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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.M.

Date of Birth: [redacted]

Date of Hearing:

March 31, 2014

CLOSED HEARING

ODR Case #14589-1314AS

Parties to the Hearing:

Parent[s]

Shenango Area School District
2501 Old Pittsburg Road
New Castle PA 16101

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Lawrence Keith, Esquire
439 Court Street
New Castle PA 16101

Patricia Andrews, Esquire
1500 Ardmore Boulevard
Suite 506
Pittsburgh PA 15221

March 31, 2014

April 15, 2014

Jake McElligott, Esquire

INTRODUCTION

[The student] is [an elementary school-aged] student residing in the Shenango Area School District (“District”). The parties do not dispute the fact that the student qualifies as a “handicapped person” under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).¹

The student has a Section 504 plan to provide certain accommodations to the student in the educational environment as the result of the student’s severe dairy allergy. Parents claim that the District has denied a free appropriate public education (“FAPE”) to the student in how the District implemented the Section 504 plan. Consequently, parents seek an order making certain findings regarding this alleged denial of FAPE in addition to future directives to the student’s Section 504 team for future implementation of the Section 504 plan.

The District counters that, at all times, it has appropriately implemented the student’s Section 504 plan and has provided the student with FAPE. In the same vein, the District seeks a finding that the Section 504 is appropriate as written and that the Section 504 plan does not need to be re-visited by the Section 504 team as the result of a hearing officer directive. Therefore, the District argues, it has not failed in

¹ 34 C.F.R. §104.3(j). It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 (“Chapter 15”) wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61.

its obligations to the student under Section 504, either as to past implementation or by design of the Section 504 plan.

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

ISSUES

Did the District violate its obligations to the student under Section 504 in the design or implementation of the student's Section 504 plan?

FINDINGS OF FACT

1. The student has been diagnosed with multiple allergies, including a dairy allergy. As a result of the dairy allergens, and other allergens, the student is in danger of, and has experienced, respiratory distress in addition to external symptoms. Some incidents of allergic reaction have resulted in emergency room visits. The student's allergic reactions have been triggered both by ingestion and by touch. (School District Exhibit ["S"]-3; Notes of Testimony ["NT"] at 28-30).
2. In the summer of 2012, by letter from the doctor's physician and in consultation with the parents, the District was notified of the student's condition. (S-3; NT at 32-33).
3. The student completed kindergarten, the 2012-2013 school year, with accommodations of the student's allergy through a Section 504 plan. (NT at 32-35, 82-83).
4. With a transition to 1st grade in the 2013-2014 school year, parents had particular concerns about the student's allergy in the context of 1st grade, given changes to the length, nature, and structure of the school day. (S-1; NT at 34-36, 38-39).
5. In May 2013, anticipating the upcoming transition to 1st grade, the student's Section 504 team met to revise the student's Section 504 plan. (S-1).

6. The May 2013 Section 504 plan recognizes the student's disability, including the fact that cross-contamination of the student's food or environments is a possibility. The Section 504 plan notes that the student's "needs should be considered during lunch, snack, and party time." (S-1).
7. The May 2013 Section 504 plan contains 18 accommodations regarding the student. (S-1).
8. Of the 18 accommodations, nine relate directly to the ingestion of/contact with potential food allergens by mouth or through contact with surfaces. (S-1).
9. Of the 18 accommodations, seven relate directly to communications by/education of/duties undertaken by school staff, including access to and use of an EpiPen in case of a life-threatening reaction. (S-1).
10. Of the 18 accommodations, two relate directly to the involvement of the student's parents or parents of classmates. (S-1).
11. The student's kindergarten teacher in the 2012-2013 school year continued to be the student's 1st grade teacher in the 2013-2014 school year and was involved as a member of the student's Section 504 team in both school years. (NT at 82-83).
12. At the outset of 1st grade, the student's teacher sent home to parents a class newsletter regarding certain aspects for the class (schedule, rules, hints, expectations, etc.). (S-15).
13. A separate letter also went home to parents of the student's classmates, informing them that a student in the class had severe food allergies. The letter provided information about how the allergies would be handled in the class environment, including certain limitations and procedures. The letter also included a list, prepared by parents and furnished to the teacher, of non-allergenic "safe snacks". (Parent's Exhibit ["P"]-5; S-9; NT at 39-41, 86-88).
14. The student eats in the cafeteria with other students in addition to eating snacks in the classroom. As part of the student's Section 504 plan accommodations, the student's teacher and cafeteria staff make sure that the student is not being exposed to allergens and that the student's table and dedicated trays are wiped down. (NT at 41-42, 85-86, 88-89, 100).

15. Every Friday, in the cafeteria, cheese pizza is served as a lunch option. The student eats in the cafeteria on those days, with the usual monitoring and precautions. The teacher testified credibly that exposure to dairy allergens was not treated differently, or in any significant way, than any other of the allergy precautions for the student. (NT at 89-90, 100-101).
16. In December 2013, as part of a traditional holiday celebration, the 1st grade classes have a special pizza lunch. Parents were invited to send in a payment for any student who wished to have pizza, takeout pizza that would be delivered to the school specifically for the lunch. (S-12; NT at 96-99, 101, 107).
17. The student's teacher, as is her practice, contacted the student's parents in advance of the pizza lunch to inform the student's parents about the event so they could make arrangements for the student. (S-18; NT at 52-55, 96-98).
18. Initially, the pizza lunch was going to be held separately in each 1st grade classroom. Given concerns about the nature of the student's allergy, the pizza lunch was moved to the cafeteria, with all 1st grade classes combined for the event. (S-18; NT at 52-55, 96-97).
19. Parents had ongoing concerns about the pizza lunch, and, in mid-December, a team—including the student's mother, the student's teacher, the school principal, the District superintendent, the District Section 504 coordinator, the school nurse, a school counselor, and a school psychologist—met to discuss the pizza lunch. (S-18; NT at 57-58).
20. Parents felt that having a specially designated pizza lunch was in violation of the student Section 504 plan and that moving the lunch from a classroom-focused event to a cafeteria event was a means of holding the event in violation of the Section 504 plan. (NT at 58-59).
21. The parties were unable to agree on whether the lunch should be held or, if held, how the lunch should be structured or what food, if any, should be served. (S-18; NT at 58-64, 98-99).
22. On December 19, 2013, on the eve of the pizza lunch, parents provided an excuse from the student's physician, requesting that the student be excused from the pizza lunch due to the student's allergies. (S-16).

23. The pizza lunch was held in the cafeteria on December 20, 2014. Students had the choice of the regular cafeteria menu items, or to bring a lunch of their own, or to eat the specially-provided pizza had their parents paid the lunch fee. Most students ate the pizza, although some students did not and ate from the cafeteria menu or brought their own lunches. (NT at 101).
24. The student attended school on the morning of December 20, 2014 but was dismissed early and did not attend lunch in school that day. (NT at 65, 99).
25. The student's teacher testified that she would have utilized the same monitoring and precautions with the student at the pizza lunch in the cafeteria on December 20th as are utilized in the cafeteria on other school days. (NT at 99-100).
26. On January 10, 2014, parents filed the complaint that led to these proceedings.

DISCUSSION AND CONCLUSIONS OF LAW

Section 504 requires that children with disabilities be provided with FAPE.² The standards for a provision of FAPE under Section 504 are broadly analogous and may even, in most cases, be considered to be identical for claims of denial-of-FAPE under the Individuals with Disabilities in Education Act of 2004 (IDEA).³ Courts have long subscribed to the notion under IDEA jurisprudence, and by analogy Section 504 jurisprudence, that the design and implementation of a student's educational program, as in a Section 504 plan, must be

² 34 C.F.R. §104.33; *see also* 22 PA Code §15.1.

³ *See generally* 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818; P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009).

reasonably calculated to address the needs of the student in the educational environment.⁴

In this case, the student's Section 504 plan was reasonably calculated to accommodate the student's needs in the educational environment. Make no mistake, as is the case with large numbers of students with allergies who face potentially life-threatening [situations], these matters cannot be taken lightly. Here, parents and the District, especially in the person of the student's classroom teacher—a dedicated teacher who showed herself to be diligent about accommodating the student's needs—, both recognize the need for the student's accommodations and the potential seriousness of not meeting those needs.

The ultimate questions, however, are whether the student's Section 504 plan was reasonably calculated to meet the student's needs and whether the District implemented the Section 504 in such a way that the student was afforded FAPE. Respectively, the answers to these questions are: the Section 504 plan is reasonably calculated to meet the student's needs and was implemented in such a way to provide the student with FAPE.

Parents' counsel argued that the District, by design and special exception, was introducing a known allergen into the school environment during the pizza lunch of December 20th. While parents' counsel argued

⁴ Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); P.P., *infra*.

effectively for this position, and was persuasive in general, the weight of the record indicates that the student has been in similar cafeteria conditions (exposed to pizza being eaten by other students) where the accommodations of the Section 504 plan (attention to seating, sanitizing, use of a dedicated tray) protected the student from ingestion and cross-contamination.

In short, the Section 504 plan was designed to protect the student in situations like those in the pizza lunch, and its implementation in the past support a conclusion that, as the teacher testified, its implementation during the pizza lunch would have afforded the student a safe and effective opportunity to access the educational environment.

Accordingly, on this record, the student was afforded FAPE through the design and implementation of the Section 504 plan.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District did not deny the student a free appropriate public education under the requirements of Section 504. The parties may convene a Section 504 team meeting at any time to discuss potential revisions to the student's Section 504 plan, but such a meeting will not be ordered.

Any claim not specifically addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 15, 2014