

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 Final Decision and Order

ODR No.

27382-22-23

CLOSED HEARING

Child's Name:

S.C.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for the Parent:

Pro Se

Local Education Agency:

Towanda Area School District
410 State Street
Towanda, PA 18848

Counsel for the LEA:

David F. Conn, Esq.
331 E. Butler Avenue
New Britain, PA 18901

Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

01/26/2023

Introduction and Procedural History

This special education due process hearing concerns a student with disabilities (the Student). The Student's parents (the Parents) requested this due process hearing and seek an order to compel the Student's public school district (the District) to accommodate the Student's disability by permitting the Student to carry migraine medication in school and take that medication when the need arises.

The District is willing to provide the accommodation under certain conditions. However, the District worries that Pennsylvania law may prohibit students from carrying and self-administering medication in school unless the medication falls into permitted categories. The District denied the accommodation for this reason.

The Parents requested this hearing on December 15, 2022. Through a series of pre-hearing emails, the parties explained their positions to me. After a resolution session, I convened a pre-hearing conference call on January 18, 2023. During that call, the parties agreed that no facts were in dispute and the matter could be resolved on a stipulated record. The parties filed joint stipulations with supporting documents on January 24, 2023. After reviewing the submissions, I agree with the parties that the stipulated record is sufficient for me to resolve this matter.

For reasons set forth below, I find that federal laws require the District to provide the accommodation and Pennsylvania laws do not prohibit the District from providing the accommodation. Therefore, I order the District to provide the accommodation.

Issue

The Parents are not represented by an attorney. Their due process complaint is fairly read to include the following issues:

1. Does Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* require the District to accommodate the Student by permitting the Student to carry and take migraine medication in school?
2. Does the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* or require the District to accommodate the Student by permitting the Student to carry and take migraine medication in school?

Stipulations

The stipulations below were written by the parties. I have edited the stipulations to protect the Student's privacy. The parties stipulate the following:

1. [The Student] is a [high school-aged] student at [the District].
2. [The Parents] are Student's parents.
3. Student is an identified student under the Individuals with Disabilities in Education Act ("IDEA") with a primary disability of Other Health Impairment and a secondary disability of Traumatic Brain Injury ("TBI").
4. A copy of Student's current Individualized Education Plan ("IEP") is attached hereto as Exhibit "A". [A copy of the IEP was attached to the stipulations and is accepted as Joint Exhibit 1.]
5. As a result of [Student's] TBI, Student is subject to frequent debilitating migraines.
6. The migraines can cause [Student] to miss one or two days of school at a time.
7. Student has prescriptions for medications to prevent or ameliorate the migraines if taken when the symptoms first begin.
8. The medications are kept locked in the nurse's office, and when needed have been administered under the direction of the nurse.
9. On at least one occasion this year, symptoms began and the time between onset and the delivery of medication was too long to prevent the manifestation of the migraine.
10. At a prior district, Student once suffered a migraine during a lockdown, preventing him from accessing his medication until it was far too late.
11. Student's IEP discusses [Student's] migraine medication at pages 5 and 6.
12. Student's physician has requested that Student be allowed to carry a single dose of one of the two prescription medications. A copy of this request is attached hereto as Exhibit "B". [A copy of a letter dated

December 6, 2022 from a medical doctor was attached to the stipulations and is accepted as Joint Exhibit 2.]

13. Parents seek to revise the IEP to add an accommodation that Student may carry a single dose of a prescription medication that [Student] can self-administer upon the onset of migraine symptoms.
14. Parents and the District have agreed that for safety reasons, the following procedure would be required to allow Student to carry and self-administer this prescription:
 - a. Student will carry a single dose, in a locked container;
 - b. Student will check in with the nurse at the start of each day to confirm that a single dose is present;
 - c. Student will check in with the nurse at the end of the day to confirm that a single dose is still present; and
 - d. In the event Student takes the medication upon the onset of symptoms, Student will [be] escorted to the nurse as quickly as possible to notify the nurse that [Student] took the medication. [Student] will rest in a dark and quiet room and be observed by staff for a minimum of fifteen (15) minutes, after which the nurse will permit Student to (i) take additional medications as instructed by his physician, (ii) continue to rest in the nurse's office for additional time as needed, (iii) return to class, or (iv) reach out to Parent for pick-up, if necessary.
15. The District and Parents agree that this arrangement will satisfy Student's needs and adequately addresses the District's safety concerns around other students' access to prescription medication.
16. Notwithstanding the parties' agreement around an acceptable procedure, in 2019 the Pennsylvania School Code was amended to establish procedures for students to self-administer three categories of medication: insulin, epinephrine and asthma medication. 24 P.S. §§ 14-1414.1 and 14-1414.5.
17. Student's medication is not in one of these three categories.
18. Since 2010, the Pennsylvania Department of Health has advised that all medication be kept in a locked area of the nurse's office, and that no self-administration by students should occur.

19. These guidelines have never been formalized as regulations.
20. The issue before the hearing officer is whether Student's ability to carry and self-administer [Student's] migraine medication is required to allow [Student] to receive a free and appropriate education under the IDEA, a federal law, such that the District must disregard current state law regarding self-administration in this case.

Findings of Fact

I accept the parties' stipulations, except for Stipulation 20, as if they are my own findings of fact. To the extent that Stipulations 16 through 19 are mixed statements of fact and law, I accept the facts in those statements as if they are my own findings. The legal conclusions in those statements are not disputed and are consistent with my own research.

I reject Stipulation 20 because the complaint itself, not a stipulation, establishes the issue presented in this hearing. The issues I am resolving are stated above. The interplay between Section 504, the IDEA, Pennsylvania laws, and Pennsylvania agency guidance is discussed below.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. § 1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and

implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision is no different.

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “de minimis” benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than de minimis” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably

calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Section 504/Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied.

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects "handicapped persons," a term that is defined at 34 CFR § 104.3(j)(1):

Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Chapter 15 applies Section 504 in schools to prohibit disability-based against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and

3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as 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." 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements.

When parents and schools cannot reach an agreement, several dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Discussion

The Student is a child with a disability as defined by the IDEA. The Student's IDEA eligibility removes the Student from Pennsylvania's Chapter 15, but only in the sense that the Student's accommodations must be drafted into

the Student's IEP, not a separate service agreement. Discussed above, every student who is protected by the IDEA is also protected by Section 504, and so the Student is entitled to accommodations that enable the Student to participate in the District's programs to the same extent as the Student's nondisabled peers.

The stipulations establish that the Student's disability, without accommodations, prevents the Student from participating in the District's programs. At the onset of a migraine, the Student must take medication immediately, as prescribed by a medical doctor who is a Board-Certified Pediatric Neurologist. See J-2. If the Student does not take medication immediately, the Student suffers migraines and misses school.

The purpose of the accommodation is to enable the Student's participation in the District's programs. As described in the stipulations, the accommodation is reasonable by any definition. I commend the parties for working cooperatively to define the parameters of the accommodation. I find that the Student is entitled to the accommodation detailed in the stipulations under Section 504 because the accommodation is both reasonable and enables the Student's participation in the District's programs. See, e.g. *In re: M.V., a Student in the Tunkhannock Area School District*, ODR No. 15903-1415-KE (2015). I will, therefore, order the District to provide the accommodation.

Cases involving disability accommodations, as opposed to special education, fit more squarely into Section 504 than the IDEA. In Pennsylvania, however, Chapter 15 moves Section 504 accommodations into IEPs for children who are entitled to special education. Disputes about the content of IEPs come under the IDEA, and so the Parents' IDEA claim is proper. Moreover, I find that the Student is entitled to the accommodation under the IDEA itself, regardless of Section 504.

Under long-standing Third Circuit jurisprudence, the District has an affirmative obligation to determine what supplementary aides and services the Student needs to receive a FAPE in the Least Restrictive Environment (LRE). *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993). The stipulations show that, without the accommodation, the Student has missed school and is likely to miss more. Therefore, without the accommodation, the Student's placement is the District's school only in a technical sense. The practical reality is that, without the accommodation, the Student's placement is a mix of school and home. The accommodation is necessary to enable the Student's placement in the District's school which, by definition, is the LRE for the Student.

The accommodation is reasonable under the IDEA just as it is reasonable under Section 504. Providing the stipulated accommodation furthers the IDEA's purposes by enabling the Student to be educated in the least restrictive environment. The stipulated accommodation is, therefore, appropriate under the IDEA and, for this Student, necessary to maintain the Student's LRE placement. The District is obligated under the IDEA to provide the accommodation.

I understand the District's position in this matter. The Student has a disability, and, because of that disability, the Student requires a reasonable accommodation both to be educated in the LRE and to participate in the District's programs to the same extent as nondisabled peers. The District essentially agrees that the accommodation is both necessary and reasonable but is concerned about running afoul of Pennsylvania law. The law in question, 24 P.S. §§ 14-1414.1 and 14-1414.5, is not clearly within my jurisdiction. I will go on, however, to address the District's concern so that both parties can move forward.

Some case law suggests that my jurisdiction expands so that I can resolve threshold issues in special education cases. *See, e.g. I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013); *A.S. v. Office for Dispute Resolution Quakertown Cmty.*, 88 A.3d 256 (Pa. Commw. Ct. 2014) (both expanding hearing officer's authority to determine if parties are bound by contracts when doing so is a threshold issue to an IDEA claim). To whatever extent resolution of the District's obligations under 24 P.S. §§ 14-1414.1 and 14-1414.5 is a threshold issue in this case, I find that those laws place no restriction on the stipulated accommodation.

Pennsylvania law at 24 P.S. § 14-1414.1 concerns student access to and use of asthma inhalers and epinephrine auto-injectors in school. Pennsylvania law at 24 P.S. § 14-1414.5 concerns student access to and use of and use of diabetes medication and monitoring equipment in school. Neither law addresses any other type of medication. Neither law places any restriction or prohibition on any other type of medication. The only thing identified by the parties that prohibits the District from freely granting the accommodation is not a law at all, but rather is guidance from the Pennsylvania Department of Health (PDH).¹ As the parties note, that guidance has never been formalized as regulations.

It is awkward – procedurally and jurisdictionally – for me to resolve issues of federal supremacy in an administrative due process hearing. And yet, I am

¹ I have not seen this guidance myself. I rely upon the parties stipulated description of this guidance.

compelled to state the obvious: The District's affirmative obligations under federal law have priority over non-statutory, non-regulatory guidance from a state agency. Therefore, to whatever extent my jurisdiction extends to the issue, I find 24 P.S. §§ 14-1414.1 and 14-1414.5 do not prohibit the District from providing the stipulated accommodation and that the District must disregard PDH guidance whenever that guidance conflicts with its affirmative obligations under federal law.

Importantly, my holding is strictly limited to the unique facts of this case. It is proper for the District to recognize the ambiguity of state law and the prohibitions imposed by PDH guidance. I do not doubt that PDH has good reasons for its guidance. Were the facts of this case even slightly different, the result would very likely be different as well.²

Summary and Legal Conclusions

The Student's disability causes migraines which, in turn, cause the Student to miss school. The Student must take medication at the first onset of symptoms to mitigate that educational harm. The parties have agreed to an accommodation that will enable the Student to keep a single dose of the medication on hand. I find that the accommodation is both reasonable and necessary. Under the unique facts of this case, I find that both the IDEA and Section 504 affirmatively require the District to provide the accommodation under the terms and conditions outlined in the stipulations.

Under Chapter 15, the accommodation must be drafted into the Student's IEP, as opposed to a separate Section 504/Chapter 15 service agreement.

The District correctly highlights that Pennsylvania laws regulate student self-administration of certain medications in school. Those laws concern asthma inhalers, epinephrine auto-injectors, and diabetes medication and monitoring equipment. The laws specify the circumstances under which students may carry and use those medications in school. Also, PDH guidance states that all other types of medication must be kept in the nurse's office. When the laws are read together with PDH guidance, it is reasonable for the District to conclude that Pennsylvania law does not permit the Student to carry the migraine medication in school. I appreciate the District's caution but, under the unique facts of this case, I disagree with the District's conclusion. To

² For example, and without limitation, both parties agree that the specific conditions of the accommodation are designed to mitigate potential harm to other students. Recent history includes obvious examples of PDH and other agencies issuing health and safety guidance to protect entire populations of students and school personnel. This decision in no way suggests that schools or parents can use federal special education laws as a mechanism to avoid critically important health and safety measures.

whatever extent I have jurisdiction over the issue, I find that 24 P.S. §§ 14-1414.1 and 14-1414.5 do not prohibit the District from providing the stipulated accommodation. I further find that the District's affirmative obligations under Section 504 and the IDEA to provide the accommodation supersede and preempt any prohibition imposed by a state agency's guidance.

An order consistent with the above follows.

ORDER

Now, January 26, 2023, it is hereby **ORDERED** as follows:

1. The District shall immediately provide the accommodation detailed in paragraphs 14(a)-(d) in the parties' stipulations.
2. At the parties soonest mutual convenience, the Student's IEP team shall convene and shall incorporate the accommodation detailed in paragraphs 14(a)-(d) in the parties' stipulations into the Student's IEP.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER