UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-4624

T.F., a minor, by his Parents, D.F. and T.S.F.
Plaintiffs-Appellants,

v.

FOX CHAPEL AREA SCHOOL DISTRICT
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
No. 2:12-CV-01666

BRIEF OF APPELLANTS, T.F., et al

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction for alleged violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, pursuant to 28 U.S.C. § 1331, in that claims were asserted under the laws of the United States, and pursuant to 28 U.S.C. § 1343(a)(4), in that claims were asserted under laws providing for the protection of civil rights.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 over this appeal from the final judgment of the United States District Court for the Western District of Pennsylvania entered on November 5, 2013.

STATEMENT OF THE ISSUES

1. Did the District Court err in finding that the Defendant-Appellee was not liable to T.F. for declaratory and equitable relief when the undisputed evidence established that Defendant-Appellee failed to provide T.F. with a written, individualized, and enforceable 504 Plan designed to ensure his safety while at school? JA 4, 18, 73, 74, 75, 89; Dist. Ct. doc. 54 at 2, 16; Dist. Ct. doc. 1 at 1, 2, 3, 17.

2. Did the District Court err in finding that vague oral promises were sufficient to satisfy a school district's obligations pursuant to Section 504 and state law? JA 18, 77, 78; Dist Ct. doc. 54 at 16; Dist Ct. doc. 1 at 5, 6.

3. Did the District Court err in finding that the Defendant-Appellee was not liable to T.F. and his Parents for compensatory damages on account of discriminating with deliberate indifference when the undisputed evidence established that Defendant-Appellee failed to act despite knowing that T.F.'s right to a written, individualized and enforceable 504 Plan had been violated? JA 23, 87, 88; Dist. Ct. doc. 54 at 23; Dist. Ct. doc. 1 at 15, 16.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no cases or proceedings related to the instant case on appeal.

STATEMENT OF THE CASE

Plaintiff-Appellant, T.F., is a student who resides in the Fox Chapel Area School District ("Fox Chapel") and has a severe tree nut allergy that can cause anaphylaxis. JA 77, 78; Dist. Ct. doc. 1 at 5, 6. On November 11, 2012, T.F. and his parents, Plaintiff-Appellants T.S.F. and D.F., timely filed suit pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and Chapter 15 of the Pennsylvania Code ("Chapter 15"), after exhausting administrative remedies. The suit alleges that Fox Chapel violated federal and state law by denying T.F. and his parents a free and appropriate public education ("FAPE") and the benefit and protections of a written and enforceable 504 plan. JA 73; Dist. Ct. doc 1 at 1. As a result, T.F. was unable to attend public school safely. JA 73, 74; Dist Ct. doc 1 at 1, 2.

The parties cross-moved for summary judgment and by final Order dated November 5, 2013, the District Court denied the motion filed by T.F. and his parents, and granted summary judgment to Fox Chapel. JA 2; Dist. Ct. doc 55.

STATEMENT OF FACTS

I. T.F.'s Disability and Need for an Explicit 504 Plan

T.F. is an individual with a disability. He has a history of anaphylaxis due to a severe allergy to tree nuts, and is at "high risk for further life-threatening reactions" if he is exposed to tree nuts again. "Anaphylaxis is a severe type of allergic reaction that involves multiple body systems; it can cause mouth and throat-swelling, interfere with breathing, produce shock and loss of consciousness." JA 656; Dist. Ct. doc. 39 at 5. T.F. cannot eat foods containing tree nuts, including foods at risk for cross-contamination from tree nuts, "as even trace amounts can be enough to cause a severe reaction." Id. T.F. also suffers from asthma, which puts him at a higher risk for a severe reaction should he ingest any allergens. JA 131, 446; Dist Ct. doc. 32-5 at 2; Dist. Ct. doc. 35-1 at 45. When exposed to tree nuts, even in minute quantities, T.F.'s immune system responds by releasing mediators that cause vasodilation, leaking of his capillaries, and if not given immediate first aid, death. JA 656; Dist. Ct. doc. 39 at 5.

T.F.'s allergy is so severe that it qualifies as a disability pursuant to Section 504, requiring a written 504 plan documenting the commitment to provide accommodations and services based on T.F.'s individual needs. T.F.'s treating physician explained to Fox Chapel that T.F. "would require immediate administration of epinephrine after accidental ingestion of tree nut and

development of any respiratory or circulatory symptoms such as difficulty breathing, wheezing, throat tightness, lightheadedness or fainting. Scrupulous avoidance and prompt treatment with epinephrine are the best ways to avoid severe allergic reactions." Id. Thus, at all times, T.F. must be in the care and custody of adults who are trained to recognize the signs and symptoms of anaphylaxis and who are able and willing to administer life-saving first aid. JA 131, 134, 656; Dist Ct. doc. 32-5 at 2, 5; Dist. Ct. doc. 39 at 5. Further, at all times, epinephrine must be immediately available as delay in administration can be fatal. JA 131, 656; Dist. Ct. doc 32-5 at 2; Dist. Ct. doc. 39 at 5.

II. T.F. Enters Kindergarten without a Safety Net

In 2010, T.F. was five years old and scheduled to enroll at Fox Chapel's Elementary School ("School")[1]. T.F.'s mother, T.S.F., attended several kindergarten orientations during which she spoke with the Principal and School Nurse about T.F.'s allergies and asthma. JA 446; Dist. Ct. doc. 35-1 at 45.

[1] Fox Chapel is a recipient of federal financial assistance. JA 77, 95; Dist. Ct. doc. 1 at 5; Dist. Ct. doc. 6 at 4. As a recipient of federal financial assistance, Fox Chapel is obligated to provide a free and appropriate public education ("FAPE") to students with disabilities and must ensure that no qualified student with a disability "shall, on the basis of [disability] be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination." 34 C.F.R. § 104.4(a). In order to provide FAPE and eliminate discrimination, Fox Chapel must afford individualized aids, services and accommodations to students with disabilities and cannot rely on generalized or generic policies. 22 Pa. Code § 15.7(a); see 34 C.F.R. § 104.33(a), (b).

Thereafter, on May 26, 2010, T.F.'s parents requested a meeting to establish a 504 plan for T.F. JA 447; Dist. Ct. doc. 35-1 at 46. The first meeting of many took place on June 7, 2010. At that meeting, Fox Chapel admitted that T.F. qualified for a 504 plan based on the information in a letter provided by his physician. JA 447, 653, 656; Dist. Ct. doc. 35-1 at 46; Dist. Ct. doc. 39 at 2, 5.

In order to assist the School, T.F.'s mother researched what other schools do for a child like T.F. and provided the School with all the necessary information and documentation, including a draft 504 plan that contained the necessary precautions and protections. JA 449, 672-690; Dist. Ct. doc. 32-21; Dist. Ct. doc. 35-1 at 48. T.F.'s treating specialist provided the School with a letter underscoring the need for an emergency response plan specific to T.F.'s needs, and opined that an appropriate 504 plan would provide for "immediate administration of epinephrine after accidental ingestion of tree nut and development of any respiratory or circulatory symptoms." JA 678; Dist Ct. doc. 32-21at 7. He added that "[s]crupulous avoidance and prompt treatment with epinephrine are the best ways to avoid severe allergic reactions." Id. The draft 504 plan T.F.'s mother provided included provisions related to 1) training of staff responsible for T.F. in the identification of anaphylaxis, 2) training of staff responsible for T.F. in the administration of epinephrine, 3) provision of T.F.'s epinephrine in an easily accessible location for staff to administer and 4) provision of a communication

plan and designation of appropriate individuals that would ensure immediate administration of epinephrine. JA 673-675; Dist Ct. doc. 32-21 at 2-4. The 504 team refused to review the documents T.F.'s mother provided, saying "We don't have time to read all of this, this is ridiculous." JA 449, 455, 560; Dist. Ct. doc. 35 at 72; Dist. Ct. doc. 35-1 at 48, 54.

Instead, Fox Chapel's initial 504 Plan and subsequent revisions offered only generic reference to "an emergency care plan" without specifying how that plan would be implemented with respect to T.F. JA 661-667, 670-71; Dist. Ct. doc. 39 at 10-15, 18-19, 25; Dist. Ct. doc. 40 at 1. The initial 504 Plan proposed at the June 7 meeting provided:

> 1. T.F. would not be given any food while in Fox Chapel's care unless provided by T.F.'s parents.
> 2. Fox Chapel would provide an emergency care plan to teachers, cafeteria staff, and custodial staff.
> 3. A nurse or T.F.'s parent designee would go on T.F.'s field trips.
>
> (JA 661; Dist. Ct. doc. 39 at 406.)

It also included the following procedures in case of a medical emergency:

> 1. Call 911
> 2. Call Andrew J. MacGinnitie
> 3. Call [D.F.] and [T.S.F.] (Id.)

This plan contradicted the explicit medical needs outlined by T.F.'s specialist, who stated that immediate administration of epinephrine was required followed by a call to 9-1-1. JA 653, 655; Dist Ct. doc. 39 at 2, 4. This proposed 504 Plan and

subsequent revisions were markedly deficient in that they failed to specify what the emergency care plan was, what events and/or symptoms would prompt administration of epinephrine and who was responsible for immediate administration of the lifesaving medication. JA 661-667, 670-71; Dist. Ct. doc. 39 at 10-15, 18-19, 25; Dist. Ct. doc. 40 at 1. It also failed to provide the most key elements of T.F.'s safety net – adults trained to recognize his symptoms and immediately act. Id.

While the plan was revised over the months that followed, Fox Chapel never once agreed to specify more than a generic reference to an emergency plan and never explained how that plan would be implemented. JA 661-667, 670-71; Dist. Ct. doc. 39 at 10-15, 18-19, 25; Dist. Ct. doc. 40 at 1. Dr. Scott Sicherer, a nationally-recognized expert in pediatric food allergy at the Pediatrics Division of Allergy and Immunology at Mount Sinai Medical Center, provided expert testimony that a sufficient emergency care plan would include "a clear [communication system for] informing a nurse or delegate, with a delegated back up (multiple backups) to the nurse," ensuring that medication would be available promptly, "calling 911 after treatment for transfer for more care, and continued monitoring awaiting an ambulance".[2] JA 131, 134; Dist Ct. doc. 32-5 at 2, 5.

[2] Dr. Scott Sicherer's qualifications include, *inter alia*, a clinical fellowship in allergy/immunology at Johns Hopkins University; certifications from the National

Instead of detailing communication and other treatment implementation steps, Fox Chapel continued to offer only superficial changes to the 504 Plan, such as providing T.F.'s parents the opportunity to prepare a tree nut free snack for T.F. to keep at school or requiring T.F. to sit alone in the cafeteria at a desk. JA 661-667, 670-71; Dist. Ct. doc. 39 at 10-15, 18-19, 25; Dist. Ct. doc. 40 at 1. None of the revisions addressed the fundamental need for the adults caring for T.F. to be prepared to recognize when he was in anaphylaxis and to respond appropriately based on his individual needs as outlined by his specialist. Id.

Despite acknowledging that it had an obligation to provide these services and accommodations, Fox Chapel admits that its proposed 504 Plan, and subsequent revisions, failed to "include any information regarding staff training about avoiding allergen exposure, the identification of anaphylaxis symptoms, treatment for anaphylaxis, or the location of the medication needed to treat anaphylaxis, epinephrine, within the classroom or on the school bus." JA 79, 96; Dist. Ct. doc. 1 at 7; Dist. Ct. doc. 6 at 5. Further, Fox Chapel admits that it "also failed to include designation of individuals responsible for treating anaphylaxis should an allergic reaction occur, as well as backups should the primary designee be unavailable, [and] provision of a communication plan." Id.

Board of Allergy and Immunology, the National Board of Medical Examiners and the American Board of Pediatrics; and several publications of original, peer reviewed studies regarding peanut and tree nut allergies in children. JA 136-166.

At a meeting on August 24th, T.F.'s kindergarten teacher for the upcoming school year informed the 504 Team and T.F.'s parents that she would not store T.F.'s EpiPen (an epinephrine auto-injector). JA 452; Dist. Ct. doc. 35-1 at 51. The teacher testified that in the case of an emergency, her sole responsibility under the 504 plan was to "call the nurse and wait for her to come." JA 351; Dist. Ct. doc. 35 at 134. She also testified that she recognized that when T.F. experiences anaphylaxis, there is a two minute window in which to administer epinephrine. JA 359; Dist. Ct. doc. 35 at 142. More particularly, she testified that if "T.F. had an allergic reaction that [she] would be able to identify the allergic reaction, call the nurse …, in the event there was no answer from the nurse's office, call 9-1-1, then take T.F. to the nurse's office 50 feet from [her] classroom, find the EpiPen and administer it," all within two minutes. Id. This time-dependent feat could be compromised if the nurse's office or the cabinet with the EpiPen were locked, which could have happened, as T.F.'s kindergarten teacher testified. JA 336, 357; Dist. Ct. doc. 32-6 at 10; Dist. Ct. doc. 35 at 140. Moreover, T.F.'s written 504 Plan did not instruct her to respond differently in an emergency.

One of the important accommodations requested by T.F.'s parents was that substitute teachers in T.F.'s classroom be trained regarding T.F.'s food allergy and be prepared to implement appropriate care and treatment. JA 674; Dist Ct. doc. 32-21at 3. This request was supported by Dr. Sicherer who testified that the "heart of

the emergency side … is to be able to recognize and treat" symptoms of anaphylaxis. JA 422; Dist. Ct. doc. 35-1 at 21. Neither the Special Education Coordinator nor the Head Nurse could reference a specific policy, procedure or practice that required the training of substitute teachers in the recognition of anaphylaxis or the administration of epinephrine. JA 522, 568; Dist. Ct. doc. 35 at 34, 80. Rather, the Special Education Coordinator testified that she simply trusted "that a sub would recognize that [T.F.] was a child with a disability and that anything that was unusual about him, [subs] would contact a professional for help." JA 575; Dist. Ct. doc. 35 at 87.

Without immediate access to epinephrine, there was no safety net and T.F. could not attend school without compromising his safety. T.F.'s mother asked to see any district-wide policies in place to protect kids with serious allergies and likewise asked what, if any training, the adults caring for T.F. would have. JA 455, 745, 746; Dist Ct. doc. 35-1 at 54; Dist. Ct. doc. 37 at 26, 27. Neither was provided and her requests were ignored. JA 442, 455, 519; Dist. Ct. doc. 35 at 32; Dist. Ct. doc. 35-1 at 41, 54.

While trying to make this work, T.F.'s mother increasingly became concerned that T.F. was at risk of exposure to tree nut allergens at School and that Fox Chapel would be unable, unwilling, and unprepared to respond in an emergency based on their refusal to commit to the protections specified by T.F.'s

specialist and based on his teacher's refusal to have any involvement or responsibility for the EpiPen.

His mother's concerns were increasingly urgent as there were four suspected tree nut exposures that occurred between September 30th and October 31st. JA 457; Dist. Ct. doc. 35-1 at 56. Two of these incidents involved T.F. visiting the nurse for hives and one incident involved an itchy lip and facial swelling. Id.; Dist. Ct. doc. 32-22. Despite all the information the parents had provided, the School Nurse testified that she did "not know why he had hives." JA 529; Dist. Ct. doc. 35 at 41. The last incident occurred at T.F.'s class Halloween party where T.F. felt his throat starting to close after bobbing for apples. JA 462; Dist Ct. doc. 35-1 at 61. T.F.'s mother testified that this made her feel that T.F. "was not safe, that every time the phone rang, that I got a call from the nurse he was in there, I thought they were calling me to tell me he was dead." JA 457; Dist. Ct. doc. 35-1 at 56.

Despite these incidents of allergen exposure, Fox Chapel refused to revise T.F.'s 504 Plan to ensure implementation of a specific plan to guarantee that adults responsible for T.F. understood his disability and were prepared to respond; to ensure timely access to epinephrine; and to ensure that all supervising staff knew when and how to administer first aid in case of medical emergency, including anaphylaxis.

Throughout the course of negotiations over T.F.'s 504 Plan, Fox Chapel maintained that it need not include provisions necessary to prevent unreasonable exposure to harm because it had a district-wide policy and procedures that sufficed to protect T.F. JA 566, 567; Dist. Ct. doc. 35 at 78, 79. T.F.'s mother testified that she repeatedly requested to see Fox Chapel's policies and procedures in emails, phone calls and meetings, and yet Fox Chapel never provided any documentation. JA 331, 455, 745-747; Dist. Ct. doc. 32-6 at 5; Dist. Ct. doc. 35-1 at 54; Dist. Ct. doc. 37 at 26-28.

The Special Education Coordinator admitted that she did not even respond to these emails. JA 440, 441; Dist. Ct. doc. 35-1 at 39, 40. She also testified that T.F.'s parents did not have a right "to know how things were being implemented[, w]hat [Fox Chapel was] doing in order to have a safety plan in place and also to train [the] staff." JA 568; Dist. Ct. doc. 35 at 80.

Fox Chapel's Special Education Coordinator admitted that no one ever produced the policy it claimed to have in response to the many requests of T.F.'s parents, or even explained its contents to T.F.'s parents. JA 436; 519; Dist. Ct. doc. 35 at 32; Dist. Ct. doc. 35-1 at 35. When the Special Education Coordinator testified regarding why various items were not included in the 504 plan – such as training and educating staff and substitute teachers, ensuring that qualified staff would at all times be available within minutes to promptly treat T.F., providing

T.F. with adult supervision at all times, and ensuring immediate access to T.F.'s medications – she was unable to provide an answer. JA 432-436, 560; Dist. Ct. doc. 35 at 72; Dist. Ct. doc. 35-1 at 31-35.

III. T.F. Is Forced to Leave Fox Chapel

With Fox Chapel refusing to commit to the necessary precautions, with no written plan in place to specify what steps would be taken in the event of exposure or the development of symptoms of anaphylaxis, and with four allergic events in just three months of school, T.F.'s parents were forced to withdraw the five year old from school and enroll him in the Pennsylvania Cyber Charter School for the remainder of the academic year. JA 128-29, 465; Dist. Ct. doc. 35-1 at 64; Dist. Ct. doc. 41 at 3, 4. In response to T.F.'s withdrawal, Fox Chapel initiated criminal truancy proceedings rather than engage T.F.'s parents in revising T.F.'s 504 Plan to address the accommodations necessary to allow T.F. to attend school safely. JA 47; Dist. Ct. doc. 35-1 at 123. Fox Chapel pursued the truancy charges even after being informed that T.F. attended cyber school. Id. Ultimately, Fox Chapel conveyed the message that it would choose criminal charges rather than suffer vigorous parental advocacy. Id.

Thereafter, from first grade through the present, lacking the option of sending T.F. to a public school, T.F.'s parents enrolled T.F. in Shady Side Academy (SSA), a private school that provides each element of the safety net T.F.

needs. JA 336; Dist. Ct. doc. 32-6 at 10. All staff at SSA is trained to recognize symptoms and is willing and able to use the EpiPen. JA 464; Dist. Ct. doc. 35-1 at 63. In contrast, T.F.'s teacher at Fox Chapel would not use the EpiPen or even allow it to be stored in her class. Id. At SSA, all food from the food services is completely nut free. Id. They have multiple systems in place to ensure there is no cross-contamination. Id. At SSA, additional EpiPens are stored in multiple locations throughout the school and students are permitted to self-carry to ensure that the EpiPen goes wherever the student goes. Id. At Fox Chapel, the Epipen was not allowed to be immediately accessible and was kept only in the nurse's office which was locked when the nurse was not in the office. Id.

At SSA, nut-free classroom signs are posted outside every classroom to reinforce the school's commitment to protecting students like T.F. with life-threatening tree nut allergies. Id. The SSA Nurse is proactive and in constant communication. Id. She emails T.S.F. when she won't be at school and informs her of the substitute nurse's name and confirms that the substitute is aware of T.F.'s allergies. Id. To date, T.F. has not presented with a single allergic reaction at SSA. JA 337; Dist. Ct. doc. 32-6 at 11.

IV. Due Process Proceedings and Fox Chapel's Food Allergy Policy

On February 2, 2012, Appellant T.F., and his parents, Appellants, T.S.F. and D.F., filed a timely request for a Due Process Hearing with the Office for Dispute

Resolution ("ODR"), requesting that the Hearing Officer find both that Fox Chapel discriminated against T.F. and his parents in violation of Section 504 by denying T.F. a FAPE and by denying him the benefit of an equally effective education program, and to find that it discriminated against T.F. and his parents with deliberate indifference. JA 70; Dist. Ct. doc. 35-1 at 109.

For the first time on the morning of T.F.'s Due Process Hearing, Fox Chapel produced a generic, generalized district-wide policy adopted just a few months earlier, on May 10, 2010. JA 370, 631-633; Dist. Ct. doc. 35 at 153; Dist. Ct. doc. 36 at 15-17. Fox Chapel's general food allergy policy failed to set forth guidelines related to the identification and treatment of anaphylaxis and failed to address issues specific to T.F. JA 631-633; Dist. Ct. doc. 36 at 15-17.Instead, the policy directed each school building to develop guidelines. Id. While Fox Chapel maintained that it followed procedures that covered necessary accommodations for students with food allergies, Fox Chapel never shared these "guidelines" with T.F.'s parents despite their repeated requests. JA 517, 519, 520, 737, 738; Dist. Ct. doc. 35 at 30, 32, 33; Dist. Ct. doc. 37 at 18, 19.

Fox Chapel's policy clearly fails to encompass T.F.'s individualized needs for staff training in the identification of anaphylaxis, staff training in the administration of epinephrine, and the creation of a communication plan in the event of a medical emergency. JA 631-633; Dist. Ct. doc. 36 at 15-17. At best, it

constituted generic, generalized guidelines directing schools to address food allergies.

A 504 plan should specify how a generic policy is implemented with respect to an individual student, as recommended by federal guidelines.[3] Here, Fox Chapel's policy clearly lacked substantive provisions and could not be construed as a substitute for a written 504 plan, as required by law, even if Fox Chapel had informed the parents of the policy before Due Process.

Indeed, although Fox Chapel's board had adopted the new food allergy policy a few months earlier, it is unclear whether the policy had been implemented at all. T.F.'s kindergarten teacher testified that she never knew that a district-wide food allergy policy existed; additionally, she never received any food allergy training materials. JA 359; Dist. Ct. doc. 35 at 142.

Moreover, the Assistant Superintendent spoke at a District forum meeting held on October 12, 2010, at which T.F.'s mother inquired about the food allergy policy and specifically why Fox Chapel schools lack written policies and procedures in place for dealing with life-threatening food allergies. JA 729; Dist. Ct. doc. 32-15 at 3. In response, he failed to identify, explain or even acknowledge

[3] See CDC, Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs (2013), *available at* http://www.cdc.gov/healthyyouth/foodallergies/pdf/13_243135_A_Food_Allergy_Web_508.pdf.

the existence of any district-wide policy. JA 331, 729; Dist. Ct. doc. 32-6 at 5; Dist. Ct. doc. 32-15 at 3. Rather, he contradicted the existence of the policy and replied that each child's needs should be considered on an individual basis. JA 729; Dist. Ct. doc. 32-15 at 3.

By a final Order dated August 14, 2012, the Hearing Officer found that Fox Chapel unlawfully retaliated against Appellants through unwarranted criminal truancy proceedings, but denied Appellants' other claims. JA 50; Dist. Ct. doc. 35-1 at 126.

SUMMARY OF ARGUMENT

Appellants' claims are premised on Fox Chapel's deliberate failure, for a portion of the 2010-2011 school year, to provide T.F. a Section 504 plan to accommodate his disabilities, asthma and a tree nut allergy, which can lead to anaphylaxis and death unless promptly treated with epinephrine. JA 73-73; Dist. Ct. doc. 1 at 1, 2. This failure violated Section 504 of the Rehabilitation Act ("Section 504") and Chapter 15 of the Pennsylvania Code ("Chapter 15"), which prohibit Fox Chapel from discriminating against T.F. and require Fox Chapel to provide T.F. with a free and appropriate public education ("FAPE"). See 29 U.S.C. § 794. The District Court erred in granting summary judgment to Fox Chapel when the undisputed evidence proved that Fox Chapel discriminated against T.F. and his parents and denied them FAPE.

Fox Chapel discriminated against T.F. and his parents and denied them a FAPE by refusing to provide a substantively appropriate 504 Plan with accommodations that Fox Chapel admits were necessary to provide T.F. access to a safe education program. JA 96; Dist. Ct. doc. 6 at 5. Instead of providing a written and individualized 504 plan, Fox Chapel relied on a generic food allergy policy not even produced until the Due Process Hearing. JA 370, 631-633; Dist.

Ct. doc. 35 at 153; Dist. Ct. doc. 36 at 15-17. This violated the explicit terms of Section 504 and Chapter 15, which require school districts to design 504 plans that are reasonably calculated to meet the individual needs of the child. 34 C.F.R. § 104.33(b); 22 Pa. Code § 15.7(a). Further, Chapter 15 expressly prohibits reliance on oral agreements. 22 Pa. Code § 15.7(a).

Fox Chapel is also liable for committing significant procedural violations of federal and state law that substantively harmed T.F. and his parents, and consequently denied them a FAPE. Here, Fox Chapel's failure to provide T.F. with an adequate 504 plan was a procedural violation that deprived his parents of the benefit of accessing state and federal administrative enforcement procedures. Additionally, Fox Chapel's failure to share its food allergy policy, on which it based its refusal to provide T.F. a meaningful 504 plan, seriously deprived his parents of their participation rights.

The District Court erred when it found Fox Chapel not liable for the foregoing violations of Section 504 and Chapter 15. These violations establish T.F. and his parents' rights to declaratory and equitable relief. Under Section 504, tuition reimbursement is available as equitable relief, for which no proof of intent is required. The District Court erred when it defined Appellants' claim for tuition reimbursement as a claim for compensatory damages, for which proof of intent is required. JA 4, 19; Dist. Ct. doc. 54 at 2, 17.

In addition to claiming equitable and declaratory relief, Appellants claim compensatory damages for the harm sustained. The District Court erred when it concluded that no reasonable jury could find that Fox Chapel discriminated against T.F. with deliberate indifference.

STATEMENT OF THE STANDARD OF REVIEW

When reviewing a district court's summary judgment decision, the Third Circuit exercises plenary review, applying the same standard the district court should have utilized initially. Oritani Sav. and Loan Ass'n v. Fid. and Deposit Co. of Maryland, 989 F.2d 635, 637 (3d Cir. 1993).

In viewing the record in the light most favorable to the non-moving party, the proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 638 (citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The Supreme Court has recognized the difficulties that are presented in factual determinations of such elements as motive, bias and intent. The Court warned that these determinations are particularly inappropriate for determination on summary judgment as "[w]here motive and intent play leading roles, the proof is largely in the hands of alleged conspirators and hostile witnesses . . . [T]rial by affidavit is no substitute for trial by jury . . . ." Poller v. Columbia Broadcasting System, Inc., 364 U.S. 464, 473 (1962).

ARGUMENT

I. Section 504 of the Rehabilitation Act Prohibits Discrimination and Requires Fox Chapel to Provide T.F. with a FAPE.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in federally funded programs. 29 U.S. C. § 794. Discrimination on the basis of disability does not require animus or ill will, but is established upon a showing that: (1) a student is "disabled" as defined by the Act; (2) that he is "otherwise qualified" to participate in school activities; (3) that the district receives federal financial assistance; and (4) that the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school. Alexander v. Choate, 469 U.S. 287, 295-97 (1985); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 253 (3d Cir. 1999) ("a plaintiff need not prove that defendants' discrimination was intentional.") (citation omitted).[4]

Discrimination prohibited by Section 504 includes the failure to provide "a free appropriate public education ["FAPE"] to each qualified handicapped person." 34 C.F.R. § 104.33(a). FAPE means "the provision of regular or special education and related aids and services that…*are designed to meet individual educational*

[4] In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of the student's disability. Id.

needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33(b)(1) (emphasis added).[5] To provide a FAPE, a school must "design" an individualized plan for a handicapped person that ensures meaningful participation in educational activities and meaningful access to educational benefits. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280 (3d Cir. 2012).[6]

Procedural violations of Section 504 and Pennsylvania's Chapter 15, which include flaws within the 504 plan and failure to adhere to the procedural requirements, also result in denial of a FAPE where they cause substantive harm to the child or his parents. Centennial Sch. Dist. v. Phil L. ex rel. Matthew L., 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) (citing, C.H. v. Cape Henlopen Sch. Dist., 606

[5] Section 504 FAPE is distinct from FAPE under the IDEA with a different legal standard. While the IDEA defines FAPE as "special education and related services provided to a child with a disability," Section 504 defines FAPE as "regular or special education and related aids and services" that are designed to meet the needs of students with disabilities as adequately as the needs of their nondisabled peers. Thus, FAPE under Section 504 is a comparative standard. Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008).

[6] Although the Third Circuit adopted a reasonable accommodation standard in Ridley Sch. Dist., 680 F.3d at 280, OCR has clarified that Section 504 FAPE does not contain a "reasonable accommodation" standard or other similar limitation. "If a school district is meeting the needs of children without disabilities to a greater extent than it is meeting the needs of children with disabilities, discrimination is occurring." OCR Policy Letter to Zirkel, 20 IDELR 134, 8/23/93. While Section 504 FAPE does not contain a "reasonable accommodation" limitation, Fox Chapel failed to meet even this standard. See id. Pursuant to a delegation by the U.S. Attorney General, OCR is the principal agency for administering and enforcing Section 504. OCR's policy letters have persuasive authority, meaning that courts defer to its interpretations of the regulations. See 29 U.S.C. § 794(a), (b).

F.3d 59, 66 (3d Cir. 2010)); see 34 C.F.R. § 104.33(b). Substantive harm under Section 504 is present where the procedural violations result in "a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." See Id.

Section 504 also prohibits school districts from providing a protected handicapped person "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others" or "with an aid, benefit, or service that is not as effective as that provided to others." 34 C.F.R. § 104.4(b)(1). To be equally effective, a district's aids, benefits and services "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement." 34 C.F.R. § 104.4(b)(2). Thus, a school district's failure to provide a protected handicapped student an equal opportunity to participate in its education program violates Section 504.

Pennsylvania's Chapter 15 imposes an affirmative obligation on school districts to provide a written "service agreement" ("504 plan") that sets forth "the specific related aids, services or accommodations the student shall receive." 22 Pa. Code § §15.7(a). Chapter 15 specifically provides that "[o]ral agreements may not be relied upon." 22 Pa. Code § 15.7(a).

In addition to the promise of equal access to education, both federal and state law provide parents with administrative enforcement procedures to guarantee

the implementation of *written* 504 plans. The U.S. Department of Education's Office of Civil Rights ("OCR") will only enforce implementation of the specific terms of a written 504 Plan. 34 C.F.R. § 104app. A . Likewise, Chapter 15's Procedural Safeguards allow parents to request assistance from the Pennsylvania Department of Education ("Department") if "(1) The school district is not providing the related aids, services and accommodations *specified in the student's service agreement*." 22 Pa. Code §15.8(b)(1) (emphasis added). In the absence of a written agreement, parents cannot seek enforcement through either OCR or the Department.

For a child with a severe food allergy, a FAPE is an education free from fear resulting from a school district's failure to comply with the guarantees of federal and state law and also an education from which the student will return home at the end of the day. It is an education in a setting where the adults responsible for the child's care know exactly what to do before, during and after exposure to an allergen. While a generic district-wide policy might outline general directives for addressing students with food allergies, such as by addressing food restrictions for school celebrations and class projects, a generic policy does not and cannot alone provide a FAPE for a specific child with a food allergy. 34 C.F.R. § 104.33(b) (requiring a plan designed to meet the individual needs of the child); 22 Pa. Code § 15.7(a) (requiring an explicit and meaningful Section 504 plan).

The written 504 plan for a food allergic child details the implementation of the child's accommodation needs including what is necessary to enter school each day with reasonable assurance that in the event of anaphylaxis, their educators are willing and able to respond appropriately. JA 133, 134; Dist Ct. doc. 32-5 at 4, 5. The plan outlines who will be trained, how they will be trained, what events would trigger action and who is responsible for taking that action. Id. In order to attend school free from unnecessary fear and real danger, a school district must detail in a written 504 plan, what happens if a child is known to have ingested an allergen, what happens if a child develops symptoms but is not known to have ingested the allergen, what events prompt administration of epinephrine, where epinephrine would be stored, who would administer epinephrine, and how soon after administration of a first dose of epinephrine a second dose would be administered.[7] JA 131; Dist Ct. doc. 32-5 at 2. 5. If epinephrine is locked away in the nurses office, if the teacher or substitute is not trained to follow the steps outlined in the 504 plan, if the adults responsible do not recognize or respond appropriately to early warning signs outlined in a plan specific to that child, the child can go into

[7] See generally, *supra* at FN 3.

cardiac arrest, coma, and can die, all while staff is attempting to locate or unlock the EpiPen.[8]

Unlike perhaps any other disability, the most important accommodation for the food allergic child is not what a school does when a child is in anaphylaxis, but the 504 plan itself. Denying a severely allergic child a detailed and individualized plan that is consistent with the recommendations of their physician is a unique kind of torture – a harm in and of itself where the child is at risk every moment, of every day without any safety net – to know that at any moment their throat could begin to close, they could lose the ability to breathe and that no one would be prepared to save them.

II. The District Court Erred in Granting Summary Judgment to Fox Chapel when the Undisputed Evidence Established that Fox Chapel Discriminated against T.F. and his Parents and Denied them a FAPE.

Fox Chapel's admissions alone are sufficient to establish liability pursuant to Section 504 and Chapter 15. First, Fox Chapel admits that T.F. is an individual with a disability and is otherwise qualified. JA 92-94; Dist. Ct. doc. 6 at 1-3. Second, Fox Chapel admits that it is a recipient of federal financial assistance. JA

[8] As the recent death of thirteen year old Natalie Giorgi painfully demonstrated, when a child is in anaphylaxis, it is too late to look for the key to the epinephrine cabinet. Andy Furillo, Family sues city after girl's peanut-allergy death at Camp Sacramento, The Sacramento Bee, Apr. 20, 2014, *available at* http://www.sacbee.com/2014/04/18/6335644/family-of-girl-who-died-from-peanut.html.

77, 95; Dist. Ct. doc. 1 at 5; Dist. Ct. doc. 6 at 4. Third, Fox Chapel admits to significant violations of T.F. and his parent's rights pursuant to federal and state law, such that a conclusion that he was denied a FAPE and an education equal to that provided to students without disabilities is inevitable.

Significantly, Fox Chapel admits that its proposed 504 Plan, and subsequent revisions, failed to "include any information regarding staff training about avoiding allergen exposure, the identification of anaphylaxis symptoms, treatment for anaphylaxis, or the location of the medication needed to treat anaphylaxis, epinephrine, within the classroom or on the school bus." JA 79, 96; Dist. Ct. doc. 1 at 7; Dist. Ct. doc. 6 at 5. Fox Chapel likewise admits that it "failed to include designation of individuals responsible for treating anaphylaxis should an allergic reaction occur, as well as backups should the primary designee be unavailable, [and] provision of a communication plan." Id. Neither Fox Chapel nor T.F.'s medical team disputes that implementation of these provisions are necessary. Id.; JA 134, 656; Dist Ct. doc. 32-5 at 5; Dist. Ct. doc. 39 at 5.

As a matter of law these admissions standing alone conclusively establish Fox Chapel's liability. Yet, the District Court disregarded that the undisputed evidence established liability and instead erred in requiring T.F. and his parents to show intent. A wealth of evidence, viewed in the light most favorable to T.F. and his parents, established that T.F. was denied equal access to an education and the

individualized, written, and enforceable plan that Section 504 and state law guarantee.

A. Fox Chapel Violated Section 504 and State Law by Relying on its Generic Food Allergy Policy Instead of Providing T.F. with a Substantively Appropriate 504 Plan.

Fox Chapel violated the Rehabilitation Act when it offered T.F. a 504 Plan that lacked any provisions regarding the identification and treatment of anaphylaxis and that failed to ensure that school staff could or would implement these services. JA 656; Dist. Ct. doc. 39 at 5. The Rehabilitation Act entitles T.F. to the benefit of a 504 plan that is designed and reasonably calculated to meet his educational needs as adequately as the needs of his non-disabled peers. 34 C.F.R. 104.33(b). For T.F., this means that Fox Chapel was obligated to afford T.F. with a written and individualized 504 plan designed with "the specific related aids, services or accommodations" necessary to ensure meaningful access to a medically safe educational program. 22 Pa. Code § 15.7(a). Further, Chapter 15 prohibits Fox Chapel from providing oral assurances in place of a written 504 plan. Id. The District Court erred when it failed to address Appellants' argument that Fox Chapel needed to include provisions concerning the identification and treatment of anaphylaxis in order for T.F.'s 504 Plan to reasonably meet his needs as adequately as the needs of his typically developing peers.

Instead of containing these essential elements for identifying and treating anaphylaxis, T.F.'s 504 Plan provided: Fox Chapel would only feed T.F. food provided by his parents until it could provide an option to purchase a tree nut free lunch in the cafeteria; a nurse or parent designee would go on T.F.'s field trips; T.F.'s parents could prepare a tree nut free snack; T.F. would sit alone in the cafeteria at a desk and staff would clean T.F.'s table. Id. The 504 Plans also made passing reference to an emergency plan without explaining the plan or how it would be implemented. Id. As a result, T.F.'s life was in perpetual danger. T.F.'s mother testified that she believed that T.F. "was not safe, that every time the phone rang, that I got a call from the nurse he was in there, I thought they were calling me to tell me he was dead." JA 457; Dist. Ct. doc. 35-1 at 56. For T.F to access a safe education program, T.F. required a 504 plan designed and reasonably calculated to ensure that his supervising staff had the training to recognize the signs and symptoms of anaphylaxis and the ability to ensure immediate administration of life-saving aid. JA 134; Dist Ct. doc. 32-5 at 5.

The foregoing provisions were necessary for T.F. to be reasonably safe while attending school, as T.F.'s expert witness explained. Specifically, he found that the offered 504 plans failed to appropriately address "recognition of a reaction and prompt therapy," which he explained was "a key component of safety." JA 133, 134; Dist Ct. doc. 32-5 at 4, 5. Further, the 504 Plans offered by the District

"would not fulfill a definition of minimally sufficient" and failed to address "several common risk reduction strategies." Id. The expert witness also determined that the plans did not sufficiently detail an appropriate communication plan in case of an emergency. Id. He stated that an appropriately specific plan would include "a clear [communication system for] informing a nurse or delegate, with a delegated back up (multiple backups) to the nurse," ensuring that medication would be available promptly, "calling 911 after treatment for transfer for more care, and continued monitoring awaiting an ambulance". JA 131, 134; Dist Ct. doc. 32-5 at 2, 5.

Fox Chapel admits that it was required to ensure that staff were trained and prepared to identify and treat anaphylaxis. JA 96; Dist. Ct. doc. 6 at 5. Yet, Fox Chapel asserts that it did not have to include detailed provisions for identifying and treating anaphylaxis in a written 504 plan. Id. Fox Chapel's actions and assertion violated Section 504 and Chapter 15. This case is analogous to Centennial Sch. Dist., where the court recognized a denial of FAPE claim is supported when a school district fails to provide a record of what accommodations were provided and where there is no record of the effectiveness of any such accommodations. 799 F. Supp. 2d at 490. Like in Centennial Sch. Dist., T.F.'s parents' efforts to ensure that T.F. would be safe at school were frustrated by Fox Chapel's opposition to providing a written record of T.F.'s necessary accommodations.

The District Court found that Fox Chapel failed to include all necessary accommodations in T.F.'s 504 Plan. JA 6-8, 10; Dist. Ct. doc. 54 at 4-6, 8. This is tantamount to a finding of liability and should have resulted in summary judgment on liability for T.F. and his parents. However, the District Court simply excused Fox Chapel's failures despite its clear violation of T.F.'s legal rights under Section 504 and Chapter 15. Instead, the District Court accepted Fox Chapel's oral assurances that it was ready to protect T.F. and was persuaded by Fox Chapel's inclusion of superficial accommodations unrelated to the identification and treatment of anaphylaxis and post-hoc justifications. JA 5, 6, 10, 22; Dist. Ct. doc. 54 at 3, 4, 8, 20.

Even if a court were to look beyond T.F.'s fatally flawed 504 Plan and consider the newly discovered policy Fox Chapel asserted offered T.F. adequate protections, the policy itself is generic and insufficiently detailed.; JA 96, 631-633; Dist. Ct. doc. 6 at 5; Dist. Ct. doc. 36 at 15-17. The policy failed to encompass T.F.'s individualized needs for staff training in the identification of anaphylaxis, staff training in the administration of epinephrine, and the creation of a communication plan in the event of a medical emergency. JA 631-633; Dist. Ct. doc. 36 at 15-17. Instead, Fox Chapel's reliance on a generic and undisclosed policy was misplaced where the referenced policy simply directed the school to "follow guidelines set up for students with food allergies" while failing to identify

or describe the guidelines. JA 517, 519, 520, 631-633, 737, 738; Dist. Ct. doc. 35 at 30, 32, 33; Dist. Ct. doc. 36 at 15-17; Dist. Ct. doc. 37 at 18, 19.

This policy clearly could not be construed as a substitute for a written 504 plan where it provides broad, sweeping statements regarding Fox Chapel's obligations, and lacks specific accommodations. Moreover, T.F.'s kindergarten teacher, who was primarily responsible for supervising T.F., testified that she never knew that there even existed a district-wide food allergy policy and that she never received food allergy training materials. JA 359; Dist. Ct. doc. 35 at 142. Fox Chapel's failure to share the district-wide policy with its staff compounded its failure to provide T.F. with an individualized and written 504 plan.

Chapter 15 requires that to be substantively appropriate, 504 plans must expressly include all necessary aids, services or accommodations and cannot be supplemented with oral assurances. 22 Pa. Code. § 15.7(a). T.F.'s 504 Plan did not become substantively appropriate when Fox Chapel provided oral assurances that the missing accommodations were covered by policy, procedure or routine practice. The law guarantees children with disabilities more than verbal promises; the law requires a written plan. See 34 C.F.R. § 104.33(b)(1); 22 Pa. Code § 15.7. According to T.F.'s expert witness, even if a policy included the accommodations considered essential for T.F., the written 504 Plan must still document how those policies would be implemented specific to the individual child with a disability

consistent with a physicians' recommendations. JA 417-419; Dist. Ct. doc. 35-1 at 16-18. The expert witness cautioned, if it's "not documented, [it's] not done." JA 417; Dist. Ct. doc. 35-1 at 16.[9]

Fox Chapel denied T.F. a FAPE, as the facts establish that it was "meeting the needs of children without disabilities to a greater extent than it [was] meeting the needs of [T.F.]" See Letter to Zirkel. Without including reasonable and necessary accommodations in the 504 Plan, T.F. could not be guaranteed access to a safe and healthy education. It is clear that the District Court erred when it failed to find that the foregoing resulted in a denial of FAPE by denying T.F. and his parents a written and individualized 504 Plan that provided access to a safe educational environment.

[9] While there is a paucity of case law regarding this issue related to students with allergies, some insight can be drawn from S.M. ex rel. G.M, a Due Process proceeding in which the Hearing Officer found that where a school district orally promised accommodations for a student with a food allergy, that informally "providing such accommodations is a tacit acknowledgement by the District that [they] are required to adequately protect Student, and, therefore, should be added to the explicit terms of the written [504 Plan]." ODR No. 00328-0910KE at *21 (April 7, 2010). Like in S.M., Fox Chapel admitted that T.F. needed accommodations and yet provided only verbal assurances instead of a substantively appropriate 504 plan. JA 96; Dist Ct. doc. 6 at 5.

B. By Providing a Superficial 504 Plan and Relying on its Generic Food Allergy Policy that Was Not Disclosed to T.F.'s Parents, Fox Chapel Committed Significant Procedural Violations that Denied T.F. and his Parents a FAPE.

Fox Chapel's refusal to provide T.F. with an individualized 504 Plan constituted a procedural violation that caused a denial of FAPE. Procedural violations of Section 504 and Pennsylvania's Chapter 15, which include flaws within the 504 plan and failure to adhere to the procedural requirements of Section 504, also result in denial of FAPE where they cause substantive harm to the child or his parents. Centennial Sch. Dist., 799 F. Supp. 2d at 490 (E.D. Pa. 2011) (citing, C.H., 606 F.3d at 66); see 34 C.F.R. § 104.33(b). Substantive harm under Section 504 is present where the procedural violations result in "a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." See id.

The District Court erred when it failed to find Fox Chapel liable for denying T.F. and his parents a FAPE where its procedural failures prevented them from accessing government assistance to enforce T.F.'s essential life-saving accommodations. The District Court further erred by finding in favor of Fox Chapel where its failure to provide parents with the food allergy policy that it relied upon in denying requests for specific accommodations in T.F.'s 504 Plan impeded parents' ability to participate in the decision-making process.

i. **Fox Chapel's Failure to Provide T.F. with a Sufficient 504 Plan Constituted a Procedural Violation that Denied T.F.'s Parents Access to State and Federal Administrative Enforcement Procedures.**

The District Court erred when it failed to find that Fox Chapel's refusal to provide a sufficient 504 Plan denied T.F. and his parents a FAPE by preventing them from accessing administrative enforcement of necessary accommodations. Dist. Ct. doc. 34 at 8, 10. Fox Chapel's failure to provide a 504 plan that included necessary accommodations was a procedural violation that substantively harmed T.F.'s parents by denying them the opportunity to enforce these accommodations through federal and state procedural safeguards. See Centennial Sch. Dist., 799 F. Supp. 2d at 490 (holding that procedural violations constitute a denial of FAPE where they substantively harm the child or parents).

Under federal law, OCR will only enforce implementation of the specific terms of a written 504 Plan. 34 C.F.R. § 104app. A . Likewise, Chapter 15 allows parents to request assistance from the Pennsylvania Department of Education ("Department") if "(1) The school district is not providing the related aids, services and accommodations *specified in the student's service agreement*" and states explicitly "[o]ral agreements may not be relied upon." 22 Pa. Code §§ 15.7, 15.8 (emphasis added). In other words, in the absence of a written agreement, parents cannot seek enforcement through either OCR or the Department.

Where a specific accommodation is not included in the 504 plan, both OCR and the Department are unable to enforce the implementation of an accommodation, no matter how vital it is to a student's safety. Where a school district refuses to incorporate specific, necessary accommodations into a 504 plan, the impact is that neither OCR nor the Department will investigate and assist in enforcing the student's right to those services.[10]

Fox Chapel agrees that T.F.'s life-threatening tree nut allergy required Fox Chapel to train and prepare its staff to identify and treat anaphylaxis. JA 566, 567; Dist. Ct. doc. 35 at 78, 79. In conscious disregard of Appellants' rights, Fox Chapel refused to include these provisions in T.F.'s 504 Plans. JA 661-667, 670-71; Dist. Ct. doc. 39 at 10-15, 18-19, 25; Dist. Ct. doc. 40 at 1.

State and federal law provide a system whereby parents can seek administrative enforcement assistance whenever a student's 504 plan is not properly implemented; they do not allow for parents to seek enforcement of vague,

[10] By comparison, non-disabled students' rights to the benefit of a safe educational environment remain intact, enforceable and protected regardless of the school district's recognition of rights in a written plan. For example, a student's right to be safe from sexual abuse and exploitation is enforceable through the Department's administrative investigation and correction action pursuant to the Professional Educator Discipline Act, which does not require District documentation acknowledging that right. 24 P.S. § 2070.1a, et seq.

oral assurances or of Fox Chapel's alleged policy.[11] By choosing to disregard Chapter 15's requirement to expressly incorporate services and accommodations into T.F.'s written 504 Plan, Fox Chapel effectively impeded T.F.'s parents' access to administrative enforcement assistance. This constitutes substantive harm under Section 504 as a deprivation of educational benefits. See Centennial Sch. Dist., 799 F. Supp. 2d at 490 (citing, C.H., 606 F.3d at 66). The District Court found that T.F.'s Parents attempted to utilize enforcement assistance from the Department, but were precluded from utilizing those resources because the provisions parents sought to enforce were not written in T.F.'s 504 Plan. JA 8; Dist. Ct. doc. 54 at 6. Despite this acknowledgement, the District Court failed to consider whether this abrogation of parents' right to an enforceable 504 plan caused them substantive harm. It is clear that the foregoing deprivation, in conjunction with the retention of procedural rights by typically developing students, resulted in discrimination, as defined by 34 C.F.R. 104.4(b) and 34 C.F.R. 104.33(a), as well as a procedural denial of FAPE.

[11] OCR and the Department's administrative enforcement procedures are not interchangeable with the administrative procedures for filing a complaint and seeking a due process hearing; the failure to provide a written 504 plan is grounds for the latter but is not a substitute for the right to access the administrative enforcement procedures. Compare 34 C.F.R. § 104app. A (describing OCR's administrative enforcement procedures) and 22 Pa. Code § 15.8(a) (setting forth the Department's procedural safeguards) with 22 Pa. Code § 15.8(d) (providing that procedures for an impartial due process hearing shall be governed by § 14.64(a)-(l), (n) and (o)).

ii. **Fox Chapel's Failure to Share its Food Allergy Policy, on which it Based its Refusal to Provide T.F. a Comprehensive 504 Plan, Denied T.F.'s Parents Meaningful Participation in Designing the 504 Plan.**

Fox Chapel denied T.F. and his parents a FAPE when it refused to include necessary accommodations in the 504 Plan, and instead offered vague, oral assurances that the accommodations were addressed by its food allergy policy, and refused to provide parents with that policy despite their repeated and desperate requests. The Rehabilitation Act requires schools to design a 504 plan with parental input, and Fox Chapel denied T.F. and his parents a FAPE by seriously depriving parents of their participation rights. Centennial Sch. Dist., 799 F. Supp. 2d at 490 (citing, C.H., 606 F.3d at 66); see also A.M. ex rel. J.M. v. NYC Dept. of Educ., 840 F. Supp. 2d 660, 686 (E.D.N.Y. 2012) aff'd sub nom. Moody ex rel. J.M. v. NYC Dept. of Educ., 513 Fed. Appx. 95 (2d Cir. 2013).

The District Court erred when it failed to address Appellants' argument that Fox Chapel denied T.F. a FAPE by excluding his parents from meaningful participation in designing his 504 Plan. Without knowing the substance of the policy on which Fox Chapel allegedly relied, his parents could not meaningfully participate in designing T.F.'s 504 Plan. Both the Special Education Coordinator and the Head Nurse testified that they did not respond to T.F.'s parents' requests to review the food allergy policy that Fox Chapel purportedly followed. JA 505, 568;

Dist. Ct. doc. 35 at 18, 80. Rather, Fox Chapel repeatedly maintained that its decision to omit these accommodations was premised on the belief that T.F.'s parents did not have a right "to know how things were being implemented[, w]hat [Fox Chapel was] doing in order to have a safety plan in place and also to train [the] staff." JA 568; Dist. Ct. doc. 35 at 80.

The District Court found that Fox Chapel repeatedly failed to provide the policy to T.F.'s parents, or to review it with them, in response to their pleas. JA 5, 10; Dist. Ct. doc. 54 at 5, 8. Despite this finding, the District Court failed to address Appellants' claim that this failure violated Section 504 by impeding their opportunity for meaningful participation in designing T.F.'s 504 Plan. Dist. Ct. doc. 34 at 11-13.

By obfuscating its food allergy policy such that T.F.'s parents could not understand which items were included, Fox Chapel denied parents meaningful participation in the drafting of the 504 Plan. Without a 504 plan that contained the necessary accommodations, and Fox Chapel's refusal to provide its food allergy policy, parents were forced to rely solely on Fox Chapel's oral assurances that it would address T.F.'s safety needs. Fox Chapel's unreasonable demands that parents rely only on its oral assurances, which is expressly prohibited by Chapter 15, denied parents meaningful participation in the development of T.F.'s 504 Plan sufficient to find a denial of a FAPE.

III. T.F. and his Parents Are Not Required to Show Proof of Intent to Merit an Award of Declaratory and Equitable Relief.

The foregoing violations entitle T.F. and his parents to declaratory and equitable relief, which includes reimbursement for tuition expended to provide T.F. a FAPE where Fox Chapel failed. In order to prove Section 504 liability, "a plaintiff need not prove that defendants' discrimination was intentional." S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 262 (3d Cir. 2013) (citing Ridgewood Bd. of Educ., 172 F.3d at 253). Courts have recognized explicitly that proving Section 504 liability merits injunctive and equitable relief without having to demonstrate intentional discrimination. See, e.g., Ferguson v. City of Phoenix, 157 F.3d 668, 674-75 (9th Cir. 1998) (holding that the requirement to show intent is limited strictly to compensatory damages only). However, the District Court failed to make this distinction, subsuming all of Plaintiffs' claimed relief into the analysis of liability for compensatory damages and finding insufficient intent to survive summary judgment. JA 19, 20; Dist. Ct. doc. 54 at 17, 18.

The foregoing violations also entitle T.F. and his parents to reasonable attorney's fees and costs. 29 U.S.C. § 794(a) ("In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party… a reasonable attorney's fee as part of the costs.").

IV. **Reimbursement is Available under Section 504 as Equitable Relief and therefore No Intent Is Required.**

The District Court also erred when it analyzed Plaintiffs-Appellants' claim for tuition reimbursement as a claim for compensatory damages. JA 4; Dist. Ct. doc. 54 at 2. Section 504 provides a statutory right to tuition reimbursement without proving intent to discriminate. Under 34 C.F.R. § 104.33(c)(4), a school district is not required to pay for a private placement chosen by parents *if* it "has made available…a [FAPE]."[12] 34 C.F.R. § 104.33(c)(1) mandates that a school district must provide "free services" or alternatively must place the disabled student in "a program not operated by the [school district] as its means of carrying out the requirements of this subpart, [and make] payment for the costs of the program." "If the placement in the private school is needed to provide the student with a FAPE because the in-school program fails to comply [with] Section 504 and its regulations, the [school district] must bear the cost of providing a program complying with law." Borough of Palmyra, Bd. of Educ. v. F.C. Through R.C., 2 F. Supp. 2d 637, 642 (D.N.J. 1998). In Borough of Palmyra, no intent was required to merit reimbursement to a child's parents for the associated costs of an

[12] "Placement of handicapped persons by parents. If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school." 34 C.F.R. § 104.33(c)(4).

appropriate placement. Id.; see also Jennifer . v. Chilton Cnty. Bd. of Educ., 891 F.Supp.2d 1313, 1325 (M.D. Ala. 2012) (holding that Section 504 offers the same remedy of equitable reimbursement as the IDEA); see also Millay v. State of Maine Dep't of Labor, No. 11-00438, 2012 WL 6044775, at *5 (D. Me. 2012) (holding that reimbursement is available as a form of equitable relief under the Rehabilitation Act). This result is supported by Supreme Court jurisprudence, which endorsed Section 504's implementing regulations in an employment discrimination case concerning the remedy of back pay. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984) (holding that Section 504's regulations merit deference).

In School Comm. of Burlington v. Dept. of Educ., the Supreme Court affirmed that reimbursement for educational expenses constitutes appropriate *equitable* relief where incurred as a result of Defendant's failure to comply with federal law. 471 U.S. 359, 370-71 (1985). Specifically, the Court held that if a school district is found liable for denial of a FAPE after parents unilaterally placed their child in private school, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than

complete." 471 U.S. at 370. Importantly, the Court expressly distinguished tuition reimbursement from the remedy of "damages", explaining that "[re]imbursement merely requires the [recipient] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper [Plan]." Id. at 370-71; see also Gregg B. v. Bd. of Ed. of Lawrence Sch. Dist., 535 F. Supp. 1333, 1339 (E.D.N.Y. 1982) (explaining that tuition reimbursement can be an appropriate remedy for a denial of FAPE and distinguishing this award from compensatory damages, generally).

SSA clearly provides T.F. and his parents with the FAPE that Fox Chapel denied. SSA is a private school that is committed to providing a nut free educational environment in consideration for its students with life-threatening nut allergies. JA 336; Dist. Ct. doc. 32-6 at 10. At SSA, all staff and personnel are trained to recognize symptoms and use the EpiPen. Id. T.F.'s teacher keeps his epinephrine immediately available and is trained both to recognize symptoms of anaphylaxis in T.F., and to administer life-saving first aid without delay. Id.

At SSA, all food from the food services is completely nut free and they have multiple systems in place to ensure there is no cross contamination. Id. At SSA, the EpiPen is stored in multiple locations throughout the school and students can wear it based on preference. Id. At Fox Chapel, they would only keep the EpiPen in the nurse's office and the kindergarten teacher would not hold the EpiPen in her class;

she testified that she did not know whether the cabinet with the EpiPen was locked if the nurse was not in the office, according to her testimony. JA 336, 357; Dist. Ct. doc. 32-6 at 10; Dist. Ct. doc. 35 at 140. At SSA, signs are posted outside every classroom. JA 336; Dist. Ct. doc. 32-6 at 10. The SSA Nurse is proactive and in constant communication. Id. She emails T.S.F. when she won't be at school and informs her of the substitute nurse's name and that she is aware of T.F.'s allergies. Id. To date, T.F. has not presented with a single allergic reaction at SSA. JA 337; Dist. Ct. doc. 32-6 at 11.

As the Supreme Court held in Burlington and as adopted by its progeny, Fox Chapel must be ordered to reimburse T.F.'s parents for tuition paid for a private placement that provides a FAPE where the public school program failed. The District Court erred insofar as it improperly required a showing of intent in order to find liability and award reimbursement.

VI. The District Court Erred when it Concluded that No Reasonable Jury Could Find that Fox Chapel Acted with Intent after Drawing all Inferences Against T.F. and his Parents.

Fox Chapel admits that it was aware of its obligation to provide a written and enforceable 504 plan for T.F. with accommodations that Fox Chapel admits were necessary to provide T.F. access to a safe education program. JA 78, 79, 96; Dist. Ct. doc. 1 at 6, 7; Dist. Ct. doc. 6 at 5. Faced with this admission, and evidence that Fox Chapel was repeatedly advised both of T.F.'s need for the

requested accommodations and of the risk of not providing the needed accommodations, the District Court had sufficient basis to grant summary judgment to T.F. and his parents. However, questions of intent are rarely appropriate for resolution on summary judgment. See, e.g., Poller, 368 U.S. at 473. At a minimum, the District Court erred by disregarding evidence demonstrating Fox Chapel's intent, by viewing the evidence in the light most favorable to Fox Chapel as the moving party, and by improperly granting summary judgment to Fox Chapel.

A. T.F. and his Parents are Entitled to Compensatory Damages by Demonstrating that Fox Chapel Discriminated against them with Deliberate Indifference.

While declaratory and equitable relief can be awarded without any showing of intent, a claim for compensatory damages must be supported by a finding that the school district discriminated with deliberate indifference. Durrell, 729 F.3d at 263. Under the deliberate indifference standard, intentional discrimination can be inferred from a defendant school district's "(1) *knowledge* that a federally protected right is substantially likely to be violated…and (2) *a failure to act* despite that knowledge." Id. at 265 (citing Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)) (emphasis added).

Deliberate indifference does not mean that a school district acted with "personal ill will or animosity toward the disabled person." A.G. v. Lower Merion

Sch. Dist., 542 Fed. App'x 194, 198-99 (3d Cir. 2013) (citing Durrell, 729 F.3d at 263 (internal citation omitted)). "It does, however, require a 'deliberate choice, rather than negligence or bureaucratic inaction.' " Id. For instance, a school district's deliberate choice to decline to modify its conduct after learning what constitutes appropriate accommodations constitutes a deliberate choice. See Duvall, 260 F.3d at 1139. As explained in H. v. Montgomery County Bd. of Educ., this Court is obliged to hold Fox Chapel liable for violating Section 504 with deliberate indifference where it "simply ignores the needs of [disabled] students. 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011).

In Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., this Court affirmed the principle that summary judgment is not proper where "reasonable minds could disagree" on whether a school district discriminated with deliberate indifference. 537 Fed. Appx. 90, 97 (3d Cir. 2013) (unpublished). This Court remanded the case for trial upon deciding that "[w]hile the record does demonstrate that the School District made attempts to provide [the student] with services and participated in developing her IEPs, we cannot ignore the evidence that reflects serious and repeated failures by the School District at several key junctures to ensure that [the student] was receiving the services that were required, and were clearly known to be required." Id. Other Circuits addressing the issue have similarly concluded that intent to discriminate requires determination of factual disputes not appropriate for

resolution on summary judgment. See, e.g., Duvall, 260 F.3d at 1140; H., 784 F. Supp. 2d at 1268; Loeffler v. Staten Island U. Hosp., 582 F.3d 268, 276 (2d Cir. 2009; Liese v. Indian River County Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012).

As the Supreme Court cautioned, "[w]here motive and intent play leading roles, the proof is largely in the hands of alleged conspirators and hostile witnesses…[T]rial by affidavit is no substitute for trial by jury." Poller, 364 U.S. at 473. Similarly, the issue of whether Fox Chapel acted with deliberate indifference should be remanded where the record is replete with evidence that a reasonable jury could weigh and find that Fox Chapel discriminated with intent. Like the lower courts reversed in Duvall, H., Loeffler and Liese, the District Court erred when it failed to construe the facts in the light most favorable to plaintiffs alleging discrimination.

B. Fox Chapel Knew that T.F. and his Parents' Rights to a FAPE and to the Benefit of an Education Program Had Been Violated and Failed to Act.

The District Court erred when it failed to find that Fox Chapel lacked knowledge that T.F. and his parents' federally protected rights to FAPE and to the benefit of his education program were substantially likely to be violated by choosing not to incorporate necessary provisions in T.F.'s 504 Plan regarding the identification and treatment of anaphylaxis.

i. **Fox Chapel had Knowledge that its Refusal to Provide T.F. and his Parents a Written, Individualized and Enforceable 504 Plan Violated their Rights to a FAPE and to the Benefit of an Education Program**.

The undisputed evidence establishes that Fox Chapel knew about T.F.'s life-threatening allergy and of his parents' right to a written 504 Plan that would allow him access to a safe education program without exposure to unnecessary risk. The first prong of the deliberate indifference standard is met where Fox Chapel had knowledge that its actions and decisions denied T.F. a FAPE. Denial of a FAPE is evident where Fox Chapel knowingly failed to provide a written and individualized 504 plan that addressed the barriers created by his disability, as detailed in Section II, Part A, *supra.* Denial of a FAPE is also apparent where Fox Chapel denied T.F.'s parents the benefit of accessing administrative enforcement procedures, as well as the opportunity to meaningfully participate in the decision-making process, as detailed in Section II, Part B(i) and (ii), *supra.*

Fox Chapel admits that it had knowledge that T.F. was a qualified student with a life-threatening tree nut allergy and asthma who could not safely attend school without a written, individualized and enforceable 504 Plan. JA 96; Dist. Ct. doc. 6 at 5. Fox Chapel also admits that the accommodations requested by T.F.'s parents were necessary to provide T.F. a safe educational environment where school staff was appropriately trained and able to identify and treat anaphylaxis. Id.

The Assistant Superintendent admitted knowledge of T.F.'s rights when he informed T.F.'s mother that each child's needs should be considered on an individual basis pursuant to Section 504. JA 331, 729; Dist. Ct. doc. 32-6 at 5; Dist. Ct. doc. 32-15 at 3. Further, after T.F. suffered multiple allergic reactions within the first two months at school, Fox Chapel acquired direct knowledge of T.F.'s need for a written 504 Plan designed to meet his individual needs for a safe education program. JA 83, 99; Dist. Ct. doc. 1 at 11; Dist. Ct. doc. 6 at 8.

Fox Chapel's knowledge is further demonstrated through the numerous discussions and meetings in which T.F.'s parents repeatedly explained T.F.'s health needs and begged for a 504 plan that would provide their son with safe access to school. Like Chambers, where the school district was repeatedly informed that the student's placements failed to address the student's educational needs, Fox Chapel knew that in order to access a safe educational environment, T.F. required a written 504 Plan with accommodations related to the identification and treatment of anaphylaxis. Chambers, 537 F. App'x at 96. Just as the parents repeatedly communicated their child's needs to the school district in Chambers, T.F.'s parents repeatedly communicated their son's health needs to Fox Chapel for a substantively appropriate written 504 Plan that set forth "the specific related aids, services or accommodations [T.F.] shall receive." See 22 Pa. Code §15.7(a); see also 34 C.F.R. 104.33(b). They also frequently conveyed their concerns that

necessary accommodations and services would not be implemented faithfully if absent from T.F.'s 504 Plan. Fox Chapel also had independent knowledge that OCR and the Department could not investigate and ensure proper implementation of T.F.'s individualized accommodations unless included in a written 504 Plan. See JA 8; Dist. Ct. doc. 54 at 6.

In Chambers, the school district clearly knew of its obligation to inform teachers of the student's disabilities and educational needs in order for her to obtain the necessary specific aids, services and accommodations. Similarly, Fox Chapel knew that T.F.'s parents required specific knowledge of Fox Chapel's policy and procedures in order to meaningfully participate in the decisionmaking process to design an appropriate 504 plan based on T.F.'s individualized needs. See 537 F. App'x at 96. As in Chambers, T.F.'s parents repeatedly relayed their concerns to Fox Chapel that they could not meaningfully participate without knowing what Fox Chapel relied upon in its insistence to omit necessary provisions from T.F.'s 504 Plan. JA 745, 746; Dist. Ct. doc. 37 at 26, 27. While Fox Chapel repeatedly justified its refusals to provide a written and individualized 504 plan by citing to its policy, Fox Chapel directly knew that its written policy provided broad, sweeping statements regarding its obligations rather than detailing the necessary substance of staff training on the identification or treatment of anaphylaxis. JA 631-633; Dist. Ct. doc. 36 at 15-17.

It is clear from the record that Fox Chapel had knowledge that it failed to afford T.F. and his parents access to the benefit of safe education program, to the benefit of state and federal administrative enforcement procedures, and to meaningful participation in the decision-making process.

ii. **Fox Chapel Failed to Act Despite Knowing that its Refusal to Provide T.F. and his Parents a Written, Individualized and Enforceable 504 Plan Violated their Rights.**

The undisputed evidence establishes that Fox Chapel failed to act despite knowing of T.F.'s life-threatening tree nut allergy and of his right to a sufficiently comprehensive 504 Plan. The second prong of the deliberate indifference standard is met where Fox Chapel failed to act despite knowing that T.F. and his parents' federally protected rights to a FAPE and to the benefit of an education program were substantially likely to be violated. See Durrell, 729 F.3d at 265. The District Court erred when it failed to find Fox Chapel liable for failing to act despite its persistent, deliberate decision to ignore T.F.'s obvious need for a written 504 plan. The District Court also erred when it failed to find Fox Chapel liable for failing to act despite knowing that its decisions denied T.F.'s parents access to the benefit of meaningful participation in the decision-making process and access to administrative enforcement procedures.

While Fox Chapel met with T.F.'s mother to revise T.F.'s 504 Plan on several occasions, Fox Chapel never agreed to include the basic safety measures

necessary to provide T.F. with safe access to a public education. Rather, Fox Chapel consciously disregarded T.F.'s needs for appropriate accommodations and only offered superficial revisions to the 504 Plan. JA 661-667, 670-71; Dist. Ct. doc. 39 at 10-15, 18-19, 25; Dist. Ct. doc. 40 at 1. The changes endorsed by Fox Chapel were utterly unrelated to T.F.'s fundamental need for safety.

As in Chambers, where the school district repeatedly ignored the parents' requests to provide the necessary services, T.F.'s parents repeatedly emailed, called and met with Fox Chapel to discuss and modify T.F.'s 504 Plan, but to no avail. 537 F. App'x at 96. As in Duvall, Fox Chapel deliberately declined to modify T.F.'s written 504 Plan, despite having knowledge that federal and state law required that all necessary accommodations be expressly included in a written 504 plan. See generally 260 F.3d at 1138-1140.

Fox Chapel admitted that its 504 Plan and subsequent revisions failed to "include any information regarding staff training about avoiding allergen exposure, the identification of anaphylaxis symptoms, treatment for anaphylaxis, or the location of the medication needed to treat anaphylaxis, epinephrine, within the classroom or on the school bus." JA 79, 96; Dist. Ct. doc. 1 at 7; Dist. Ct. doc. 6 at 5. Further, Fox Chapel admits that it "also failed to include designation of individuals responsible for treating anaphylaxis should an allergic reaction occur,

as well as backups should the primary designee be unavailable, [and] provision of a communication plan." Id.

Fox Chapel deliberately chose not to revise T.F.'s 504 Plan even after T.F. experienced four discrete allergic reactions at school. JA 462; Dist. Ct. doc. 32-22; Dist. Ct. doc. 35-1 at 61. While these allergic reactions did not ultimately lead to anaphylaxis, only one instance of anaphylaxis can result in cardiac arrest and death in the event that epinephrine is not immediately administered. JA 656; Dist. Ct. doc. 39 at 5. Yet in deliberate disregard of this knowledge, Fox Chapel repeatedly refused T.F.'s parents' pleas to protect their child, and unlawfully provided oral assurances of its safety protocol. Ultimately, Fox Chapel placed T.F.'s parents in the untenable position of waiting until T.F. actually suffered anaphylaxis to find out whether the school was prepared to save his life.

This Court should find that a school district cannot demonstrate that it acted "by proffering just any accommodation for [an] individual's disability." Duvall, 260 F.3d at 1124. Like Duvall, the record is replete with sufficient evidence demonstrating that Fox Chapel failed to "consider [T.F.'s] need" and chose to forego conducting any additional, fact-specific investigation to determine necessary accommodations to include in his written 504 Plan. 260 F.3d at 1140. As discussed, *supra,* Statement of Facts, T.F.'s mother researched and provided T.F.'s 504 Team with a draft 504 plan that contained the necessary precautions and

protections; yet the 504 Team refused to review them. JA 449, 455, 560, 672-690; Dist Ct. doc. 32-21; Dist. Ct. doc. 35 at 72; Dist. Ct. doc. 35-1 at 48, 54. The Special Education Coordinator testified that Fox Chapel should not be inconvenienced by incorporating accommodations in T.F.'s 504 Plan regarding the identification and treatment of anaphylaxis. JA 566, 567; Dist. Ct. doc. 35 at 78, 79. The expert witness opined that Fox Chapel's proposed 504 Plans, as written, failed to "fulfill a definition of minimally sufficient" and failed to address "several common risk reduction strategies." JA 133, 134; Dist Ct. doc. 32-5 at 4, 5.

Fox Chapel repeatedly and deliberately failed to act despite knowing that T.F. needed staff trained in identifying and treating anaphylaxis, while having full knowledge that its own policy did not provide for these essential safety measures. Here, Fox Chapel's failures clearly reflect its preference for administrative convenience over compliance with the law and respect for T.F.'s rights. As in Chambers, where the school district repeatedly ignored the parents' requests to provide the necessary services, T.F.'s parents repeatedly emailed, called and met with Fox Chapel, always requesting that Fox Chapel disclose the policy and procedures that it purportedly followed. 537 F. App'x at 96; JA 745, 746; Dist. Ct. doc. 37 at 26, 27. While T.F.'s parents attempted to cooperate with Fox Chapel to ensure that T.F. would enjoy access to a safe educational environment, Fox Chapel repeatedly ignored their requests to disclose its food allergy policy and procedures

while at the same time repeatedly failing to incorporate their itemized proposals concerning the identification and treatment of anaphylaxis into T.F.'s Section 504 Plan. JA 96, 436; 519; Dist. Ct. doc. 6 at 5; Dist. Ct. doc. 35 at 32; Dist. Ct. doc. 35-1 at 35. The Special Education Coordinator testified that Fox Chapel declined to inform T.F.'s parents "how things were being implemented[, w]hat [Fox Chapel was] doing in order to have a safety plan in place and also to train [the] staff." JA 568; Dist. Ct. doc. 35 at 80. In effect, Fox Chapel knowingly subjugated T.F. and his parents' rights to the interests of School staff who would be responsible for implementing T.F.'s 504 Plan. JA 566, 567; Dist. Ct. doc. 35 at 78, 79.

Moreover, once T.F.'s parents failed to obtain reasonable assurances that they could send T.F. to school each day without fear of unnecessary exposure to risk of anaphylaxis, they chose to withdraw T.F. from Fox Chapel and enroll him in cyber school. JA 128-29, 465, 493; Dist. Ct. doc. 35 at 6; Dist. Ct. doc. 35-1 at 64; Dist. Ct. doc. 41 at 3, 4. Fox Chapel displayed its deliberate indifference to T.F. and his parents' rights to a FAPE when it initiated criminal truancy proceedings rather than engage T.F.'s parents in revising T.F.'s 504 Plan to address the accommodations necessary to allow T.F. to attend school safely. JA 47; Dist. Ct. doc. 35-1 at 123. Ultimately, Fox Chapel conveyed the message that it would initiate criminal charges rather than suffer vigorous T.F.'s parental advocacy. Id.

As in Chambers, the record clearly establishes that Fox Chapel "failed to act appropriately in a way that rose above mere negligence" once it had knowledge that T.F.'s parents required more than vague, oral assurances to meaningfully participate in designing a 504 plan and to exercise T.F.'s rights to an enforceable, individualized 504 Plan. See 537 F. App'x at 97. This included the right to know the substance of the food allergy policy on which Fox Chapel relied in its decision to omit the necessary provisions from T.F.'s 504 Plan. Without the benefit of knowing Fox Chapel's policy, T.F.'s parents could not know whether they were sufficient and could not engage in meaningful discussion with T.F.'s 504 Team to develop an appropriate, individualized 504 Plan for T.F. This case is also analogous to Liese, where the Eleventh Circuit found the evidence supported an inference of deliberate indifference where the doctors of a hearing-impaired patient failed to effectively communicate with her, evaded her questions about surgery and ignored her repeated requests for an interpreter . 701 F.3d at 351.

Moreover, by consciously deciding to provide T.F. and his parents with oral, rather than written, assurances of its readiness to identify and treat anaphylaxis, Fox Chapel prevented T.F.'s parents from utilizing OCR's or the Department's administrative procedures to enforce the written terms of an individualized 504 Plan. As explained in H., this Court is obliged to hold Fox Chapel liable for violating Section 504 with deliberate indifference where it "simply ignores the

needs of [disabled] students." 784 F. Supp. 2d at 1263. Here, Fox Chapel repeatedly ignored T.F.'s needs for an enforceable, individualized 504 plan that would afford him access to a medically safe environment. Fox Chapel also repeatedly snubbed its obligation to engage T.F.'s parents in meaningful participation in designing T.F.'s 504 Plan.

Like in Chambers, the record clearly establishes that Fox Chapel "failed to act appropriately in a way that rose above mere negligence" once it had knowledge that it denied T.F. and his parents a written 504 Plan reasonably calculated to afford access to a safe educational program. See 537 Fed. Appx. at 97.

The foregoing demonstrates that Fox Chapel discriminated against T.F. and his parents with deliberate indifference by repeatedly and deliberately refusing to offer a written, individualized and enforceable 504 Plan that addressed critical safety concerns.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Appellants pray this Honorable Court grant this appeal and reverse the District Court Order dated November 5, 2013, which denied Plaintiffs-Appellants' Motion for Summary Judgment and granted Defendant-Appellee's Motion for Summary Judgment. Appellants also pray this Honorable Court remand this case to the District Court

for trial on the issues of discriminatory intent and damages only, to determine the amount of compensatory and any other allowable relief due to Appellant.

Respectfully Submitted,

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Date: April 29, 2014

CERTIFICATE OF BAR MEMBERSHIP

I, Jeffrey J. Ruder, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Jeffrey J. Ruder
Jeffrey J. Ruder

I, Mary C. Vargas, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Mary C. Vargas_____
Mary C. Vargas

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 AND L.A.R. 31 and 32

We, Jeffrey J. Ruder and Mary C. Vargas, hereby certify that we have complied with the requirements of F.R.A.P. 32 and L.A.R. 31 and 32 as follows:

1. This brief contains 14,051 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

2. This brief complies with Option B of the Order issued by this Court on March 17, 2009, relating to Options for Filing the Appendix and setting forth an allowance of an additional 75 words.

3. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6), because it as been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 pt. font.

4. This brief complies with L.A.R. 31, because the text of the electronic brief is identical to the text in the hard copies.

5. This brief complies with L.A.R. 31, because a virus detection program, Avast, has been run on the file and no virus was detected.

/s/ Jeffrey J. Ruder
Jeffrey J. Ruder

/s/ Mary C. Vargas
Mary C. Vargas

CERTIFICATE OF SERVICE

We hereby certify that on April 29, 2014, we have caused 7 copies of the foregoing Brief of Appellant and 4 copies of the Appendix (Volumes I – V) to be filed in the Clerk's Office for the United States Court of Appeals for the Third Circuit. We have also caused to be served a copy of the foregoing Brief of Appellants and Appendix (Volumes I – V) upon the following, by First Class Mail, pre-paid, in lieu of ECF, pursuant to Option B of the Order issued by this Court on March 17, 2009, relating to Options for Filing the Appendix:

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DATED: April 29, 2014