

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. 15903-1415KE

Child's Name: M.V.

Date of Birth: [redacted]

Date of Hearing: 4/23/15

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Tunkhannock Area
41 Philadelphia Avenue
Tunkhannock, PA 18657

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney

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May 30, 2015

June 11, 2015

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The Student involved in this case is completing 2nd grade in a District elementary school. Due to a medical diagnosis of Type I diabetes, Student is a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the federal regulations implementing §504 (34 C.F.R. §§104.32—104.37), and Chapter 15 of the Pennsylvania Code.

Student's condition carries a risk of hypoglycemia, which, if it occurs, requires a lifesaving dose of glucagon administered by injection within minutes. The District requires that a nurse administer the medication if needed, but there is not always a nurse present in Student's building. Parents argue that administration of the glucagon does not require a nurse, and that the District is engaging in a discriminatory practice against their child by refusing to agree to training for individuals other than a nurse to provide emergency glucagon treatment in the event of a life-threatening emergency. The District argues that the Pennsylvania Nurse Practice Act precludes delegation of the administration of medication to non-nursing personnel, and, therefore, that Patents' requested accommodation is unreasonable.

Based upon review of the record produced at the single brief hearing session on April 23, 2015, which resulted in no significant dispute concerning facts relevant to the decision, as well as review of the parties' respective legal arguments, I find for the Parents.

ISSUES

1. Should the District be required to permit staff other than registered or licensed nurses to be trained, and if needed, to administer glucagon injections in order to assure that someone is available to provide that life-saving emergency treatment whenever Student is present at school or at a school event or activity such as a field trip?

2. Is the District presently engaging in a discriminatory practice, in that when a nurse or a Parent is not present to administer a glucagon injection in the event of an emergency, Student is precluded from participating in school and/or school activities due solely to Student's medical condition?

FINDINGS OF FACT

Student/Medical Condition/ Training of School Staff

1. Student, an [an elementary school age] child, born [redacted] is a resident of the School District. [Stipulation, NT p. 13]
2. Due to a medical diagnosis of Type I diabetes, Student is a qualified handicapped person/protected handicapped student in accordance with Federal and State Standards. [Stipulation, NT pp. 14, 15; S-2]
3. Student checks his/her sugars 6 to 12 times/day, and Parents are up in the middle of the night to check the child's sugar once or twice while the child is asleep. Parents have to help the child make judgment calls with respect to whether food or insulin is needed. [NT pp. 106, 107]
4. In school, Student can check his/her own blood sugar in the nurse's office, where the meter is kept. If Student is low, Student knows to drink a juice, but then needs to be rechecked in 15 minutes. If Student is high, such as 300 which happens quite often, Student self-administers insulin through the pump but the nurse¹ is right there to supervise. [NT pp. 114, 115]
5. Student has a set schedule of going to the nurse before snack, before lunch, and after lunch. Anytime during the day that Student reports feeling low, or doesn't feel quite right, the teacher immediately sends Student to the nurse. [NT p. 28]
6. Student has a sense of Student's own body and recognizes feeling low, but sometimes the teacher has witnessed Student get shaky, get a glossy-eyed look, have a blank face and look a little pale. [NT p. 29]
7. The teacher recalls, and nursing records corroborate, that since September 2014, Student has had to go to the nurse's office a minimum of four times/day, with an average of four to seven times/day. [NT pp. 27, 58; P-3]
8. Student's teacher has been with the District for seven and a half to eight years. She has never had training on managing diabetes through the District. [NT p. 26]
9. Student's teacher is with Student all day with the exception of a 30-minute lunch period and a 40-minute period of special subjects such as gym, computers, music, art library. [NT p. 29, 30]

¹ Two nurses testified. The nurse assigned to Student's building is referenced as the "nurse." The other witness is referenced as the "certified nurse".

10. At the beginning of the school year Student's mother provided the teacher with a list of symptoms, things to watch for. [NT pp. 26, 30, 31]

11. The teacher keeps a copy of the list on her desk; there are three copies of the list in her classroom. There is a copy in her Substitute Folder, an Alert Folder. There is also a copy in her mailbox in the event that there is a substitute teacher. [NT p. 32]

12. The District has never provided the teacher with an emergency plan or a procedure to follow in the event Student has an emergency. [NT pp. 30, 31]

Glucagon

13. Glucagon is a life-saving emergency treatment for hypoglycemia (low blood sugar), which can occur as a complication of Type I diabetes. [P-2, P4-a]

14. A glucagon kit has two separate components: a vial with a dry substance, the glucagon, and a syringe filled with liquid that has to be put into the bottle and mixed by shaking prior to putting it back into the syringe and injecting it into a site, typically a large muscle. [NT p. 70]

15. According to the guidelines for administering glucagon, an injection would be given if Student loses consciousness, or is having a seizure, or cannot swallow. [NT pp. 70, 71]

16. If glucagon were administered when Student really did not need it, *e.g.*, if Student were unconscious from a fall and not low blood sugar, the glucagon shot would not harm Student. The only potential side effect is inducing vomiting. [NT p. 125]

17. According to the nurse, glucagon administration needs to be immediate because the longer a person remains unconscious the lower the person's blood sugar is dropping. In order to effectively raise blood sugar, a person must be conscious because he or she must be able to swallow. When the person is given glucagon and becomes conscious, he or she must continue to receive glucose in another form. Although a glucagon injection typically works, it does not always work effectively, and in any given situation, it is not possible to predict whether it will work or not. It is, therefore, important to administer the glucagon injection as soon as possible. [NT pp. 96, 97]

18. When Student is not in school, Student always has a backpack with the meter, a glucagon kit and food, juice or anything to bring Student's sugar up, and the backpack goes everywhere with Student. [NT pp. 108,109]

19. Whenever Student goes with grandparents or other relatives, the adults have been trained to administer a glucagon shot. If Student goes to a birthday party Student's mother offers to train the hosting parent[s] on how to administer glucagon and the friends' parents have always accepted Mother's offer. [NT pp. 107, 108]

Glucagon Availability During the School Day

20. Student's glucagon kit is kept in a medication storage cabinet in the nurse's office that is locked when the nurse is there. When the nurse is not in the building, the cabinet remains unlocked, but the nurse's office door is locked and the key is left in the school office with the secretary. [NT pp. 49, 83]
21. When the nurse, or another nurse, is not in the building, the school secretary would not give the keys to the nurse's office to anyone else to get access to the glucagon. If the glucagon were needed, only the nurse, or another nurse could retrieve the glucagon, since, at present, no one other than a nurse would be permitted to give Student a glucagon injection. [NT pp. 50—52, 63, 83, 84; S-3]
22. Student's teacher is willing to be trained to administer glucagon if Student needed it. [NT p. 39]
23. The teacher has not received any training through the District and does not know how to administer glucagon although she and the mother have discussed it. [NT pp. 31, 32]
24. The nurse assigned to Student's building has not trained anyone else in the school to administer glucagon in the event of an emergency with Student. It is the nurse's understanding, corroborated by the certified school nurse, that under Pennsylvania law she is not permitted to teach a nonprofessional to administer medicine. [NT pp. 51, 87, 88, 96, 145-147; S-5]
25. In a meeting with the building principal and the guidance counselor the Parents expressed their concerns that at times there might not be a nurse in the building. Parents asked to have other staff trained to administer glucagon in an emergency. The school staff members indicated that they would discuss the issue with administration. [NT pp. 110, 111]
26. The school staff later informed the Parents that a non-professional could not be trained to administer glucagon, that only a nurse could do it. [NT p. 111]
27. The nurse has not consulted with other school districts in Pennsylvania to ascertain whether they allow nonprofessionals to administer glucagon. The certified nurse knows that some school districts in Pennsylvania do permit emergency administration of glucagon. [NT pp. 52, 160]
28. In many discussions with the school, the response to Parents has been that there is a nurse available at all times. [NT p. 113]
29. The registered nurse assigned to Student's building generally needs about two sick days per year and takes about two personal days a year. [NT pp. 44, 45]
30. The nurse assigned to Student's building goes to four-hour professional trainings at least once a year; she tries to go to trainings conducted after school hours. [NT p. 47]

31. When she was absent, the nurse was not sure if/when coverage was obtained for her, or who was assigned to cover, or if/when she was able to have a conversation about Student's nursing needs with someone who may have covered for her. [NT pp. 53-55]
32. The nurse maintains that she is "not obligated" to speak with someone who may be covering for her because the school has annually updated doctor's orders in Student's record and on the computer. [NT pp. 55, 56]
33. The nurse assigned to Student's building could not say the number of times she is asked to report to another District building; she estimates that this has happened twice this school year. [NT pp. 45, 46]
34. When the nurse assigned to Student's building is out or reassigned to another site, and if the District cannot get a substitute nurse, the nurse assigned to Student's building, or another of the nurses, "monitors" Student's school building. The nurses "monitor" the uncovered building for children who need scheduled medications. The building Student attends is about a half mile to a mile from the middle school and the high school. [NT pp. 46, 144, 145]
35. It would take from six to eight minutes for the nurse to drive from the middle school, where she might be on assignment for the day, to Student's school. The nurse would have to leave her car, go into the building and retrieve or be handed the glucagon, and go to where Student is located to give the glucagon injection. [NT pp. 69, 97]
36. The certified nurse does not think there is a plan for administering glucagon to Student if there is not a nurse in the building. [NT p. 157]

Concerns/Student's Status When a Nurse Is Unavailable

37. Parents' biggest medical concern with respect to Student's school attendance is the potential need for a glucagon shot because if needed, Student would be in a life or death situation. Parents are concerned that if Student were to pass out when the nurse is not in the building, the teacher would have to tell someone to call 9-1-1, tell the secretary to call the nurse at the other school site and have her rush back to administer the glucagon. If other staff were properly trained, they would know what to do in an emergency situation and could administer glucagon if necessary. [NT pp. 115-117, 122]
38. Since Student entered the District, a nurse has not been present in Student's building for the entire day about seven or eight times. Parents have had to keep Student home on those days. [NT p. 113]
39. When the nurse is not in the building Student does not come to school because there is not a nurse there to do blood level checks and administer insulin or to respond by administering glucagon in case of an emergency. [NT pp. 37, 41, 42]
40. Student is not penalized for absences related to the lack of a nurse in the building. [NT p. 41]

41. On a few occasions, Parents have not been called and informed that there was not going to be a nurse in the building that day. [NT p. 129]
42. In the nurse's professional opinion it is dangerous for Student to be in school if there is not a nurse in the building to administer glucagon. [NT p. 96]
43. Student's physician provided a written opinion stating that if Student's school nurse is not available to administer glucagon, there must be someone else in the school trained to do it. [P-2]
44. Student likes to be at school, but because of Student's diabetes, which requires numerous nurse visits, and because of staying at home on days a nurse is not present in the building, Student "definitely" misses more instructional time than non-disabled children. [NT pp. 38, 118]
45. Parents' biggest educational concern about having to keep Student out of school if there is no nurse in the building is that as Student ages, the work will get harder and as the work gets harder, Student may fall behind by missing whole days of school for safety concerns because of the amount of time Student is already out of the classroom, at the nurse's office, due to diabetes management. [NT pp. 117, 118]

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

§504

The claims in this case were asserted solely under the statute prohibiting disability-based discrimination, commonly referred to as "§504 of the Rehabilitation Act of 1973" or simply "§504," found at 29 U.S.C. §794(a). §504 provides that,

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 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 IDEA statute 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).

The protections of §504 are implemented by federal regulations found at 34 C.F.R. §§104.32—104.37. In addition, Pennsylvania has adopted regulations implementing §504 in the context of prohibiting discrimination on the basis of disability and providing educational services in the public schools, which are found in 22 Pa. Code §§15.1—15.11 (Chapter 15). As explained in §15.1:

- 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.

Despite the congruence courts have found between IDEA and §504, however, it is important to keep in mind that the statutes differ in focus. The primary focus of §504 is to “level the playing field,” *i.e.*, to assure that an individual, specifically, a school-aged student in this context, is not disadvantaged in education based upon a disability. As stated in *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 at *14, *15: (D.N.M. 2008):

“In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [she is disabled]...

Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.” *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (quoting C. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)).

Elements of a §504 Claim

To assert a successful §504 educational discrimination 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.*

Pennsylvania law defines a §504/chapter 15 “protected handicapped student” as

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.

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).

Burden of Proof

The burden of proof consists of two elements: the burden of production [generally, which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing

officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipose”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012).² In this case, because Parents asked for the hearing, they bore the burden of persuasion. As the evidence in this case strongly supported Parents’ claims, it was not equally balanced, so the *Schaffer* analysis did not apply.

Relevant Facts, Parties’ Positions

There is no dispute with respect to the facts essential to the decision in this matter. To this point, Student has never needed a glucagon shot, but could suffer serious medical consequences, including death, if Student needs a glucagon shot and does not get it within ten [10] minutes at the most. “Need” is not difficult to determine: if the child passes out, the clock starts ticking. The glucagon injection is no more difficult to administer than using an epi-pen, and Parents regularly train the parents of their child’s friends to administer an emergency glucagon injection when the child attends a sleepover or a birthday party.

Most important, there is no possibility of a glucagon overdose – even if the child passes out from a cause unrelated to diabetes and receives the glucagon injection, it will cause no harm. The only health risk to Student arises from not getting the glucagon shot when it is needed. The professional opinion of the nurse assigned to Student’s building, who has known Student since

² Although the Parents bring this matter solely under section 504, the Supreme Court’s analysis in *Schaffer* was based upon basic principles in the common law and in administrative law. I see no reason to deviate from this analysis under section 504. Moreover, the Third Circuit Court of Appeals has recognized that the two statutes are unusually similar with regard to the rights that they protect, and that at least one procedural requirement of the IDEA should be applied in section 504 cases. *P.P. v. West Chester Area School District*, 585 F.3d 727, 736 (3d Cir. 2009)(applying the IDEA statutory limitation of actions to section 504 cases). I conclude that the reasoning in these cases is applicable to section 504 cases; thus, I follow those cases here.

kindergarten and sees Student multiple times a day, is that it is dangerous for Student to be at school when she or another nurse is not present in the building because there is no one available to administer glucagon in the event it is needed.

Ordinarily, there is a nurse in the building where Student attends school who could administer the glucagon shot. Occasionally, however, the District cannot procure enough nurses to put one in each school building for the entire day. On those occasions, there is about an eight [8] minute delay, assuming everything is perfect in terms of traffic and/or other conditions that might cause a travel delay, for a nurse to get to Student's building.

For obvious reasons, considering the potentially life-threatening consequences of a delay longer than an additional two minutes from the time the need for a glucagon injection is needed, Parents have asked to be notified when a nurse is not going to be present in Student's building for the full day, so that they can keep the child at home. The fact that this has happened about 5 to 8 times in the past two years is irrelevant. Parents are rightfully concerned that missing full days of instructional time because of unexpected, forced absences, even if sporadic, may become more of a problem as Student gets older and the work becomes more difficult. In addition, Student may be forced to miss other desirable or important events due only to safety concerns arising from the combination of Student's medical condition and the District's glucagon injection policy.

Parents' requests are simple: they either want the District to assure that there is a nurse in Student's school building at all times, or they want the District to allow the child's teachers to be trained each year to give the glucagon shot if necessary. The District's position in support of its refusal to have non-medical staff trained to give a glucagon injection is that state law prohibits a nurse from training anyone who is not medically licensed to administer injections. The District,

therefore, is adamant that it may not require the nurse to train the teachers [or give the teachers access to the glucagon which is kept in the nurse's office].³ The District also seems to think that there is no great harm in having the child stay home occasionally if a nurse is not available, or alternatively, that the child could come to school since the glucagon shot has never been needed.

Having the child stay home from school to protect the child's health constitutes discrimination on the basis of disability through denial of access to/participation in education. Student is obviously being treated less favorably than non-disabled children because under the District's policy, Parents are required to choose between protecting their child's health and safety due to a potential complication from Student's disabling condition, or having the child attend school when a nurse is not present. The District policy, therefore, violates §504 and Chapter 15, regardless of the number of times the exclusion occurs, or the likelihood of an emergency should Student take the risk of attending school on those occasions. There is no minimal acceptable level of exclusion from school on the basis of disability, and there is certainly no minimal acceptable level of danger of death.

The District's reliance on the position that "state law prohibits" nurses from implementing Parents' requested accommodation, in terms of training non-nursing staff to administer a glucagon injection does not make it unreasonable. The state laws referenced by the District do not apply, either directly or indirectly, to school districts, but only to the non-educational staff, *i.e.*, the nurses who work in and for the District. Pennsylvania law, therefore, does not prohibit the District from permitting non medical professionals from being trained or from administering glucagon injections.

³ Interestingly, there is a specific carve-out exception in the Pennsylvania Nurse Practice Act for epi-pens to which teachers have access and which they are permitted to use.

Moreover, the nurses who work for the District will not be required to train other staff to administer a glucagon injection. Training can be obtained from the Juvenile Diabetes Association, and the Parents have offered to arrange for staff training, or to train the staff themselves. In this regard, Parents are most reasonable.

In addition, Parents are willing to accept an assurance that a nurse will be in Student's school building at all times when Student is present, and that a nurse will likewise attend field trips which Student attends. If the District continues to be more concerned about the remote possibility of professional consequences to nurses who work in the District than about the real, actual and immediate discriminatory effect of its glucagon injection policy, the District may certainly continue to protect the nurses by choosing the option of having a nurse available for Student at all times as a means of complying with the Order in this case.

CONCLUSION

Student's diabetes meets the legal test of §504 and Pennsylvania Chapter 15 regulations for a disability that affects full participation in school in the absence of accommodations, namely, reasonable safety precautions in light of the potential for a life threatening drop in blood sugar. 22 Pa. Code §15.2. Student's disability requires special provisions in order to ensure Student's safety in a public school setting, and in community settings that Student's peers visit on educational field trips.

The District's refusal to assure Student's access to a potentially life-saving medication on every day that Student could or would otherwise attend school violates §504 and Chapter 15. Student is treated less favorably than non-disabled peers because Student is required to choose between attending school and assuring that Student's life is not put in danger by Student's handicapping condition, based solely on the school's refusal to assure access to a glucagon

injection on every school day. The District, therefore, must either permit its non-nursing staff to be trained to administer glucagon if needed, or assure that a nurse will be present in school and during school functions off school grounds, since a glucagon injection is needed in the event of a life-threatening emergency. The only other alternative is for Student to remain out of school, or otherwise be excluded from school-related activities, by reason of Student's disability when a District nurse is not available at Student's location for the entire time Student is present.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to assure that Student has immediate access to a glucagon injection on every school day, and/or at every officially sponsored School District activity that Student is either required or permitted to attend by virtue of Student's enrollment in the District.

It is **FURTHER ORDERED** that the term "immediate access" is defined as a guarantee that an adult District staff member, who may or may not be a registered or licensed nurse, trained to follow appropriate medical protocol and to administer a glucagon injection according to appropriate medical procedure, is at the same location as Student at all times that Student is present to engage in a District sponsored and/or school-related activity.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 11, 2015