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

Child's Name: T.F.

Date of Birth: [redacted]

Dates of Hearing:

April 16, 2012
June 8, 2012
June 14, 2012
June 19, 2012

OPEN HEARING

ODR Case #2803-1112AS

Parties to the Hearing:	Representative:
Parents	Jeffrey Ruder, Esquire 710 Fifth Avenue Suite 2600 Pittsburgh PA 15219
Fox Chapel Area School District 611 Field Club Road Pittsburgh PA 15238	Patricia Andrews, Esquire 1500 Ardmore Boulevard Suite 506 Pittsburgh PA 15221
Date Record Closed:	July 16, 2012
Date of Decision:	August 14, 2012
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Name redacted] ("student") is [an elementary school-aged] student residing in the Fox Chapel Area School District ("District") who has been identified as a student with a disability under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as "Section 504").[1] Parents claim that, in the 2010-2011 school year, the District's alleged inability and/or indifference to provide the student a Section 504 plan to accommodate the student's disability, a severe tree nut allergy, denied the student a free appropriate public education ("FAPE"). Parents also claim that the District discriminated against the student in its alleged acts and omissions and retaliated against them using provisions of Pennsylvania's Public School Code of 1949 ("School Code")[2] related to truancy. Ultimately, parents sought a unilateral private placement and seek from the District reimbursement for the private school tuition.

For the reasons set forth below, I find in favor of the District on most issues and in favor of the parents on one issue.

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[1] 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 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of "protected handicapped students". 22 PA Code §§15.1, 15.10.

[2] 24 P.S. §§1-101 - 27-2702.

ISSUES

Was the student denied a FAPE for the District's alleged failures under its Section 504 obligations?

If so, are parents entitled to tuition reimbursement?

Did the District discriminate against the student in violation of its Section 504 obligations?

Did the District retaliate against the parents?

STIPULATIONS

The parties stipulate that the student was withdrawn from the District on December 3, 2010 to attend a Pennsylvania cyber charter school. (Notes of Testimony ["NT"] at 451-454).

The parties stipulate that the District received on December 3, 2010 a request from the cyber charter school for the student's records. (NT at 451-454).

The parties stipulate that the District provided records to the cyber charter school on or about December 13, 2010. (NT at 451-454).

FINDINGS OF FACT

1. The student suffers from a severe nut allergy. In December 2009, the student experienced a severe anaphylactic reaction at home after consuming nut product, resulting in swelling, difficulty breathing, and vomiting. This was the first reaction to nut product and brought the student's allergy to the attention of the parents. (Parents' Exhibit ["P"]-28; *see generally* NT at 203-273, NT at 358-359, 361-363).

2. In May 2010, in anticipation of the student beginning kindergarten in the District in the 2010-2011 school year, the student's mother began to communicate about the student's severe nut allergy and the need for a Section 504 plan. (Joint Exibit ["J"]-11, P-1, P-2).

3. In June 2010, the parents met with the District to discuss the student's needs and to develop a Section 504 plan. Parents left the meeting to consider the Section 504 plan and the District's position on how it would handle the student's nut allergy. (J-12, J-13; NT at 276-289).

4. In the latter half of August 2010, the parents returned the Section 504 plan to the District, indicating that they did not agree with how the District intended to proceed under the terms of the proposed plan, indicating that they had concerns about the lunchroom and a perceived lack of detail in the proposed plan. (J-13).

5. On August 24, 2010, the parties met to share more information and to discuss the Section 504 plan. (J-14, J-15, J-16; NT at 292-296).

6. At the August 24th meeting, parents produced a 19-page packet of materials for the Section 504 team to consider. Among the materials was a 6-page Section 504 plan drafted by the parents, including 27 enumerated items/tasks/requirements to accommodate the student's needs. (P-5).

7. The Section 504 plan proposed by the District at the August 24th meeting included the following accommodations: (1) a nurse or parent accompanying the student on field trips, (2) only parent-provided food would be given to the student, (3) an emergency response plan was to be circulated to teachers, cafeteria staff, and custodial staff, (4) the student would sit at a nut-free table in the cafeteria, and the student's classroom would have a treat box dedicated for the student's use, to be supplied with parent-provided food. The Section 504 plan also included a list of emergency response contacts. (J-16).

8. On August 27th, the principal of the student's school sent a letter to the parents of classmates, informing those parents that a classmate of their child had a severe nut allergy, sharing information about allergies, and requesting that the parents take certain steps to guard against nut contamination in the classroom. The student's name was not shared in the letter. (J-17; P-5).[3]

9. On August 31st, the Section 504 team met again to discuss the student's accommodations. The August 24th plan was revised

[3] P-5 at page 16 is the principal's letter of August 27th. This letter could not have been part of the packet of materials, however, as it post-dated the August 24th meeting.

regarding the handling of cafeteria choices and snacks in the classroom. The August 31st plan also included a directive to follow a food allergy action plan for the student which included the use, if necessary, of an EpiPen in case of a severe reaction. (J-14, J-18.)

10. On September 8th, the Section 504 team met again to discuss the student's accommodations. Over the ensuing weeks, the parties communicated regarding a Section 504 plan. The District felt that it was addressing many of the 27 items in the parents' Section 504 plan and also that parents signal to the District what were priorities so that the most important needs of the parents could be addressed in a manageable plan. The parents felt the District was unresponsive to the needs of the student, and that the District's proposed Section 504 plan did not address the dangers inherent in the student's condition. (J-19; P-12, P-15, P-16, P-20, P-21; NT at 305-309, 368-370, 629-640).

11. To maintain a nut-free zone in the cafeteria, the student sat at a solitary desk that abutted a cafeteria table. On September 22nd, parents notified the student's teacher that a classmate was teasing the student because of the arrangement. The teacher addressed the issue, and it did not occur again. (J-21; P-11, P-13; NT at 97-99).

12. On September 17th, parents complained to the Pennsylvania Department of Education ("PDE"). PDE investigated and determined that the District had been working with the family on multiple revisions of the Section 504 plan. The PDE advisor handling the complaint indicated that if the parties were at loggerheads, due process proceedings were available to resolve the dispute. (School District Exhibit ["S"]-13, S-14).

13. The student was an active class participant. On September 28th, the student's teacher emailed all school staff that, because the student often raised a hand while participating in class, she and the student had established a signal—holding up one finger—if the student was in distress. (S-1).

14. On October 13th, the Section 504 plan was revised to include provisions for cleaning the student's eating areas in the cafeteria and the classroom. (J-23; P-22).

15. On October 18th, parents filed a special education due process complaint. (P-24; S-9, S-10).

16. Over the course of the fall of 2010, parents became concerned for the student regarding anxiety related to school and allegations of teasing and bullying. By the end of October 2010, parents decided to keep the student home from school. (J-25; NT at 402-403, 426-428).

17. The student missed school on November 2nd, 5th, and 8th-12th. The principal confirmed with parents that they were keeping the student home from school. On November 15th, the principal sent a letter to the parents indicating that excessive unexcused absences could lead to truancy proceedings. (J-25, J-28; S-4).

18. The student missed school on November 15th-18th. On November 18th, the District, through the building principal, issued a truancy citation against the parents and filed it with the local magistrate. A hearing was scheduled for December 7th. (J-26, J-27, J-28).

19. There is no District policy on the handling of truancy citations. Each situation is handled individually and is the primary responsibility of the building principal. (NT at 164, 708-709).

20. On December 3rd, the District received a notice that the student was withdrawing from the District to attend a Pennsylvania cyber charter school. On the same date, the District received a request for the student's records from the cyber charter school. On or about December 13th, the District had provided educational records to the cyber charter school. (*See* "Stipulations" subsection above).

21. The student's mother made arrangements regarding work and child care and appeared at the December 7th hearing on the truancy citation. The District did not withdraw the citation, and the hearing was continued at the District's request. The hearing was rescheduled for February 7, 2011. (NT at 161-163, 429-431, 440-441).

22. In January 2011, the due process complaint was withdrawn by parents. (S-11, S-12).

23. The student's mother made arrangements regarding work and child care and appeared at the February 7th hearing on the truancy citation. The District did not withdraw the citation, and the hearing was continued at the District's request. The hearing was rescheduled for a date in April 2011, although the record is

unclear as to the exact date. (NT at 165-167, 429-431, 440-441, 753-754).

24. In February 2011, the principal shared with the District's assistant superintendent and school solicitor the opinion that the truancy citation should be withdrawn. The District administration did not withdraw the citation and stopped including the principal in consultations about the truancy proceedings. (NT at 165-167, 750-751).

25. The student's mother made arrangements regarding work and child care and appeared at the April 2011 hearing on the truancy citation. The District withdrew the truancy citation at that time. (NT at 161-163, 429-431, 440-441, 753-756).

26. The District did not withdraw its citation until April 2011 because (a) it felt that there should be some consequence for the days of absence while at the District, and (b) it felt it was required under the School Code to monitor the attendance of the student. (NT at 710-711, 740-747).

27. The student completed the 2010-2011 school year at the cyber charter school. (NT at 429).

28. The student enrolled in a private school in the 2011-2012 school year. (NT at 441).

29. The District maintained comprehensive policies and engaged in sufficient training regarding students with allergies such as that exhibited by the student. (J-5, J-30, J-31; S-5; see generally NT at 46-197, 256-356, 457-619, 625-699).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE under Section 504

To assure that an eligible child receives a FAPE under Section 504, a student must be provided "regular or special education and related aids and services that …are designed to meet individual educational

needs of handicapped persons as adequately as the needs of non-handicapped persons are met" and also comply with procedural requirements related to least restrictive settings, evaluations, and access to procedural due process. (34 C.F.R. §104.33(b)). In meeting these requirements, the school district is held to analogous standards under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA").[4] P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009). Specifically, such interventions must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning" (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

In this case, the District provided FAPE to the student under Section 504. No one denies the concern of both parties over the student's allergy or the potential severity of a reaction. (FF 1, 2, 3, 10, 29). Parents are quite rightly concerned that an effective plan must be in place to guard against exposure and to provide an action plan should exposure occur. (FF 1, 2, 4, 6, 12, 15, 16). But the record supports the conclusion

[4] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

that, where Section 504 and Chapter 15 mandate that accommodations to address such concerns must be in place, the District was at all times ready to provide accommodations and appropriately did so. (FF 3, 5, 6, 7, 8, 9, 10, 11, 13, 14).

The entirety of the record supports the finding that the District met its obligations to provide FAPE to the student in the 2010-2011 school year. Accordingly, there is no remedy due for tuition reimbursement at the private placement.

Discrimination under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In this case, there is agreement between the parties that prongs #1, 2, 3, or 5 have been met. The dispute hinges on whether the District was deliberately indifferent to the student's needs and, as a result, the

student has been excluded from participation in or denied the benefits of school-based programs or activities, or been subject to discrimination. Ridgewood; Matula; 34 C.F.R. §104.4(a).

Here, the record does not support a finding that the District excluded the student from participation in or denied the benefits of school-based programs or activities, or subjected the student to discrimination. Indeed, the record taken as a whole supports the finding that throughout the period May-December 2010, the District strenuously sought to meet its obligations to the student under Section 504. (FF 2, 3, 5, 7, 8, 9, 10, 11, 13, 14, 29).

Accordingly, the District did not discriminate against the student in how it met the needs of the student, and worked with parents, in the fall of 2010.

Retaliation

Where a family engages in the process for educating students with disabilities under Section 504, it should do so secure in the knowledge that engaging in those processes will not be held against them by the school district and that they will not be penalized for engaging in those processes. To establish that a school district has retaliated against a family for engaging the processes outlined in Section 504, a three-part test has been elucidated, namely: (1) did the parents engage in protected activities, (2) was the school district's retaliatory action sufficient to deter

a person of ordinary firmness from exercising his or her rights, and (3) was there a causal connection between the protected activity and the retaliation. Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007).

If the chronology of events had ended in December 2010, with the student having withdrawn from the District and enrolled in a cyber charter school, with the parties going their separate ways, the following analysis would not be necessary. Unfortunately, the District chose a different path.

Protected Activity. Here, the parents engaged in a months-long series of interactions with the District regarding the student's Section 504 plan. Just as the District, during this time, engaged in good faith efforts to make accommodations for the student, parents also acted entirely in good faith in seeking out the programming they felt was necessary for the student to be safe in the school environment. (FF 1, 2, 3, 4, 5, 6, 9, 10, 12, 14, 15, 16). Engaging in the processes related to formulating a Section 504 plan, including a parent's right to use complaint procedures and due process proceedings, is protected activity. In this case, parents engaged in that activity, all in a good faith effort to obtain the Section 504 programming they felt was necessary.

Deterrence. Here, there is no doubt that, in issuing the truancy citation on November 18th, the District acted legitimately under the School Code.[5] (FF 16, 17, 18, 19). The hearing was scheduled for

[5] 24 P.S. §13-1333.

December 7th, and that scheduling decision lay outside the District's control. (FF 21). And the District received notice only on December 3rd that the student had been withdrawn from the District and would be attending a specific Pennsylvania cyber charter school. (FF 20). By December 13th, the District supplied its records to the cyber charter school. (FF 20). Therefore, the timing of the withdrawal of the student from the District, and the December 7th hearing date clearly support the finding that nothing in the District's actions was retaliatory through mid-December 2010. (FF 16, 17, 18, 19, 20, 21).

Thereafter, however, matters take on a different hue. Twice over the next 3+ months, from January into April 2011, the District continued to force the parent in front of a magistrate. (FF 21, 23, 25). The message that might all too easily be absorbed is "see what happens when you advocate vigorously for your Section 504 plan". Again, this does not impugn the District's actions through December 2010; but after that point, the District persisted in using the threat of a judicial proceeding against parents, parents who removed the student from the District because, rightly or wrongly, they saw the alternative as sending the student into a dangerous situation. That was not the case, as the FAPE analysis above indicates. But by January 2011, the District knew or should have known that issues of truancy regarding the student had evaporated.

The actions of the District in the period from January –April 2011 were sufficient to sufficient to deter a person of ordinary firmness from exercising his or her rights.

Causal Connection. Here, there is a causal connection between the protected activity of engaging in the Section 504 process and the retaliation employed by the District in its use of truancy proceedings. The student stopped attending the District over the parents' frustrations related to their views of the Section 504 process. (FF 3, 4, 6, 10, 16). The District pursued truancy proceedings, as it was permitted to do by statute, judging under the terms of District policy that such a course of action was advisable. (FF 17, 18, 19). Even after the student withdrew from the District, the District persisted with truancy proceedings. (FF 21, 23, 25). By the District's own policy, the person who oversees truancy issues is the building principal; by February 2011, she saw no need to continue. (FF 19, 24). The District persisted, no longer including the principal in the decision-making. (FF 24).

The District assistant superintendent gave two reasons for the District's persistence in pursuing the truancy proceedings—the importance of a student having been out of school for the ten school days listed on the citation, and the District's perceived obligations for the student's attendance under the School Code. (FF 26). On the first point, the District's own actions belie the supposed importance of missed school days; ultimately, the District did not pursue the citation before

the magistrate. (FF 21, 23, 25). The assistant superintendent was unconvincing when testifying to this effect—for all the supposed importance to the District of missed school days prior to December 2010, the issue simply went away, albeit four months later. (FF 21, 23, 25; *see generally* NT at 701-761). On the second point, the District's sense of needing to account for the student's attendance at the cyber charter school is misplaced. Nothing in the School Code requires a school district to account for a resident student's attendance with a cyber charter school. Indeed, wherever attendance is addressed in the School Code provisions related to cyber charter schools, the responsibility explicitly lies with the cyber charter school.[6] The School Code provisions related to truancy for a student who is truant from a cyber charter school environment is not made part of the cyber charter school's responsibility.[7] Therefore, it may well be that proceedings for truancy from a cyber charter school environment would be handled in conjunction with the student's district of residence.

But that is not the case here—the District's truancy citation was not issued for truancy from cyber school truancy but for truancy from the District. (FF 16, 17, 18, 19, 21, 23, 25). The District took it upon itself to make sure the student attended cyber school by keeping alive the truancy proceedings it had initiated in November 2010. (FF 21, 23,

[6] 24 P.S. at §§17-1743-A(d)(3)(10), 17-1745-A(c), 17-1747-A(14), 17-1749-A(a)(1), 17-1749-A(b)(2). Where the duties of school districts vis a vis cyber charter schools is particularly addressed, there is no mention of attendance. 24 P.S. §17-1744-A.
[7] 24 P.S. §17-1749-A(a)(1).

25; *see generally* NT at 701-761). The entirety of the record weighs in favor of a finding that the District, by maintaining the truancy proceedings, was keeping an undue focus and pressure on a particular student and that student's family long after the student had withdrawn from the District and that student's educational programming became the responsibility of another public school entity.

Accordingly, there will be finding that, in maintaining the truancy proceedings after January 2011 and continuing through April 2011, the District retaliated against the parents for engaging in the Section 504 process in the fall of 2010.

CONCLUSION

The District placed the student in a position to receive FAPE in the 2010-2011 school year thereby meeting its Section 504 obligations. The District did not discriminate against the student but did retaliate against the student's parents in its use of truancy proceedings after January 2011.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Fox Chapel Area School District did not deny the student a free appropriate public education in the 2010-2011 school year under its Section 504 obligations. The Fox Chapel Area School District did not discriminate against the student.

In its use of truancy proceedings beginning in February 2011 and thereafter, the Fox Chapel Area School District engaged in retaliatory behavior against the parents.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

August 14, 2012