This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 00328-0910KE

Child's Name: SM

Date of Birth: xx/xx/xxxx

Dates of Hearing: 11/18/09, 12/17/09; 1/19/10, 1/21/10, 1/26/10, 2/9/10, 3/3/10

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Parent Attorney David G. C. Arnold, Esquire Suite 106, 920 Matsonford Road West Conshohocken, PA 19428
School District Upper Dublin 1580 Fort Washington Avenue Maple Glen, PA 19002	School District Attorney Claudia Huot, Esquire Wisler, Pearlstine 484 Norristown Road Suite 100 Blue Bell, PA 19422

Date Record Closed: March 23, 2010

Date of Decision: April 7, 2010

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is a first grade student in the Upper Dublin School District (hereinafter District) with a severe allergy to peanuts and tree nuts. There is no dispute that by reason of those allergies, Student is a qualified student, protected from discrimination on the basis of handicap, under §504 of the Rehabilitation Act of 1973. There are no other restrictions on Student's ability to participate in all aspects of a public school education program to the same extent as typical children.

After several months of negotiation, the parties signed a §504 Service Agreement in the fall of 2008, Student's kindergarten year. Parents, however, remained dissatisfied with its terms, believing that it was insufficient to fully assure Student's safety. Parents also believe that the Agreement was not properly implemented by the District in several respects. When the parties were unable to reach a final agreement on revisions for the current school year, Parents filed a due process complaint in October 2009, followed by a seven session hearing held between November 18, 2009 and March 4, 2010.

For the reasons explained below, Parents claims based upon the insufficiency of the accommodation in place to assure Student's safety, the District's alleged failure to properly implement the Agreement and the District's alleged violations of it obligation to provide services to Student in the least restrictive environment (LRE) will be denied. The District will, however, be directed to make certain changes to the §504 Service Agreement, primarily to reflect all protections currently provided to Student. The District will also be directed to inform the PTO that it is obligated to assure that the Service Agreement is implemented with respect to all activities that the PTO conducts within the elementary school building or on school grounds.

ISSUES

1. Has the District provided Student with a §504 Service Agreement sufficient to assure that he could safely attend school during the 2008/2009 and 2009/2010 school years?

2. Has the Upper Dublin School District properly implemented the §504 Service Agreement currently in effect to assure that Student needs are met as adequately as the needs of his non-disabled peers in terms of both safety and full participation in school and school-related activities?

3. Does the revised Service Agreement proposed by the Upper Dublin School District reflect all accommodations currently provided to Student to assure his safety?

FINDINGS OF FACT

1. (Student) is a 7 year old child, born [Redacted date]. He is a resident of the District. Due to severe allergies, Student is a qualified handicapped student under §504 of the Rehabilitation Act of 1973. (Stipulation, N.T. pp. 14, 15)

2. Early in 2008, prior to Student entering the District's kindergarten program for the 2008/2009 school year, Parents contacted the District, seeking a §504 Service Agreement to assure that precautions would be put in place to prevent Student's exposure to peanut and tree nut products so that he could safely attend school. (N.T. pp. 55—59, 589, 590; P-6)

3. After the District received documentation of Student's medical condition in June 2008, it drafted a proposed §504 Agreement and met with Parents several times during the summer and early fall of 2008 to discuss revisions Parents believed were necessary, as well as information that Parents requested be distributed to the parents of other students attending the same elementary school. (N.T. pp. 597—612; S-1, P-6)

4. Parents and the District signed the Service Agreement on October 27, 2008. The Agreement includes provisions to prevent Student's exposure to peanuts and tree nuts at school and during school sponsored activities, as well as provisions to treat/manage an allergic reaction should such exposure occur. The Agreement covers training of staff, dissemination of information concerning peanut/tree nut allergies, and precautions to be taken in the classroom, cafeteria and at school sponsored activities. The relevant precautionary provisions are as follows:

    a. Training provided by the school nurse or an LPN at the direction of the school nurse to all staff and teachers concerning specific procedures for responding to an allergic reaction, including availability/location of a medicine pack, allocating responsibility for responding to an allergic reaction, notification of the school nurse and correct administration of an EpiPen injection;

    b. Notification of all school staff and parents of other students across Student's grade level that no peanut/tree nut products will be used in classroom projects/activities;

c. Education to be provided by the school nurse or an LPN at the direction of the school nurse for all students at Student's grade level concerning life threatening allergic conditions and procedures/precautions to be used in grade level classes;

d. Notification of parents of students in Student's class that it includes a student with a peanut/tree nut allergy and that all grade level classrooms are to remain allergen free; a list of peanut/tree nut products not permitted in grade level classes; reminders of the allergen restrictions at least a week in advance of any special event in Student's class; visitors to be told to refrain from bringing any items to Student's classroom that contain peanut or tree nut products

e. Separation of peanut free lunches from lunches that may contain peanut or tree nut products in a bin outside of the classroom ;

f. Foods containing any type of peanut/tree nut product not to be used in any classroom activities; teachers to use either an alternate product or choose an alternate activity;

g. Cafeteria Precautions:

    i. Clearly designated peanut/tree nut free table/space in the cafeteria, not to be used for consumption, preparation or serving of food containing peanut/tree nut products at any time during the school year, including special events;
    ii Other students instructed on the "safe lunch table" and sitting at the table in the lunch room;
    iii Student to sit at the peanut/tree nut free table with friends who agree to bring a peanut/tree nut free lunch;
    iv Everyone entering the peanut/tree nut free space must use wipes to clean their hands prior to entering the space for recess or lunch;
    v Only foods labeled peanut/tree nut free product may be brought into the space; no cafeteria-prepared foods to be brought into the space;
    vi Parents to have the opportunity to view the school's monthly menu and indicate the days Student will purchase lunch; the school will provide a peanut/tree nut product for purchase;
    vii Table chairs and utensils (if any) to be cleaned with disinfectant after each lunch period/use.
    viii Student's grade level peers to wash their hands before going to recess after lunch;

h. Field Trips

    i Parents to be invited to accompany Student on school trips; if not available, a designated classroom teacher or aide who has read and is able to fully implement the plan will be included on the trip;
    ii Student may be excluded from a field trip only if detrimental to his health even with accommodations in place, e.g., trip to peanut processing plant;
    iii Bus driver to be trained by school nurse or LPN at the direction of the school nurse in correct administration of EpiPen;

iv No eating permitted on the school bus except for medical needs;

i. After School Sponsored Activities If Food Is Served

i Notice will be provided prior to activity informing parents that students allergic to peanut/tree nut products may be attending the event;
ii Clearly labeled peanut/tree nut free items will be offered and kept on a table separate from food products that may contain peanut/tree nut products
iii District will ask parents to provide written recipes for any homemade food items, to be displayed with the food items;

j Each time Student is assigned to use a computer in the computer lab, library and/or classroom, the teacher will thoroughly clean the keyboard with disinfectant before use.

(N.T. pp. 59, 612; S-1)

5. Parents were not satisfied that the Service Agreement sufficiently protected Student but were concerned that no precautions would be in place without it, compromising Student's safety at school. (N.T. pp. 60—62)

6. An area of concern with the Service Agreement are provisions for using disinfectant to clean tables and chairs, and the use of antibacterial hand wash or wipes for students to clean their hands after lunch instead of soap and water. Soap and water is the most effective way to remove peanut/tree nut residue. Disinfectants and antibacterial hand wash do not remove peanut residue, but friction is also necessary for removing allergen residues even when washing hands with soap and water. The friction created by manual wiping, such as with hand wipes, can be used to effectively remove allergen residues. (N.T. pp. 313, 321—328, 200, 1239—1241; P-1, P-22)

7. Cafeteria tables and chairs are cleaned daily with soap and water by the elementary school's chief custodian. (N.T. pp. 864, 868, 956)

8. Although the Service Agreement does not explicitly provide for training of substitute teachers to respond to a potential allergic reaction, the school nurse has trained substitute teachers who regularly work at the elementary school Student attends. (N.T. pp. 1175, 1176)

9. Parents are also concerned that the restrictions on peanut/tree nut products in grade level classrooms are not sufficiently detailed or protective because the possibility of cross contamination creates a potential for accidental ingestion of allergens in items that appear to be safe. In addition to the prohibition of all peanut/tree nut products, therefore, Parents want the Service Agreement to include all items containing traces of peanuts/tree nuts; items manufactured or processed in a facility where peanut/tree nut products are manufactured and all homemade products. (N.T. pp. 71, 296—298, 314—319; P-1)

10. Although the additional classes of food products Parents are seeking to ban from grade level classrooms are not included in either the current Service Agreement or the revisions proposed by the District, Student's teachers have notified parents that such products may

not be served as party or birthday treats. On one occasion, Student's kindergarten teacher refused to serve a birthday treat item to the entire class because it was manufactured in a facility that also manufactures peanut/tree nut products. (N.T. pp 996, 997; P-18, S-1, S-9, S-10, S-11)

11. Because of the possibility of cross contamination by students from other grade levels where peanut/tree nut products are not prohibited, Parents were concerned that the District was not using an effective process for cleaning the computer keyboard(s) Student uses at school. The District is willing to consider accommodations such as covering the keyboards Student uses or designating a separate keyboard for Student's use. (N.T. pp. 136, 137, 329, 540, 541; P-1)

12. Parents seek similar accommodations with respect to art and gym equipment, either purchasing supplies designated for Student's use and that of his grade level peers or cleaning the equipment with soap and water before Student's class uses the supplies and equipment. (N.T. pp. 136—138, 329, 330; P-1)

13. Parents also want the section of the Service Agreement that sets forth procedures for responding to an allergic reaction to include a provision that Student may go to the nurse at his request. (N.T. p. 139; P-1)

14. There have been several incidents that concerned Parents with respect to the District's implementation of the Service Agreement in terms of either Student's safety or in terms of being set apart from peers:

    a. In December 2008, Student's kindergarten teacher was concerned that a birthday treat a parent left outside Student's classroom was purchased from a store bakery that the teacher knew produces peanut/tree nut items. The treat was served to the class, but Student and another allergic child received an alternative treat; (N.T. pp. 94—97, 613—615, 993, 994; P-9)

    b. During the end of the year or "Bear Party" celebrated throughout the school, a parent with a student in kindergarten and in another grade placed a box of treats intended for her other child's class on the teacher's desk. The food was not served to the kindergarten class; (N.T. pp. 997—999)

    c. During kindergarten, the peanut/tree nut free table was located close to another kindergarten class, at least one table removed from the regular table reserved for Student's class, and no more than 4 or 5 other children could sit with Student. (N.T. pp. 79—82, 709, 710, 777, 778)

    d. After registering for an annual PTO sponsored after school activity in January 2010, Parents were notified that Student's first choice, "Fun with Food," a cooking activity, may not be safe for him because the instructors could not guarantee that peanut and tree nut products would not be used in the cooking activities. Parents removed Student from the class and he selected another activity in the program; (N.T. pp. 356—360; P-34)

15. In the spring of 2009, a petition was circulated by parents of kindergarten students in the same elementary school asking the District to take into account the impact of the grade-wide ban on peanut/tree nut products on providing convenient an affordable snacks to non-allergic children. The District responded with a letter to parents of all students attending the same elementary school explaining the necessity of peanut/tree nut restrictions in order to meet District's commitment to providing a safe environment for all students. (N.T. pp. 107, 108, 629—632; P-13, P-14)

DISCUSSION AND CONCLUSIONS OF LAW

A. Legal Standards Applicable to a §504 Claim

Substantive Requirements for Non-Discrimination and Providing FAPE

The statute prohibiting disability-based discrimination in various settings, commonly referred to as "§504 of the Rehabilitation Act of 1973" or simply "§504" is found at 29 U.S.C. §794(a), and provides as follows:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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.

Notwithstanding the statutory language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the Individuals with Disabilities Education Act, 20 U.S.C. §1401, *et seq.* (IDEA), with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009

In 22 Pa. Code Chapter 15, Pennsylvania law makes that obligation explicit for all school-aged children with disabilities, including those students who are not eligible for special education and related services under IDEA. The relevant portions of Chapter 15 provide as follows:

§15.1. **Purpose**.

(a) This chapter addresses a school district's responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and implements the statutory and regulatory requirements of Section 504.

(b) Section 504 and its accompanying regulations protect otherwise qualified handicapped students who have physical, mental or health impairments from discrimination because of those impairments. The law and its regulations require public educational agencies to ensure that these students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question. School districts are required to provide these students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met. These aids, services and accommodations may include, but are not limited to, special transportation, modified equipment, adjustments in the student's roster or the administration of needed medication. For purposes of the chapter, students protected by Section 504 are defined and identified as protected handicapped students.

§15.2. **Definitions**.

Protected handicapped student—A student who meets the following conditions:

(i) Is of an age at which public education is offered in that school district.

(ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program.

(iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10 (relating to discrimination claims).

Service agreement—A written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student.

§ 15.10. Discrimination claims.

Notwithstanding other provisions of this chapter, an eligible or noneligible student under Chapter 14 (relating to special education services and programs) may use the procedures for requesting assistance under § 15.8(a) (relating to procedural safeguards) to raise claims regarding denial of access, equal treatment or discrimination based on handicap. A student filing a claim of discrimination need not exhaust the procedures in this chapter prior to initiating a court action under Section 504

§ 15.11. Rules of construction.

(a) The full description of substantive responsibilities of school entities is set forth in Section 504 and the Section 504 regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefitting from federal financial assistance) and not in this chapter.

(b) Eligible and thought to be eligible students continue to be governed by Chapter 14 (relating to special education services and programs), except for the provisions of §15.10 (relating to discrimination claims).

(c) It is not the purpose of this chapter to preempt, create, supplant, expand or restrict the rights or liabilities of protected handicapped students or school entities beyond what is contemplated by Section 504, the Section 504 regulations at 34 CFR Part 104 or another law. This chapter does not restrict or limit a parent, protected handicapped student, school entity or the Commonwealth from pursuing claims or defenses available, whether constitutional, statutory, regulatory or common law. This chapter does not restrict or limit a protected handicapped student or school entity from filing a cognizable action, appellate or original in nature, to resolve a dispute under Section 504 or the Federal Section 504 regulations. This chapter does not increase or diminish the jurisdiction of any court.

(d) It is not the intent of the Board that this chapter be interpreted as influencing, in either the plaintiff's or defendant's favor, the disposition of a particular civil action. However, this chapter is intended to have the force of law and to be so interpreted by the courts.

The federal regulations referenced in Chapter 15 give substance to the §504 statutory language in the context of the education of protected handicapped students by public schools. The regulations relevant to this case provide as follows:

§ 104.33 Free appropriate public education.

(a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

§ 104.34 Educational setting.

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

The federal and state regulations further provide procedural safeguards, including the opportunity for a due process hearing, as a means of challenge a school district's conduct for parents who believe that a public school district failed to meet any of the substantive legal standards set forth above:

> A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, 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. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

34 C.F.R. §104.36. *See also* 22 Pa. Code §15.8(d), which provides that when parents and school districts are unable to informally resolve disputes concerning §504 issues, either may request a formal due process hearing governed by the provisions of 22 Pa. Code §14.64(m), governing IDEA due process hearings. In Pennsylvania, therefore the procedural safeguards provisions of §104.36 are fulfilled by complying with IDEA procedures.

B. <u>Parents' Claims Concerning the Contents and Implementation of Student's Service Agreement</u>

To assert a successful §504 claim a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A*.

In this case, there is no dispute that Parents have satisfied the first three elements of a §504 claim. The dispute, therefore, centers on whether the District has provided educational services that meet Student's needs as adequately as the needs of non-disabled students as required by 34 C.F.R. §104.33(b)(1)(i). There are two general aspects to Parents' claims. They contend, first, that the Service Agreement in place since October 2008 is inadequate to assure that Student can safely attend school by taking all necessary steps to prevent Student from ingesting the peanut and tree nut protein that causes a life-threatening allergic reaction and that revisions to the Agreement proposed by the District in the fall of 2009 do not completely remedy the deficiencies.[1] Second, Parents contend that throughout Student's enrollment in kindergarten and first grade, the District failed to assure that Student has had a full opportunity to participate in all non academic school and school-related programs and activities to the same extent as non-disabled peers by making certain that all programs/activities are designed and carried out in such a way that Student is neither excluded nor subjected to different treatment due to his severe allergies. Parents argue that Student was either overtly excluded from certain social activities, or that the District implicitly excluded, and intended to exclude Student from various school

[1] Parents' claims in this case primarily concern Student's full participation in non-academic school activities, such as lunch, class room-based or school-wide parties and treats. Except for an issue concerning safe use of a computer keyboard, now resolved, there has been no dispute that Student is, and has always been, safely and fully included with typical peers in all academic aspects of the educational program at Student's grade level..

activities by failing or refusing to assure that the Service Agreement was properly implemented and that all school–related activities in which Student was otherwise able to participate were free of the potential for ingesting peanut and tree nut protein.

Although the issues in dispute are closely intertwined, there are differences in the basis for Parents' claims regarding specific instances of alleged discrimination. The question whether the District has provided sufficient safety precautions for Student is based primarily on the provisions of the written Service Agreement and proposed revisions. Parents claims based on Student's exclusion from and/or differential treatment with respect to non-academic activities generally available to students at the same grade level, such as seating at lunch and treats provided for parties, are based primarily upon implementation of the Service Agreement, including allegations that the District tried to circumvent provisions of the parties' Agreement and suggested that Student refrain from participating in other activities.

1. Implementation of the October 2008 Service Plan

Parents' claims in general, and with respect to the implementation issues in particular, are based upon an overly broad interpretation of the legal obligations imposed by both the federal and state §504 regulations that govern protections for public school students. Parents' arguments concerning the conduct of the District that allegedly constitute violations of §504 are unsupported by an analysis of, or even reference to, §504 federal regulations pertaining to educational programs, or supported by any other authority, such as relevant case law or interpretations of the applicable regulations by the Federal Office for Civil Rights (OCR), which are available to the public. *See,* Petitioner's Closing Argument. Analysis of the applicable regulations in light of the facts established by the evidence in this case does not support most of Parents' contentions.

In considering whether the District violated §504, it is important to keep in mind that the federal regulations concerning education require only that the District to provide services that meet Student's needs "**as adequately** as the needs of nonhandicapped persons are met." §104.33(b)(1)(i)(Empahsis added). The term "adequately" is not defined in the regulations and a search of relevant authority did not disclose a court or agency interpretation of that term. In the absence of any basis for concluding that the term "adequately" as used in the §504 regulations should be given a special meaning, it is reasonable to begin the analysis of whether the District fulfilled its obligation to this Student by referring to the common and general understanding of the term. The dictionary[2] defines "adequate" as,

> 1 : sufficient for a specific requirement <adequate taxation of goods>;
> *also* **:** barely sufficient or satisfactory <her first performance was merely adequate>
> 2 : lawfully and reasonably sufficient <adequate grounds for a lawsuit>

The definition of the operative term used to describe the District's §504 obligations does not suggest that the District is required to take all of the measures Parents contend are necessary for compliance with §504 in terms of either the contents of a Service Agreement or its implementation. Rather, the standard for §504 compliance is functionally equivalent to the IDEA requirement that school districts provide an "appropriate" educational program, not the best possible or ideal program. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

That conclusion is reflected in an Oregon decision where the hearing officer concluded that a §504 plan (less detailed than the Service Agreement in this case) met the legal standard despite five exposures to peanut allergens at school in 13 months that required use of the student's EpiPen. *In Re:Cascade School District*, 37 IDELR 300 (Oregon SEA 2002). A

[2] Merriam Webster Online Dictionary (2010); Merriam Webster Third New International Dictionary (1961).

revised §504 plan, very similar to the Service Agreement in effect in this case, was also found to be adequate.

The federal regulations also provide that with respect to non-academic and extracurricular services and activities, which includes lunch and activities such as parties and shared treats, school districts must assure that a protected student can "participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question." In the context of this case, the "maximum extent appropriate" means safely in terms of minimizing the possibility that Student will be exposed to peanut or tree nut allergens. Student was not excluded from participating in any activity that occurred during school hours in either the 2008/2009 or 2009/2010 school year.

In a few instances, however, the District concluded that assuring Student's safety required some alteration to his participation in the activities which both Student and typical peers were engaged. Such alterations, however, were minimal. During kindergarten, the peanut/tree nut free table at which Student was required to eat lunch was next to another kindergarten class, not Student's class. F.F. 14c In one instance involving a classmate's birthday treat, Student's kindergarten teacher was concerned that cupcakes left outside the classroom by a parent might not be safe because the bakery where the cupcakes were purchased also produces products that contain peanuts and tree nuts. F.F. 14a The cupcakes were served at lunch, but Student and another allergic child were provided with an alternative treat. These incidents, alone or in combination, do not rise to the level of disability-based discrimination for isolating Student from peers or providing less favorable treatment.

Similarly, Parents' suggestions that District teachers and administrators may not be entirely enthusiastic about some the provisions in the Service Plan, and resistant to implementing such provisions, do not establish discrimination on the basis of disability, as long as the District

provides and fully implements an adequate Service Plan, and does not engage in conduct with respect to Student that amounts to retaliation or creation of a hostile school environment for Student.

Parents cannot establish a §504 violation based on their subjective feelings about the District's attitude toward the accommodations provided to Student, including suspicions that the District has tried in various ways to circumvent the terms of the Service Agreement. Nor can Parents establish a §504 violation based upon their feelings that the Student has felt, or could feel, different or set apart from classmates due to accommodations in place to assure his safety, or determinations made from time to time that participating in an activity in exactly the same way as other children could compromise his safety. There must be a general and objective standard for determining whether a protected student has been provided with services as adequately as nonhandicapped students, and whether a protected student participated in such services and activities to the maximum extent appropriate to the protected student's needs.

The difference between assessing those requirements in terms of an objective or subjective standard is well-illustrated by reference to the location of the peanut free lunch table during Student's kindergarten year, which was near other kindergarten students but not his particular class, and two birthday treat incidents. Notwithstanding Student's testimony that separation from his particular classmates and sitting with only a few other students made him unhappy, as did getting a bag of baked potato chips instead of the cake provided for a classmate's birthday treat, (N.T. pp. 27, 29—32), Student nevertheless participated in both activities with peers. When these incidents are viewed objectively, Student was neither isolated nor treated less favorably than other students, since he ate in the cafeteria daily and received a food treat to celebrate a classmate's birthday along with the other children in his class. The differences in lunchtime seating and in the specific treat provided for the birthday celebration

were necessary to meet Student's safety needs and did not unreasonably isolate Student. Even Student and his friend testified that Student did not sit entirely alone at lunchtime. *See* N.T. pp. 30, 36, 45, 46[3] Whether the District violated §504 cannot be based upon an individual child's preference for sitting with more rather than fewer children and for chocolate cake over potato chips, if for no other reason than a different child might have the opposite preferences. Nothing in the applicable legal standard suggests that the District is required to determine and accommodate a protected student's particular preferences in order to provide adequate §504 accommodations.

Another illustration of the danger of relying on a subjective standard is Parents' contradictory position on whether the District should refuse to serve all classmates treats that may be unsafe for Student. With respect to the chocolate cake birthday treat, Parent took the position that the Service Agreement required the District to decline to serve to every child in Student's class a treat deemed unsafe for him. *See* Petitioner's Closing Statement at p. 3. In testifying about another birthday celebration that occurred later in the kindergarten year, Parent complained that the teacher refused to serve water ice that she had discussed with the other parent and approved as an allergen free treat. The kindergarten teacher refused to serve it because the label indicated that it was manufactured at a place that may also process peanut and tree nut products. (N.T. pp. 103, 879) Parents contended throughout the hearing that due to the potential for cross contamination, Student's safety requires that the Service Agreement prohibit such products, F.F. 9 Nevertheless, Parents apparently believe that in taking extra precautions to assure Student's safety, the District not only violated the terms of the written Agreement, but

[3] Parent testified that one of the issues with a separate allergy-free lunch table removed from Student's classmates is Student developing the notion that he owns the separate table and can determine else may sit there. N.T. pp. 80, 81. It is possible that the number of classmates sitting with Student at lunch may have been affected by that unfortunate misperception. The District subsequently re-arranged the lunch seating to make a section of a larger table the allergy-free section, which likely eliminated or reduced the potential for Student's attempt to dictate which classmates could sit at the restricted table. The lunch seating is no longer a disputed issue. Petitioner's Closing Statement, p. 9

intended to inflame the parents of other students in the school against Parents and Student and blame them for the restrictions on snacks and treats. (N.T. pp.103, 105—107)

Parents also asserted that the District failed to enforce the grade-wide prohibition in the Service Agreement against snacks containing peanut or tree nut products. Parents' only evidentiary support for that broad assertion, however, is Parent's testimony that the mother of a student in another kindergarten class told Parent that she sent peanut butter crackers as a snack for her child on a weekly basis. (N.T. 77, 78, 94) Such uncorroborated hearsay testimony is entirely self-serving as well as unreliable. Moreover, there was no evidence that after receiving such information, Parent ever notified the District to give the District the opportunity to investigate whether it was accurate and take steps to assure that all kindergarten teachers were enforcing the Service Agreement in their classrooms.

It is certainly understandable that Parents have a strong interest in assuring that their child is completely safe at school and an equally strong interest is protecting their child from feeling that he is different from his classmates. Nevertheless, the law does not require the District to assure that the Service Agreement will be perfectly implemented at all times in accordance with the Parents' desires and notion of proper implementation, The law does not require the District to assess every issue in terms of how Student or Parents will feel about the means the District chooses to adequately assure Student's safety.

Finally, the law also does not require the District to protect Student and/or Parents from unkind and insensitive remarks and actions of others, such as the parents of District students who signed a petition asking that the District take the convenience of others into account when deciding the extent of the protections provided to Student. F.F.15

As noted above, however, the District must assure that the Service Agreement includes all precautions necessary for Student's safety, regardless of the opinions of other parents. The

District must also assure that it does not inadvertently allow either its own employees or others to create an environment that will make it difficult for Student to fully participate in both the academic and social aspects of his educational program. To that end, the District must make it clear to the entire school community that there is a substantial difference between subjecting the majority to the inconvenience of finding alternatives to foods containing peanuts and tree nuts and compromising the safety of students with food allergies. There is no right to convenience, while qualified students with disabilities residing within the District have a protected right to enjoy all the benefits of a public school education, beginning with the right to be as safe as all other students while attending school.

There is, however no persuasive evidence suggesting that the District is not fully cognizant of its §504 obligations to Student, and no persuasive evidence supporting Parents' claims that the District failed to properly implement the §504 Service Agreement in effect for Student with respect to nonacademic activities provided during the regular school day. After the petition incident, the District sent a letter to parents of students attending the same elementary school as Student to affirm its commitment to providing a safe environment for allergic students. F.F. 15; P-13

There is also no persuasive evidence supporting Parents' claim that the District has failed to assure that Student's inclusion in nonacademic activities to the maximum extent appropriate to meet Student's safety needs. Parents claims in those respects, are, therefore, denied.

2. PTO Programs Provided Outside of School Hours

Determining the District's obligation to provide for Student's participation in the PTO programs presents additional legal issues. The District contends that it has no control over an independent entity such as the PTO and, therefore, has no §504 obligation to assure non-discrimination in such programs/activities, and cannot be held responsible for PTO activities that

may exclude Student by failing to assure that he can safely participate in food-related activities.

In this case, the evidence established that the PTO activity in question, an after school enrichment program, was conducted outside of regular school hours. F.F. 14d Because it is a fund-raising activity students pay a fee to participate. N.T. p. 384 The program, however, is provided at the school, using school facilities without charge to the PTO. Under such circumstances, the PTO program in question is equivalent to a recreational extra-curricular school activity. As a matter of law, the District must also assure that Student is not denied access to non-academic programs/activities offered as a school activity by a provider other than the District school due to his disability if Student is otherwise able to participate in such programs/activities.

In accordance with 34 C.F.R. §104.37, the District must provide for the participation of protected students in extracurricular activities as well as other non-academic services, including,

> (a) General.
>
> (1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
>
> (2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment

The District, therefore, must notify the PTO that it is required to follow the Service Agreement with respect to programs/activities provided in the District public school buildings and grounds, including prohibiting use of peanut and tree nut products in its cooking activities.

C. Terms of the Service Agreement

Parents contend that the Service Agreement does not include sufficient protections to reduce, to the greatest extent possible, the potential for Student to come into contact with allergens that could cause a life-threatening reaction. In addition, although Parents acknowledge that the District has begun providing some of the additional accommodations they requested, refusing to add those provisions to the written Service Agreement is a violation of the District's §504 obligations.

1. Shared Equipment and Hand Washing

Adding a provision to the Service Agreement requiring the District to wash playground and art equipment prior to Student's class using it, or to purchase duplicate equipment for the exclusive use of the children at Student's grade level, would no doubt lessen Parents' anxiety over Student's safety at school, but goes beyond accommodations necessary to adequately protect Student. It is important to note that Student has not had an allergic reaction to peanuts/tree nuts at any time while participating in school-related activities. There was also no evidence suggesting that Student has ever had such an allergic reaction when participating in community activities or accessing commercial or other public facilities. It is possible, but highly unlikely, that every surface Student touches when playing or visiting stores or amusement venues, for example, is washed with soap and water before he touches them. It is also possible, but highly unlikely, that no one with peanut/tree nut allergens on their hands touched the same surfaces before Student. It is reasonable to conclude that the danger from cross contamination of such equipment is low.

In addition, adding a requirement that playground equipment be washed would still provide no guarantee that Student will not come into contact with allergens at school due to cross contamination. To accomplish that, the Agreement would need to require that all surfaces that Student might possibly touch during the school day be washed daily.

In addition, the District's most recent proposal for revisions to the Service Agreement provides that all students will wash or wipe their hands after lunch, which would provide Student with a level of protection similar to sharing equipment with his classmates who ate peanut/tree nut products for lunch.

Requiring hand washing with soap and water rather than the use of hand wipes also goes beyond providing adequate protection. Although soap and water may be the highest standard, teaching students to wipe their hands with sufficient friction using a hand wipe is adequate, and might provide better protection than not washing long enough with soap and water or not using the level of friction necessary to remove allergens. Parents are correct however, that specifying "antibacterial" hand wipes adds nothing to the effectiveness of the procedure with respect to removing allergens.

2. Adding Language to Reflect Protections Currently Provided

Parents, however, have a valid point in requesting that all accommodations the District is currently providing be reflected in the language of the Service Agreement. Providing protections to Student in addition to those explicitly required by the Service Agreement is, at most, a technical violation of §504 requirements, and certainly created no harm. Nevertheless, providing such accommodations is a tacit acknowledgement by the District that the accommodations are required to adequately protect Student, and, therefore, should be added to the explicit terms of the written Agreement. Moreover, not doing so may lead to further litigation in the future due to confusion concerning what the District is required to do. Finally, as Parents note in their closing argument, District employees could not articulate a valid reason for not including such provisions in the Agreement. The District, therefore, will be required to do so via Student's §504 team.

Parents request that the emergency response provisions of the Service Agreement be amended to permit Student to visit the nurse if he feels it is necessary due to a possible allergic requirement will also be granted. Such revision is a minor and reasonable change that puts Student in the same position as other students who request to visit the nurse when not feeling well. It also removes another potential source of confusion and future dispute.

Going forward, it is important for both parties to approach the process of revising the Service Agreement and issues concerning implementation in a spirit of cooperation and good faith. The administrative due process hearing consumed considerable time and resources for little or no gain, except perhaps, to clarify the legal rights and obligations of the parties. Virtually all of the specific issues decided via the due process hearing could, and certainly should, have been resolved by continued negotiations concerning revisions to the 2008 Service Agreement.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the District is hereby **ORDERED** to:

1. Convene Student's §504 team to revise the written Service Agreement in the following respects:

   a. Assure that all protections and accommodations currently provided to Student are reflected in the terms of the written §504 service Agreement by including
      i. training of substitute teachers to respond to an allergic reaction;
      ii. prohibiting serving all items containing traces of peanuts/tree nuts; items manufactured or processed in a facility where peanut/tree nut products are manufactured and all homemade items, as well as peanut/tree nut products, in classrooms at Student's grade level;

   b. Add a provision permitting Student to go to the nurse for evaluation/treatment of possible allergic reactions at his request, as well as by referral from school staff.

2. Inform the PTO that it is obligated to implement the §504 Service Agreement with respect to any program/activity conducted within a District building or on school grounds.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 7, 2010