qualification seems straightforward outside of the phrase "substantially limits or prohibits participation in or access to an aspect of the student's school program". While the record does not support the notion that the student's disability substantially limits the student's school program, the

⁶ Id. at §15.3.

⁷ *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999); *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995).

⁸ 34 C.F.R. §104.3(j)(2)(i)(A).

⁹ Id. at §104.3(j)(2)(ii).

District's construction of the service agreements prohibits participation in/access to the school program. Specifically, the District's proposed implementation of the service agreement reduces to "go to the office, the library, or the nurse's office". (FF 25). This is not, under the terms of the service agreements, environmental modification; it is environmental relocation. (FF 15, 25).

This aligns with establishing a prima facie Section 504 claim under the *Ridgewood/Matula* rubric. The District's construction of accommodation of the service agreements is to exclude the student from class.¹⁰

The weight of the record indicates that the student has a severe, even potentially dangerous, disability. (FF 2, 5, 6). The District has offered "environmental modifications" as the explicit accommodation of that disability in the education setting, yet the classroom environment would remain entirely unmodified except for parents' supplying air conditioning. (FF 15, 17, 19, 25). The presence of air conditioning has had a positive effect on the student's overall respiratory health. (FF 19, 20). Most persuasively, both allergists strongly support the need to modify the student's environment with air conditioning. (FF 5, 16, 23, 24, 25, 26, 27).

¹⁰ This "exclusion" requirement under *Ridgewood/Matula* is, to this hearing officer, the only prong (#4) of the five prongs that is open to interpretation under these facts. The other four prongs (#s 1-3, 5) do not seem open to dispute.

Therefore, it is the finding of this hearing officer that, in denying the student access to an air conditioned classroom and requiring the student's parents to absorb the cost of this accommodation, the District has (1) violated the student's Chapter 15 service agreement and (2) has discriminated against the student under the terms of Section 504 and Chapter 15.

CONCLUSION

The student qualifies for protection under Section 504 and Chapter 15 due to the impact of the student's disability on learning. The District has discriminated against the student by requiring the parents to pay for the accommodation recommended by, and set forth in, the student's Chapter 15 service agreement. Accordingly, the District will be ordered to provide the required accommodation.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, it is hereby ordered that the District shall provide an air-conditioned environment for the student as follows:

- within 30 calendar days of the date of this order, the District shall procure portable air conditioning units similar to/approximating the units that have previously been supplied by parents; and
- within 60 calendar days of the date of this order, the District shall fabricate, or contract to have fabricated, Plexiglas window inserts similar to those described above to account for the operational/security concerns of having the portable air conditioning units vent to the outside.

The District shall supply a portable air conditioning unit for every regular education classroom where the student receives instruction, including art and music. The District is not ordered to provide air conditioning in the gym, cafeteria, and hallways or other non-air conditioned common areas.

Therefore, within 60 days of the date of this order, the District shall be in a position to offer an air conditioned environment to the student in art, music, and academic instruction classrooms before the onset of the spring pollen season.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

January 29, 2009