UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-4624

T.F., A MINOR BY HIS PARENTS
AND D.F. AND T.S.F., ON THEIR OWN BEHALF,

Appellants,

v.

FOX CHAPEL AREA SCHOOL DISTRICT,

Appellee.

BRIEF OF APPELLEE

Appeal from the Order and Judgment of the United States District Court for the Western District of Pennsylvania, dated November 5, 2013, at Case No. 2:12-cv-01666-AJS granting Defendant's Motion for Summary Judgment

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COUNTER-STATEMENT OF THE ISSUES

1. Did Plaintiff-Appellant waive the issue of declaratory and equitable relief in the form of tuition reimbursement by failing to brief these issues either in their Motion for Summary Judgment or in Opposing Defendant-Appellee's Motion for Summary Judgment?

2. Did the District Court properly determine that the School District's Proposed 504 Plans provided T.F. with reasonable accommodations to ensure meaningful participation in educational activities and meaningful access to educational benefits?

3. Did the District Court properly determine that the material facts of the case did not demonstrate that Fox Chapel Area School District acted with deliberate indifference toward T.F. or his parents?

COUNTERSTATEMENT OF THE FACTS

T.F. is a former student of the Fox Chapel Area School District. At all times during his enrollment, he was recognized as a protected handicapped student under Section 504 of the Rehabilitation Act.

1. Chronology

T.F. started kindergarten with the District in August, 2010. Prior to the school year, T.F.'s mother, T.S.F. informed the District that T.F. was allergic to tree nuts and requested a 504 meeting on May 26, 2010. (JA 754). A 504 meeting was immediately scheduled for June 7, 2010. (JA 757). In attendance were Dr. Lonnie Carey, Director of Special Education, Dr. Sari McNamara, former Principal, Wynona Cox, lead certified school district nurse, as well as a teacher, guidance counselor and T.S.F.

At the meeting, T.S.F. provided medical documentation regarding T.F.'s food allergy. The medical information informed the meeting participants of T.F.'s allergies and the need to avoid tree nuts, the necessity of an EpiPen Jr. and an inhaler for T.F.'s use. T.F.'s treating allergist, Dr. MacGinnitie made no other recommendations for the 504 plan. (JA 678-679).

A 504 Service Agreement was developed and offered at that meeting. (JA 661-661-A).[1] Parents did not provide a draft 504 Plan to the Team at that time. (JA 448). The 504 Plan proposed included 3 accommodations:

1. T.F. will not be given any food while in our care, unless provided by the parents

2. Provide emergency care plan to teachers, cafeteria staff, custodial staff.

3. Nurse or parent designee will go on field trips.

T.F.'s emergency care plan specifically provides the steps to follow in the event of an allergic reaction, including, call the nurse, who will bring T.F.'s medications; nurse will administer EpiPen, Jr., prescribe antihistamine and observe; adult will call 911 and parents ASAP. It provides a script for what to say when calling 911 and provides that the nurse will continue to assess the student's condition. It contains T.F.'s picture. (JA 661-A). Additionally, the nurse had a Food Allergy Action Plan, signed by T.F.'s doctor, and provided to staff that specified when an antihistamine (Benadryl) should be administered and when Epinephrine (EpiPen, Jr.) should be administered. (JA 681).

[1] Joint Appendix filed included the June 7, 2010 Service Agreement labeled JA 661. The next page contains T.F.'s emergency care plan that is not numbered. Therefore, reference to this document will be JA 661-A.

Parents did not approve the agreement as there were unresolved issues that required further exploration with T.F.'s treating physician such as the use of hand sanitizers and seating arrangements in the cafeteria. (JA 758). On August 20, 2010, T.S.F. disapproved the June 7, 2010 504 Plan. (JA 661). Therefore, another meeting was scheduled for August 24, 2010.

At the meeting, the Service Agreement was revised to include the accommodation that T.F. be seated at a tree nut free table and added that a clearly marked treat box will be provided for T.F. by his parents to celebrate special occasions. (JA 662-663). Although the parents signed that they agreed and gave permission to proceed as recommended, they indicated their permission only extended until September 1, 2010. (JA 663). Therefore, a third meeting was scheduled for August 31, 2010. Once again, the 504 Plan was revised regarding the handling of cafeteria food choices and snacks in the classroom. The August 31, 2010 plan also continued to include a directive to follow the food allergy plan, including the use of an EpiPen in case of severe reaction. (JA 664-665). The parents did not agree with this third revised plan.

A fourth meeting was scheduled for September 8, 2010. Although the plan was discussed, no changes were made to the proposed plan. (JA 666-669). Thereafter, the lead school nurse contacted T.F.'s treating allergist, Dr. Andrew MacGinnitie from Children's Hospital in Pittsburgh. Dr. MacGinnitie had

previously provided the District with information regarding T.F.'s allergies and needs. The school nurse spoke with Dr. MacGinnitie and requested that he review the service plan for his approval to ensure that the proposed plan would keep T.F. safe. She faxed him the District's proposed 504 plan along with a plan proposed by the family. (JA 692). The family admits that Dr. MacGinnitie indicated his approval by initialing the District's proposed 504 plan and faxed it back to the nurse with no additional comments or recommendations. (Dist. Ct. Doc. 33, p. 10 No. 45, JA 666-669). At least two additional meetings were held in October, 2010, with a final Service Agreement offered on or about October 13, 2010. (JA 670-671). Once again, the parents did not agree.

On November 12, 2010, T.S.F. emailed the Principal, Dr. Sari McNamara that T.F. was not coming back to school because she disagreed with T.F.'s seating in the lunchroom. (JA 27, JA 753). Thereafter, Dr. McNamara advised the parents that because T.F. was of compulsory school age, if he did not attend school, he would be considered truant. She offered to meet with the parents to discuss their issues. Parents never scheduled a meeting and did not withdraw T.F. or enroll him in another school until December 3, 2010. (JA 128, JA 493). As a result, and as mandated by law, the School District filed a citation with the magistrate for truancy.

The Administrative Hearing Officer found that the School District appropriately filed truancy charges against T.F. given that he was not attending school. (JA 46-47). The District Court reversed the hearing officer's determination that the District pursued truancy charges in retaliation against the family. (JA 27-29). Despite Appellant's characterization of these facts, they did not challenge that determination on appeal.

On December 3, 2010, parents enrolled T.F. in the Pennsylvania Cyber Charter School for the remainder of the school year. (JA 128, JA 493). A charter school is considered to be a public school. Beginning in the fall of 2011 through the present, T.F. has attended Shadyside Academy.

2. Procedural Safeguards

In response to the proposed 504 Plans that were offered, on or about September 15, 2010, T.S.F. contacted the Pennsylvania Department of Education, Special Education Advisor, Dr. Malcolm Conner. (JA 115-116). Parents informed Advisor Conner that their son had a severe tree nut allergy and complained that no service agreement had been developed by the School District and that they were fearful that T.F. would come into contact with tree nuts. Dr. Lonnie Carey, Director of Special Education for the Fox Chapel Area School District responded to Advisor Conner that the 504 team met on June 7, 2010, August 24, 2010, August 31, 2010 and September 8, 2010. Dr. Carey informed Advisor Conner that

the School District had developed an appropriate program and provided Parents with Procedural Safeguards to advise them of their rights to challenge the program. (JA 115). Special Education Advisor, Malcolm Conner investigated and determined that the School District had been working with the family on multiple revisions to the Section 504 plan. He explained that due process proceedings were available to resolve the dispute. (JA 117-118).

Thereafter, on October 18, 2010 parents filed a Due Process Complaint with the Pennsylvania Department of Education, Office for Dispute Resolution. (JA 52). Therein, parents allege that the District has not provided detailed written accommodations for life threatening food allergies. (JA 53). Appellants' current counsel, Jeffrey Ruder, entered his appearance on December 8, 2010 and has represented the family at all relevant times hereto. (JA 64). On January 19, 2011, parents' counsel withdrew the due process complaint stating "the parents have just decided not to pursue litigation at this time." (JA 58). Plaintiffs subsequently filed a Complaint with the Pennsylvania Human Relations Commission which dismissed the Complaint. In addition, Parents indicate through an email to Robert Flipping that they also filed a complaint with the Office of Civil Rights on or about October 26, 2010. The District received no notice of this complaint being filed. (JA 119). Parents did not file the next due process complaint until February 1, 2012. (JA 70).

3. District's Food Allergy Policy

Prior to T.F. enrolling in the District, the Board of School Directors passed a District wide Policy entitled Food Allergies on May 10, 2010. (JA 631-635). During the 2008-2009 school year, the Board committed to updated Board Policies. The Board utilized the Pennsylvania School Boards Association (PSBA) Policy Service to review existing policies, recommend changes to existing policies where necessary and suggest new policies to comply with the law and/or best practices. This process took almost a year. (JA 256).

During the 2009-2010 school year, the District's Assistant Superintendent reviewed these proposed policies and distributed them to appropriate staff for review and input. PSBA's recommended Food Allergies Policy was given to the nurses to review and provide input. PSBA then reviewed the nurses' suggested changes. The final policy was adopted by the Board on May 10, 2010. (JA 631-635).

The Board Policy was provided at the due process hearing when it was requested by parents' attorney. Prior to the hearing, no request was made for a copy of said policy. The Policy was immediately provided in response to parents' attorney's question to Dr. McNamara regarding the existence of a specific policy that addresses children with severe food allergies. When Dr. McNamara explained that a Board Policy does exist, it was immediately provided. (JA 369-370).

The Policy provides for specific procedures that all school buildings and staff will follow for children with food allergies in order to provide a safe and healthy environment for all students. Specifically, the Policy provides that the school nurse will in-service designated staff each school year for updates on procedures for dealing with food allergies. (JA-631). School staff will be knowledgeable of student allergy, be able to recognize symptoms and know what to do in an emergency. (JA 632).

With regard to training, every two years, the school nurse provides CPR, AED and First Aid training to all paraprofessional staff in the District using training materials through the American Heart Association. First aid training includes training on food allergies including life threatening allergy symptoms, treatments and emergency response to anaphylaxis or other reactions to food allergies. Training also includes the use of an EpiPen where staff is taught to use and practice using the training EpiPen. The nurse also used The School Food Allergy Program materials from FAAN for training on food allergies.[2] (JA 250-253).

Each school in the District has a designated Emergency Response Team, which at T.F.'s elementary school, consisted of eleven (11) staff members who are

[2] FAAN was the Food Allergy & Anaphylaxis Network. They are now FARE or Food Allergy Research & Education. See Amicus Brief Statement of Interest, p. ix, n. 2.

responsible for responding in the event of an emergency within the building. (JA 504-505, 532). In the event of an emergency, they are paged over the school intercom to report to the scene. (JA 532). They are also trained in CPR, AED and First Aid, including symptoms, treatments and responses to food allergies as set forth above. (JA 505). Students with food allergies are specifically identified so the Emergency Response Team is aware of students with life threatening allergies. (JA 505).

Each year, the nurse also determines which teachers and other staff will have children with food allergies. The nurse individually meets with those staff members prior to the start of school to provide information specific to the student, including symptoms, treatment and emergency responses. (JA 531). EpiPen training, including practice is provided. (JA 504).

In addition to periodic training on food allergies, T.F.'s teacher, Ms. Synan had training specifically for T.F. at her in-service days prior to school starting. (JA 364). She met with the nurse, guidance counselor and principal prior to school starting. (JA 363). In additional to T.F.'s 504 Plan, she was provided with his emergency care plan, the Food Allergy Action Plan, a list of tree nuts, and a list of ways children may describe an allergic reaction. (JA 661-A, JA 681, JA 719, JA 717-718). She was trained to use the EpiPen. (JA 357).

Additionally, the school nurse also trained the entire Fairview elementary staff using FAAN materials on proactivity and responding to a food allergy emergency. Staff watched a video entitled Keeping Our Children Safe, reviewed emergency procedures for an anaphylaxis reaction and received instruction and practice on the use of an EpiPen. Per the Policy, cafeteria staff were also trained on cross contamination of food. (Tr. 504-505).

Additional provisions of the Policy includes, among other provisions, a requirement that lesson plans that involve food must be reviewed, making sure supplies are non-allergenic to students in the class, limiting or reducing potential food allergens during classroom parties, avoiding cross-contamination, requirements for student hand washing. (JA 631-635).

4. Procedural History

T.F.'s parents filed their second due process Complaint with the Pennsylvania Department of Education's Office For Dispute Resolution (ODR) on February 1, 2012. (JA 70-72). Four hearing sessions were convened. (JA 76). The administrative due process Hearing Officer issued an opinion on August 14, 2010, wherein he found that the Fox Chapel Area School District did not deny T.F. a free, appropriate public education while he was enrolled in the District and did not discriminate against the student. (JA 51). He did find that although the School District properly initiated truancy proceedings against T.F., the School District

engaged in retaliatory behavior by continuing the truancy proceedings once T.F. was enrolled in cyber school. (JA 45-51).

T.F. and his parents field an appeal in the U.S. District Court on November 11, 2012. (JA 73-91). Parents allege disability-based discrimination under Section 504 of the Rehabilitation Act, Title 15 of the Pennsylvania Code and the PHRA. (JA 73). The School District filed an Answer and Counterclaim on March 4, 2013. (JA 92-113). The School District sought reversal of the Hearing Officer's decision with respect to his decision that the District retaliated against the student's parent for engaging in the Section 504 process by continuing truancy proceedings. (JA 112).

The parties submitted Cross-Motions for Summary Judgment on September 30, 2013. (JA 33, Doc. Nos. 28 and 31). The Honorable Judge Schwab issued a Memorandum Opinion and Order on November 5, 2013 granting summary judgment in favor of the School District and denying T.F. and his parents' Motion for Summary Judgment. (JA 3-29). The District Court upheld the decision of the administrative hearing officer and found that the Fox Chapel Area School District did not discriminate against Plaintiffs, did not violate Section 504 and at all times provided T.F. with a free, appropriate public education. The Court further found that there was no evidence that the School District acted with deliberate indifference. Finally the District Court also overturned the Hearing Officer's

determination that Fox Chapel retaliated against Plaintiffs. T.F. filed Notice of Appeal with this Honorable Court on December 4, 2013. (JA 35, Doc No. 56).

SUMMARY OF THE ARGUMENT

The record in this matter is devoid of any evidence that the School District failed to provide T.F. with reasonable accommodations that ensured meaningful participation in educational activities and meaningful access to educational benefits. To the contrary, the evidence of record fully supports the District Court's conclusion that the entirety of the record supports the finding that Fox Chapel was at all times ready to provide accommodations and appropriately did so.

The facts and arguments set forth below demonstrate that the School District provided accommodations to allow T.F. to access a safe educational program. The School District, through a School Board approved Food Allergy Policy, set forth a requirement that staff be knowledgeable about food allergies, be able to recognize symptoms and know what to do in an emergency. The School District, through its certified school nurse, provided extensive training to all staff at T.F.'s elementary school regarding food allergies, symptoms of food allergies, keeping children with food allergies safe and the use of an EpiPen to treat allergic reactions.

Importantly, parents do not argue, nor do they provide evidence, that the School District denied T.F. a free, appropriate public education. The facts support that T.F. participated in school and never, during the time that he was enrolled in the District, had a medical emergency that required him being sent home from school, that the nurse or the school's emergency medical response team had to

respond to an emergency, that T.F. could not breathe, that his throat closed, or that an EpiPen had to be administered. The fail to allege or provide evidence that the School District failed to provide an accommodation to T.F. Moreover, they fail to allege that T.F. was denied access to or the benefit of an educational program. Parents' only contention that T.F.'s parents were denied access to the administrative review process and denied participation in T.F.'s 504 meetings is similarly not supported by the facts of the record.

Furthermore, the record is equally devoid of evidence that the Fox Chapel Area School District acted with deliberate indifference to T.F.'s needs, which is the only argument parents made at Summary Judgment. Again, to the contrary, the record fully supports the District Court's determination that the material facts of this case do not demonstrate that Fox Chapel acted with deliberate indifference towards T.F. The District Court appropriately found that the facts demonstrate quite the opposite.

There is absolutely no evidence to support an inference that the School District had any knowledge that T.F.'s rights were likely to be violated and failed to act. Rather, the record supports that the School District offered T.F. four (4) appropriate 504 Plans, one of which was approved by T.F.'s treating allergist. The School District continued to meet with the mother in an attempt to revise the plans

to her satisfaction, but nothing short of adopted her proposed Plan with 27 accommodations would suffice.

Because parents failed to submit material facts to support their conclusory allegations, the District Court properly entered Summary Judgment in the School District's favor in this case.

STANDARD OF REVIEW

The Third Circuit reviews a district court's grant of summary judgment de novo, applying the same standard as the district court. *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 256 (3d Cir. 2013) (citing *Gonzalez v. Sec'y of Dep't of Homeland Sec.,* 678 F.3d 254, 257 (3d Cir.2012)). The School District argued that District Court should have applied a modified de novo review, giving due weight to the factual findings of the hearing officer as is the standard under the IDEA. *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 389 (3d Cir. 2006). The District Court applied a de novo standard of review. Nevertheless, this was harmless error as even applying the least deferential standard of review as parents' requested, the Court appropriately found that Plaintiffs, who have the burden of proof, failed to establish facts to support their claim. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

ARGUMENT

I. T.F. and His Parents Waived the Issue of Declaratory and Equitable Relief In the Form of Tuition Reimbursement By Failing To Brief These Issues Either In Their Motion for Summary Judgment or In Opposing Fox Chapel School District's Motion for Summary Judgment.

T.F. and his parents argue for the first time on appeal that the District Court erred in requiring T.F. and his parents to show intent. The family's contention that the District Court failed to consider their claim as one for equitable and declaratory relief is meritless as these issues were not sufficiently presented to the District Court and thus, were waived. The family's sole argument at Summary Judgment, both in their Supporting Brief and Brief in Opposition to the School District's Motion for Summary Judgment sought a determination that the School District was deliberately indifferent to T.F.'s needs. The family is now barred from asserting new claims for tuition reimbursement and other theories on appeal.

It is well settled that "in order for an issue to be preserved for purposes of appeal, a litigant 'must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider it merits.'" *Dempsey v. Delaware Department of Public Safety*, 359 Fed. App'x. 347, 349 (3d Cir. 2009) (citing *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999)). "Consequently, 'it is well established that arguments not raised before the District Court are waived on appeal.'" *Id.* (citing *DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007)).

The family filed a Motion for Summary Judgment with the District Court. Nowhere in their Supporting Brief do they raise the issue of declaratory relief, tuition reimbursement, compensatory education or any other form of equitable relief. To the contrary, the family argued that they would establish that Defendant discriminated against them with deliberate indifference throughout their Brief in Support of Summary Judgment. This Court has established that in order to sustain a claim for compensatory damages under § 504 of the Rehabilitation Act, there must be a finding of intentional discrimination. *S.H. ex rel. Durrell*, 729 F.3d at 261. This Court further concluded that to prove intentional discrimination, a Plaintiff must show that the Defendant acted with deliberate indifference. *Id.* at 263. The family argued nothing but deliberate indifference.

It is further settled "that a party opposing a summary judgment motion must inform the trail judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so and loses the motion, it cannot raise such reasons on appeal." *Ray v. Pinnacle Health Hospitals, Inc.*, 416 F. App'x 157, 162 (3d Cir. 2010) (citing *Liberles v. Cook Cnty*, 709 F.2d 1122, 1126 (7th Cir. 1983); *accord Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.")

(internal citation omitted)). The District Court cannot be faulted for failing to address an issue that was not raised before it.

While the family did include one statement that the Court may also award relief absent a finding of intentional discrimination in the form of tuition reimbursement and transportation expenses, they provided no further argument or briefing on the matter. While the Third Circuit has not established whether tuition reimbursement is even an available remedy under Section 504, District Courts have recognized it as such. However, to obtain tuition reimbursement under Section 504 parents must prove (1) that the student was denied FAPE; (2) that the private placement is appropriate; and (3) that equitable considerations favor reimbursement. *Lauren G. ex rel. Scott G. v. West Chester Area Sch. Dist.*, 906 F. Supp. 2d 375, 390 (E.D. Pa. 2012). Although parents arguably assert that T.F. was denied FAPE, they fail to raise or brief that Shadyside Academy was appropriate or that equitable considerations favor reimbursement. Thus, this issue was waived below and parents cannot now, for the first time, brief the issue of why they are entitled to tuition reimbursement. The District Court did not address the issue of tuition reimbursement, declaratory or other equitable relief because it was not raised or briefed below, and was thus waived. The only issue raised and briefed was the family's contention that the School District acted with deliberate indifference.

Even if this Court does not find that the issue was waived, the District Court properly found that the School District provided T.F. with reasonable accommodations and FAPE and thus, tuition reimbursement and other declaratory or equitable relief is not warranted.

II. The District Court Properly Determined That The School District's Proposed 504 Plans Provided T.F. With Reasonable Accommodations to Ensure Meaningful Participation in Educational Activities and Meaningful Access to Educational Benefits

A. The District Court Properly Determined that the Fox Chapel Area School District Did Not Discriminate Against T.F. and Provided Him With a Free and Appropriate Public Education.

This case was originally tried before an administrative due process hearing officer with expertise in the area of special education and Section 504. The Hearing Officer properly found that that the School District provided T.F. a free, appropriate public education (hereinafter "FAPE") under Section 504 and did not discriminate against T.F. in how it met his needs. (JA 43, 44, 45, 50, 51). The District Court agreed.

The Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, prohibits discrimination on the basis of disability in federally funded programs. In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied

the benefits of, or subject to discrimination at, the school. *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3d Cir. 1999), *superseded by statute on other grounds as recognized by P.P. ex rel Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009), (citing *W.B. v. Matula,* 67 F.3d 484, 492 (3d Cir.1995) (quoting *Nathanson v. Med. Coll. of Pennsylvania,* 926 F.2d 1368, 1380 (3d Cir. 1991)).

The U.S. District Court for the Eastern District of Pennsylvania analyzed other courts' interpretation of the requirements under the 4th prong of the Rehabilitation Act and found that these cases stress that schools, similar to the IDEA, must provide a child an appropriate education. The Court held that an 'appropriate' education under the Rehabilitation Act is one that reasonably accommodates the needs of a handicapped child." *Molly L. ex rel. B.L. v. Lower Merion Sch. Dist.*, 194 F. Supp. 2d 422, 428 (E.D. Pa. 2002). The Third Circuit issued a similar opinion regarding the requirements of Section 504 of the Rehabilitation Act, interestingly enough, in a case involving a student with severe food and contact allergies. The Third Circuit relied heavily on the analysis in *Molly L.* and opined that "to offer an 'appropriate education' under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure 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) (emphasis added). However, Section 504 does not mandate "substantial changes to the school's program and courts "should be mindful of the need to strike a balance between the rights of the student and [the] parents and the legitimate financial and administrative concerns of the school district." *Ridley Sch. Dist.*, 680 F.3d at 280-281.

Similar to their arguments at Summary Judgment, Parents' hypotheticals, as outlined in their appeal to this Court are simply not supported by the facts of record. As both the Administrative Hearing Officer and the District Court Judge properly concluded, "the entirety of the record supports the finding that Fox Chapel was at all times ready to provide accommodations and appropriately did so." (JA 18). Contrary to parents' theoretical contentions, the Fox Chapel School District provided T.F. with a program where in the event of anaphylaxis, the educators were ready, willing and able to respond appropriately; were thoroughly trained in preventing allergic reactions, recognizing signs and symptoms of allergic reactions and responding to and treating allergic reactions; had a designated nurse in the building at all times, with a trained emergency response team as backup in the event of an emergency, including the administration of epinephrine; and had a Food Allergy Action Plan developed with T.F.'s doctor that specified symptoms that would be seen and when an antihistamine (Benadryl) and when epinephrine (EpiPen) should be administered. T.F.'s medication was kept in an unlocked

cabinet in the nurse's office that was 20-25 feet away from T.F.'s classroom. (JA 532). The facts of this case do not support parents' hypothetical situation that staff would have to attempt to locate or unlock T.F.'s EpiPen.[3]

While parents contend that denying an allergic child a plan that is consistent with recommendations from their physician is a form of torture, they fail to recognize that T.F. was provided an individualized plan that was not only consistent with the recommendation made by is physician, it was approved by his physician. (JA 666-669). After several meetings where the parents would not agree with the proposed 504 Plans, the district's head certified school nurse, Wynona Cox, contacted T.F.'s allergist. She asked him to review the plan to ensure that it met T.F.'s needs and make any additional recommendations he felt were necessary. She emailed him a copy of the proposed plan. (JA 692). He initialed each page, making no further recommendations. (JA 666-669). Parents admitted that the doctor approved the plan. (Dist. Ct. Doc. 33, p. 10 No. 45).

The District's plan allowed T.F. to fully and equally participate in school district programs. T.F. never once had an emergency situation at school. The nurse was never called to an emergency, T.F.'s throat never began to close, he never lost the ability to breath, the EpiPen was never administered, 911 was never called. He was safe at school. Parents claims to the contrary are mere "conclusory

[3] The record also established that the School District offered to have T.F. carry his own EpiPen, but his doctor felt he was too young. (JA 456; JA 511).

statements, conjecture, or speculation," inadequate to survive summary judgment. *A.M. ex rel. J.M. v. NYC Dep't of Educ.*, 840 F. Supp. 2d 660, 684 (E.D.N.Y. 2012) *aff'd sub nom. Moody ex rel. J.M. v. NYC Dep't of Educ.*, 513 F. App'x 95 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 809 (2013) (citing *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996).

B. The School District Did Not Simply Rely on a Generic Food Allergy Policy Instead of Providing T.F. With A Substantively Appropriate 504 Plan

Fox Chapel School District has not and does not admit that it violated Section 504 or Chapter 15 in any way, nor did either the Hearing Officer or District Court find as such. Both the Due Process Hearing Officer and T.F.'s treating allergist approved the School District's 504 Plan. The evidence clearly established that T.F. was offered 504 Plans that were designed and reasonably calculated to meet is educational needs as adequately as the needs of his non-disabled peers. His Plans, as approved by his doctor, did contain individualized and specific related aids, services and accommodations necessary to ensure T.F. had meaningful access to a medically safe educational program. Further, the School District's Food Allergy Policy, which was adopted by the School Board on May 10, 2010, prior to the time T.F. even enrolled in the District is far from generic and contains school wide practices and procedures that are not required to be rewritten into T.F.'s 504 Plan. (JA 631-633).

At no time was T.F.'s life in danger. Parents argue that for T.F. to have access to a safe educational 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. Parents, however, who had the burden of proof, provided no evidence that this was not done. To the contrary, the evidence clearly supports that the staff at Fox Chapel were thoroughly trained and had the ability to ensure immediate administration of epinephrine.

The School Nurse testified regarding the training that is done. The nurse testified that the majority, if not all staff within Fairview Elementary are trained in food allergies. (JA 530). That included the classroom teachers, including T.F.'s teacher, the special area teachers, the PCA's (Personal Care Assistants) and IA's (Instructional Aides). (JA 530). Another training session was done with the noontime or cafeteria aides and the staff that actually served the food in the cafeteria. (JA 530). The nurses use a binder provided by FAAN – the Food Allergy Anaphylaxis Network, that included a video describing what a reaction would look like, general provisions on keeping kids with allergies safe and how to administer an EpiPen. (JA 530-531). They also had the staff use practice EpiPens to practice how to use the pens and explained where pens are located. (JA 531).

The nurse and the Principal also hand delivered T.F.'s emergency care plan to the teachers, including T.F.'s classroom teacher and made sure that they understand what is in the child's emergency care plan. (JA 531). Per T.F.'s emergency care plan, the nurse is responsible for the administration of medication, in the event of an emergency. In the event of an emergency in the classroom, the teacher would call the nursing office or could push a button in their room that would go to the main office who would then overhead page the nurse. (JA 532). The nurse and teacher each had a walkie-talkie to use. (JA 532).

As an additional backup plan, each building in the Fox Chapel Area School District, including Fairview Elementary School, has an emergency response team to either assist the nurse in an emergency or could be contacted again by overhead page if the nurse is not available. (JA 504-505, JA 532)). In each building, there are approximately eleven people on a team which included the school nurse, an administrator and several teachers. (JA 505). Everyone on the emergency response team is trained to do CPR, use an AED, and administer first aid, which includes allergies. (JA 505). They are all trained to use an EpiPen. (JA 505).

Parents' expert, Dr. Scott Sicherer admitted that he was not made aware of this information by the parent and did not contact the District. He admitted that if these things were accurate, that this would address the key component of safety recognition and prompt therapy that he found lacking in his report. (JA 414).

Parents' citation of *Centennial School District v. Phil L. ex rel Matthew L.* to support their position is misinterpreted. 799 F. Supp. 2d 473 (E.D. Pa. 2011). The *Centennial* Court did not hold that 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. Nor does it support that Parents are entitled to Summary Judgment in this case. To the contrary, in *Centennial*, a hearing officer found a student with ADHD eligible for services under Section 504. Parents sought compensatory education, arguing that he was entitled to this remedy for the period of time their child was without a formal written 504 Plan. *Id.* at 490. However, the Court did not hold that the student was automatically entitled to compensatory education because there was no formal plan. Rather the Court found that this would be deemed a procedural violation that does not amount to a per se denial of FAPE. *Id.* (citing *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 33 (3d Cir. 2010)). While parents in *Centennial* argued that there was no record of what accommodations were provided or the effectiveness of any such accommodations, the school argued that accommodations were provided. Because no administrative record was established as to whether the procedural error of having no 504 Plan at all resulted in a denial of FAPE, the case was remanded. *Id.* at 491. In the instant case, T.F. was provided with a Section 504 Plan that was found to be appropriate and the

evidence more than supports that he was not denied FAPE. Moreover, parents do not argue that T.F. was denied FAPE or denied access to any educational programs or educational benefit.

Parents' characterization that the District "relied" upon a generic plan rather than providing T.F. with an individualized 504 Plan is again misplaced and not supported by the record. T.F. was offered four (4) 504 Plans (JA 661-671). Further, parents' characterization that the District's policy was "newly discovered" is similarly misplaced. The District's Policy was adopted by the Board of School Directors on May 10, 2010, before T.F. even became a student in the District. (JA 631).

This is not a case where the School District failed to provide a 504 Plan for a child with a disability. Rather, the School District declined to rewrite its Board approved Policy into T.F.'s 504 Plan, a decision that was supported by parents' own expert. Dr. Sicherer provided an expert report wherein he opined that "many children with severe food allergies are cared for safely without a 504 plan, because the school has general procedures in place for food allergies that provide protection." (JA 132) He recognized that these plans may include providing training to food service personnel, encourage hand washing, enforce no food sharing, and training teachers or delegates on food allergy treatment. *Id.* Dr. Sicherer further opined in testimony that that if the school has a general plan on

dealing with food allergies, it would not be expected that those items in the general plan would be rewritten into a 504 plan. (JA 417).

Both T.F.'s 504 Plan and the Board's Policy are thorough and detailed. Despite parents' contentions, the District Court did not find that Fox Chapel failed to include all necessary accommodations in T.F.'s 504 Plan. To the contrary, the District Court correctly agreed with the Hearing Officer that "the entirety of the record supports the finding that Fox Chapel was at all times ready to provide accommodations and appropriately did so." (JA 18). Further, the District Court correctly agreed with the Hearing Officer that "the record taken as a whole supports the findings that throughout the period of May-December 2010, the District strenuously sought to meet its obligation to the student under Section 504." (JA 21). The District Court also correctly determined that like the student in *Ridley School District*, Fox Chapel took "reasonable steps to accommodate T.F.'s disabilities and include him in all class activities; it was not required to grant the specific accommodations requested by Parents or otherwise make substantial modifications to the programs that were used for all other students." (JA 21) (citing *Ridley Sch. Dist.*, 680 F.3d at 282)). These findings were more than supported by the record and should not be overturned.

C. The Fox Chapel Area School District Did Not Commit Procedural Errors Nor Did It Deny T.F. Or His Parents a FAPE.

i. Fox Chapel Did Not Deny T.F.'s Parents Access to State and Federal Administrative Enforcement Procedures.

As set forth above, Fox Chapel did not commit procedural errors and did not deny T.F. or his parents a FAPE. Parents argue that they were unable to access procedural safeguards and were denied the ability to participate in the development of the 504 Plan to support their argument that the District Court erred in granting Summary Judgment to the School District. However, it must be recognized that the Third Circuit has not yet determined whether parents have an enforceable right to sue under Section 504. Several District Courts have held that parents or guardians do not have the right to prosecute claims on their own behalf when claims are filed only under Section 504 of the Rehabilitation Act. *Sher v. Upper Moreland Twp. Sch. Dist.*, 2012 WL 6731260 (E.D. Pa. Dec. 28, 2012); *Woodruff v. Hamilton Township School Dist.*, 2007 WL 4556968 (D.N.J., Dec. 20, 2007); *A.G. v. Lower Merion School Dist.*, 2011 WL 6412144 at *4 (E.D. Pa. 2011) (stating that "[w]e have since read *Winkelman* to apply to claims under the ADA and § 504, but only where there were also claims under the IDEA and the claims under the ADA and § 504 were closely intertwined with them" concluding that *Winkleman* is inapplicable to parents' claims only under the Rehabilitation Act and the ADA, unrelated to the IDEA, because "[t]hose statutes do not contain any

references to the rights of parents, much less any independent, enforceable rights of parents").

Although this argument was not raised below, federal courts are under an independent obligation to examine their own jurisdiction, and "standing is perhaps the most important of the jurisdictional doctrines." *Sher*, 2012 WL 6731260 at *2 (citing *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230–231 (1990) (stating that the issue of standing may be raised by the court sua sponte at any stage of the proceedings)). As parents request this case be remanded, even if the Court finds that the District committed a procedural error, parents would not have jurisdiction to raise claims in their own right under Section 504.

Even if this Court finds that parents have an independent cause of action under Section 504, parents' argument that they were somehow denied the ability to seek enforcement of Section 504 through either OCR or the Department of Education is neither supported by neither facts nor case law and belies reasoning. Parents did not raise issues regarding access to the Office for Civil Rights (OCR) in their Summary Judgment Motion and are thus, precluded from raising such an argument for the first time on appeal. *See supra.*

The facts of the case contradict parents' unsupported allegation that they were in any way impeded from accessing state administrative procedures. The District Court did not find 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. Rather, the Court's summary of the facts support that parents did exercise their rights to challenge the District's offered Plans.

Pursuant to Pennsylvania Regulations, parents have the right to seek assistance from the Department of Education if the school district is not providing the related aids, services and accommodations specified in the student's service agreement. 22 Pa. Code § 15.8(a)(1) (emphasis added). Parents fail to include that the Regulations additionally provide that they may also seek administrative assistance if the school district has failed to comply with the procedures in Chapter 15. 22 Pa. Code § 15.8(a)(2). Parents' allegation that the District chose to disregard Chapter 15 requirements to expressly incorporate services and accommodations into T.F.'s written 504 Plan is an allegation of procedural error to which parents could have sought assistance under Section 15.8(a)(2). *Centennial Sch. Dist.*, 799 F. Supp. 2d at 490. Contrary to parents' contentions, however, the regulations do not state that this is a mechanism for enforcement.

Parents did exercise their right to assistance when they contacted Dr. Malcolm Connor on September 17, 2010. However, their complaint to Dr. Connor was not that they disagreed with the School District's proposed Service Agreement. Rather, they inaccurately complained that no Section 504 Plan had

been developed at all. (JA 116). Per 22 Pa. Code § 15.8(b), Mr. Connor investigated by contacting Dr. Lonnie Carey, Director of Special Education who informed Dr. Connor that the team had met on four occasions and had developed a plan that they believed to be appropriate and had provided parents with procedural safeguards explaining their right to due process. (JA 8, JA 115). Again, pursuant to 22 Pa. Code § 15.8(b), Mr. Connor responded to the parents, stating that the 504 Team had met and explained that informal hearings, mediation or due process were available if they were unable to resolve their dispute. (JA 117). Parents were in no way impeded from accessing administrative assistance and in fact, the record clearly establishes that they did so.

Thereafter, parents did file an administrative due process complaint on October 18, 2010 wherein parents raised that the 504 plan does not include detailed accommodations for the student. (JA 52-54). Before the hearing began, however, Plaintiffs, who were represented by counsel withdrew their hearing request stating that "the parents have just decided not to pursue litigation at this time." (JA 58). Again, the School District did not impede parents from continuing to seek administrative enforcement, they chose not to do so at that time.

Because the record clearly reflects that parents were in no way impeded from accessing any of their procedural safeguards, there was no need for the District Court to find that parents were substantively harmed. Parents fail to plead

or provide any evidence at Summary Judgment or in their appeal that they were harmed in anyway.

ii. Fox Chapel Did Not Deny T.F.'s Parents Meaningful Participation in Designed the 504 Plan

Again, parents fault the District Court for not considering their unsupported allegation that they were denied the opportunity to meaningfully participate in designing T.F.'s 504 Plan. However, as with all of parents' conclusory statements, they provided no facts in their Complaint, through Summary Judgment or in this appeal for the Court to consider. There is no evidence in the record to support that the parents were in anyway denied the ability to participate in 504 meetings. As no evidence exists, parents misquote the record in support of their position.

The record is replete with evidence that School District policies and practices were thoroughly discussed at the 504 meetings. T.S.F. was present at all 504 meetings.[4] T.S.F. provided the District with a proposed 504 Plan that she wanted adopted for T.F. that contained 27 proposed accommodations. (JA 672-675). Dr. Carey, the District's Special Education Coordinator testified that at the meetings, the Team went through, item by item and explained how the District addressed each of her proposed accommodations. (JA 433-438, JA 560). The District's Head Nurse, Wynona Cox also testified that T.S.F.'s proposed plan was discussed at length at the 504 meetings. (JA 508-513). Mrs. Cox testified in great

[4] The record supports that D.F. did not participate in any of the 504 meetings.

detail to the discussions that the Team had regarding T.S.F.'s proposed plans. (JA 508-513). Each proposed accommodation was discussed in great detail to explain to parents the School District's policies and procedures for addressing students with food allergies.

Parents claim that the School District 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" is inaccurate and misquoted from the record. Rather, Dr. Carey was responding to a question on cross examination where she explained again that T.S.F. was not asking for a copy of the District's policy, she was asking "how things would be implemented. What we were doing in order to have a safety plan in place and also to train our staff." Dr. Carey further stated "we addressed it on numerous occasions." (JA 568).

The record is also clear that parents wanted the District to simply accept their proposed Service Agreements. As the District Court again correctly found, schools are "not required to grant the specific accommodations requested by Parents . . . ." *Ridley School Dist.*, 680 F.3d at 282.

As parents once again fail to allege any facts in support of their conclusion that the parents were denied participation in the development of a Section 504 Plan, the District Court's granting of Summary Judgment must be upheld.

iii. Parents Do Not Argue That T.F. Suffered Substantive Harm Or Was Denied FAPE

Parents argue that the District Court erred in granting summary judgment when the undisputed evidence established that Fox Chapel discriminated against T.F. and his parents and denied them FAPE. Parents allege that Fox Chapel discriminated against T.F. by not providing him with a substantively appropriate 504 Plan. Parents do not, and have not, provided any evidence that Fox Chapel did not provide a specific accommodation to T.F. Rather, they argue that not all accommodations are written in T.F.'s proposed 504 Plan, but do not argue that T.F. was denied FAPE or denied access to any educational program or benefit as a result.

As set forth more fully above, the School District contends that the Hearing Officer and District Court correctly found that the 504 Plans provided reasonable accommodations so as to ensure T.F.'s meaningful participation in educational activities and meaningful access to educational benefits as required by law. However, even if this Court finds that the District erred in not rewriting those accommodations provided in the District's Food Allergy Policy into T.F.'s 504 Plan, at most, this is a procedural error. *Centennial Sch. Dist.*, 799 F. Supp. 2d at

490. A procedural violation alone does not amount to a per se denial of FAPE. "A school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents." *Id.* (quoting *Cape Henlopen Sch. Dist.*, 606 F.3d at 66).

Parents only argue that they were denied the ability to participate in the development of the 504 Plan and they were unable to access procedural safeguards. They do not argue or provide any evidence of substantive harm to T.F. As parents have not argued that T.F. suffered any substantive harm and thus, failed to cite to any facts that T.F. was denied FAPE, the District's grant of Summary Judgment must be upheld.

III. The District Court Properly Determined That The Material Facts of the Case Did Not Demonstrate That Fox Chapel Area School District Acted With Deliberate Indifference Toward T.F. or His Parents.

The Parties in this case filed cross motions for Summary Judgment. As the District Court correctly cites, a party moving for summary judgment has the initial burden of supporting its assertion that fact(s) cannot be genuinely disputed by citing to particular parts of materials in the record . . . or by showing that: (1) the materials cited by the non-moving party do not establish the presence of a genuine dispute, or (2) that the non-moving party cannot produce admissible evidence to support its fact(s). Fed. R. Civ. P. 56(c)(1). The Court even accepting "the deficiencies alleged by Plaintiffs" correctly held that parents failed to set forth

facts to establish a violation of any federally protected right or that Fox Chapel exhibited any deliberate indifference. (JA 25). As with the current appeal, parents' Complaint and Summary Judgment Motions were replete with conclusory allegations that are not supported by the facts of record. Again, mere "conclusory statements, conjecture, or speculation," inadequate to survive summary judgment. *A.M. ex rel. J.M.*, 840 F. Supp. 2d at 684.

A. T.F. and His Parents Are Not Entitled to Compensatory Damages As Parents Failed to Prove That Fox Chapel Discriminated Against Them With Deliberate Indifference.

The Third Circuit has held that Plaintiffs must prove deliberate indifference to sustain a claim for monetary damages under Section 504 of the Rehabilitation Act. *S.H. ex rel. Durrell*, 729 F.3d at 264. As the Court set forth, Plaintiffs must present evidence that shows both: (1) *knowledge* that a federally protected right is substantially likely to be violated (i.e., knowledge that T.F.'s 504 Plan did not appropriately address his needs), and (2) *failure to act* despite that knowledge. *Id.* at 265. The District Court properly determined that parents presented no factual evidence to support either conclusion.

Parents argue that Summary Judgment is not appropriate in a case involving intent. Parents own filing of a Motion for Summary Judgment with the District Court refutes this contention. Parents themselves filed for Summary Judgment asking the Court to find that the School District acted with "intent." They cannot

now argue that the District Court erred in considering such a matter at the Summary Judgment level and the issue should have been presented to a jury.

Although the Third Circuit has only recently reviewed the issue of deliberate indifference in Section 504 cases, the Court in the leading case of *S.H.*, affirmed a District Court's decision to grant Summary Judgment in the Defendant School District's favor finding that appellants had failed to present evidence to establish the first required prong of "knowledge." *Id.* at 267. This Court also affirmed Summary Judgment in favor of the Lower Merion School District in a second case, finding that the Plaintiff failed to produce sufficient evidence in support of her claim that LMSD acted with deliberate indifference to her federally protected rights. *A.G. v. Lower Merion Sch. Dist.*, 542 F. App'x 194, 195 (3d Cir. 2013).

In this case, there is no genuine issue of material facts that a jury could consider in determining whether the Fox Chapel Area School District acted with deliberate indifference. Unlike *Chambers v. Sch. Dist. of Philadelphia Bd of Educ.* cited by parents, there is no evidence of record that that reflects serious and repeated failures by the School District at several key junctures to ensure that T.F. was receiving the services that were required, and were clearly known to be required. 537 F. App'x at 97. The record supports the District Court's determination that "there has been no evidence to support an inference that the School District had any knowledge that T.F.'s federally protected rights were

substantially likely to be violated and they failed to act." (JA 22). The District Court properly concluded that "Plaintiffs have failed to establish . . . that Fox Chapel exhibited any deliberate indifference towards them because of T.F.'s disability." (JA 25).

B. The District Court Properly Determined That There Was No Evidence To Support An Inference That The School District Had Knowledge that T.F.'s Federally Protected Rights Were Likely To Be Violated And Failed To Act.

Once again, parents' contention that the School District had 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 allegedly choosing not to incorporate necessary provisions in T.F.'s 504 Plan regarding the identification and treatment of anaphylaxis is unsupported by the facts of the record. Further, it should be noted as more fully set forth above, that it has not been settled in the Third Circuit whether parents have any federally protected rights of the their own under Section 504.

i. Fox Chapel Did Provide T.F. With An Appropriate Written Individualized and Enforceable 504 Plan And Thus Did Not Violate T.F.'s Right to FAPE Or His Right To Benefit Of An Education Program.

The undisputed evidences establishes that Fox Chapel knew about and accepted T.F.'s food allergy, offered him several written 504 Plans and at all times provided him with reasonable accommodations that ensured meaningful

participation in educational activities and meaningful access to educational benefits as required under the law. Again, the District Court agreed with the administrative Hearing Officer's finding that the District's plans for T.F. were appropriate. Further, the School District sought and obtained approval from T.F.'s treating allergist to assure that the offered Plan was appropriate and met T.F.'s needs. (JA 692). T.F.'s allergist confirmed that the Plan offered was appropriate by initialing the Plans and offered no additional accommodations to add. (JA 668-669).

Further, parents submitted an expert report that outlined only some "potentially problematic" issues. Parents argue that the District's plans were inappropriate because there were no accommodations related to the identification and treatment of anaphylaxis. Parents' expert, Dr. Sicherer opined in his report that the plan did not seem to adequately address prompt recognition and treatment of an allergic reaction. (JA 133). He opined in his report that this would be accomplished through training of the responsible adults, usually undertaken by the nurse. (JA 134).

On cross examination, Dr. Sicherer admitted that he was not aware of the School District's Food Allergy Policy that provided that school staff would be trained to be knowledgeable of student allergy, be able to recognize symptoms and know what to do in an emergency. (JA 134). As stated above, Dr. Sicherer, the parents' expert witness, opined that if the school has a general plan on dealing with

food allergies, it would not be expected that those items in the general plan would be rewritten into a 504 plan. (JA 418). He admitted that if the accommodations were in T.F.'s plan or in the District's policy and being implemented, then "he would be looking at it differently." (JA 419) (emphasis added). He conceded that if staff were trained as set forth in the District's policy, "that would be good." (JA 419).

Parents contend that the School District had knowledge that the plans were inappropriate based upon their "numerous discussions and meeting 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." However, parents fail to cite to any evidence of record to support this statement and T.S.F.'s testimony actually refutes this allegation. At the first meeting in June, 2010, T.S.F. testified that she did not voice any concerns about T.F.'s EpiPen and could not recall whether she brought any other concerns to that meeting. (JA 449). She further testified that at the next meeting on August 24, 2010 she presented her proposed 504 Plan and the Team discussed who would have T.F.'s EpiPen but that there was not discussion on any other issue. (JA 453). She testified that there was no in depth discussion of her proposed 504 Plan at the September 8, 2010 meeting. (JA 455). Parents' attorney even recognized that T.S.F.'s testimony was contradictory, acknowledging that he was unsure whether she was testifying that the District did

not discuss anything at all or that the District gave contradictory answers. T.S.F. did not clarify this in her response. (JA 456).

To the extent parents argue that the school district somehow ignored their pleas, the record supports the opposite: that the services that the District would and did provide to T.F. were thoroughly discussed at the 504 meetings. Dr. Carey, the District's Special Education Coordinator testified that at the meetings, the Team went through, item by item and explained how the District addressed each of her proposed accommodations. (JA 433-438, JA 560). The District's Head Nurse, Wynona Cox also testified that T.S.F.'s proposed plan was discussed at length at the 504 meetings. (JA 508-513). Mrs. Cox testified in great detail to the discussions that the Team had regarding T.S.F.'s proposed plans. (JA 508-513). Each proposed accommodation was discussed in great detail to explain to parents the school district's policies and procedures for addressing students with food allergies.

Parents provided the District with a proposed 504 Plan that contained 27 proposed accommodations that presumably they felt would meet T.F.'s needs. (JA 672-677). Parents assert that the District's proposed Plans were inappropriate because they did not address the identification and treatment of anaphylaxis. Yet, parents' proposed 504 Plan provides no more specificity or information than what the record clearly establishes was provided to T.F. by the District. As the District

Court correctly determined, although the school district was not required to adopt all of the accommodations that the parents demanded, with the exception of the lunchroom desk situation, which parents place great emphasis at both the administrative level and the District Court, but do not raise at all on appeal, "Fox Chapel endeavored to include nearly all of Plaintiffs' other substantive requests into the proposed 504 Plans." (JA 22, JA 753).

Parents' proposed plan provides that the District will educate all staff that will have contact with [T.F.] about food allergies and EpiPen training and distribute emergency health care plan with [T.F.'s] picture. (JA 673). Parents' proposed plan does not go into any specific detail about what will occur at each training or describe the signs or symptoms are of an allergic reaction. A cd provided by the parents is referenced. Similarly, the District's Board Policy states that school staff will be knowledgeable of student allergy, be able to recognize symptoms, and know what to do in an emergency. (JA 632). The record fully supports that this occurred. Additionally, the District's proposed 504 Plans all provide that T.F.'s Emergency Action Plan will be provided to all staff. (JA 661-671). The nurse and Principal hand deliver the emergency care plans to the teachers and make sure that they understand what is in the child's emergency care plan. (JA 531).

The only other accommodations proposed by the parents regarding identification and treatment of anaphylaxis is that the nurse will be within 2 minutes of [T.F.] at all times and immediate administration of the EpiPen is necessary. (JA 673). Parents' expert did not testify that a nurse would be required to be within 2 minutes of T.F. at all times, although the record clearly established that T.F.'s elementary school always had a nurse on duty whose office was 20-25 feet away from T.F.'s classroom. (JA 532). Rather, his report indicates that he opined that the district's proposed accommodation of following the Food Allergy Action Plan – where the nurse is called immediately, the nurse will call 911 if needed and then call the parents was appropriate and that the nurse would be an appropriate person who is responsible for administering T.F.'s medication if needed was appropriate. (JA 133). However, he notes that based upon information provided by the parents, implementation is unclear since no line of stable communication was apparently developed. (JA 133). Once the clear and stable communication plan that was in place was explained to Dr. Sicherer he admitted that this would address the key component of safety recognition and prompt therapy that he found lacking in his report. (JA 414).

Thus, what parents characterize as the school district's knowledge that the School Board's Food Allergy was "broad" and undetailed was no different than what parents demanded in their own proposed 504 Plan. Once again, Parents'

allegations are simply not supported by facts in the record, including testimony provided by their own expert. Thus, the District Court correctly entered Summary Judgment in the School District's favor on this issue.

Finally, parents attribute knowledge that the proposed 504 Plans were inappropriate to T.F. suffering "multiple allergic reactions." Once again, this unsupported allegation is contradicted by T.F.'s medical records. Although T.F. saw the nurse on three occasions for very minor symptoms – one hive on two occasions and one itchy lip, there was no evidence provided whatsoever that T.F. was exposed to tree nuts or that the District did not provide an accommodation that T.F. needed.

Based upon T.F.'s medical records, Plaintiffs can provide no evidence to support that any of these incidents involved "exposure" to ingestion of nuts or that T.F. suffered "multiple allergic reactions." On September 30, 2010, T.F. reported to the nurse with one (1) hive on his left leg. There are no medical reports that show that T.S.F. or D.F. sought any medical treatment at all that day. There is no evidence that T.F. ingested a tree nut. Defendant's expert, Dr. Eigen opined, based upon his review of the medical records that there is no evidence to connect this to tree nut exposure. (JA 168). On October 5, 2010, T.F. reported to the nurse with one (1) hive on midline chest. Not only do the records not support any exposure to tree nuts, T.F.'s medical records actually show that T.F. had a bilateral ear

infection during this time and his hives were a suspected reaction to Advil and Motrin given to him by his parents for his fever. (JA 121-126). Despite clear knowledge of this, it is inconceivable that they would somehow try to attribute this to the school district.

Student also reported to the nurse on October 7, 2010 stating that his bottom lip was itchy. Students did have a project in class using acorns around this time. T.F.'s teacher testified that prior to this activity she spoke with T.S.F. about the activity. T.S.F. gave Ms. Synan a list of nuts that T.F. may be allergic to. (JA 719-721). Acorns were not on the list. T.S.F.'s email to Ms. Synan after this incident supports this conversation. (JA 759). The email states "I know I initially told you acorns should be low risk based on what his doctor and FAAN both say." Additionally, the District's head nurse called Children's Hospital to ask whether "exposure" to acorns would be a problem and was told no. (JA 547-548). She also researched it on her own and found that there should be no problem. (JA 548-549). Thus, even if this could be considered "exposure" to a tree nut, there is no evidence that this was the result of an inappropriate plan or evidence of deliberate indifference – that the District knew that exposure to an acorn would cause a reaction and took no action to prevent it.

Finally T.F.'s medical records include a report from Children Hospital dated 11/30/10. (JA 121-124). The report indicates that T.F. was last seen in the

allergist's office five months prior. Thus this report would cover the entire time period that T.F. was enrolled at Fox Chapel Area School District. The report indicates three incidents only during that time period. One referenced above where T.F. had a "suspected" allergic reaction to Advil and Motrin during an episode of otitis media (ear infection), not tree nuts. A separate report indicates that this was October 5-7, 2010. (JA 125-126). The report also references one episode of ocular itching after exposure to "playing with" acorns at school[5]. It references a third incident of exposure to ice cream. This does not indicate this occurred in school. The report states "He has not had other tree nut exposures." (JA-122). No medical records support parents' claim of an allergic reaction after bobbing for apples at school at Halloween.

Therefore, once again, despite Parents' unsupported, conclusory statements, there is no evidence to support that the District had any knowledge that their proposed plans were inappropriate or did not meet his needs. The District met with the mother on numerous occasions, reviewed and revised their proposed plans, discussed mother's areas of concerns and had T.F.'s treating allergist review the plans for approval. Again, importantly, there was absolutely no testimony that T.F.'s plan was not implemented or that an accommodation that he needed was not

[5] Presumably this is the same incident as described above. However, this reports indicates reported ocular itching, where T.F. reported to the nurse lip itching. No report was provided to the doctor that T.F.'s lip or face swelled.

provided. There were no examples of a teacher not being trained that led to T.F. going into anaphylactic shock, there were no examples of staff members failing to respond to an emergency, there are no examples of staff failing to recognize an emergency, there were no examples of times where the nurse couldn't be reached or didn't respond to an emergency. In fact, despite T.S.F.'s testimony that she was afraid that the District would call every day to say that T.F. was dead, there was never a time while T.F. was in school that he had an emergency or went into anaphylactic shock. There was never a time where the EpiPen was administered or that 911 was called. This District provided T.F. with reasonable accommodations that allowed T.F. to be safe, to avoid contact and ingestion of tree nuts, to prevent T.F. from experiencing a severe allergic reaction while he was in school and to allow him to access and participate in the educational programs of the District.

ii. Fox Chapel Did Not Fail To Act In Providing T.F. With Reasonable Accommodations.

Once again, the District Court correctly determined that the evidence does not support that the School District acted with deliberate indifference towards T.F. and in fact, demonstrated quite the opposite. (JA 20). The record is clear that the District was attempting to work with the parents from before the time T.F. was even enrolled in the District through the time that parents unilaterally withdrew him. Approximately four (4) 504 Plans were proposed, with numerous revisions made. (JA 661-671). The School District consulted with T.F.'s treating physician

to ensure that the plans met his needs. As the Hearing Officer found and the District Court properly accepted, "the record taken as a whole supports the findings that throughout the period of May-December 2010, the District strenuously sought to meet its obligations to the student under Section 504." (JA 21; JA 45).

While parents rely heavily on the *Chambers* decision to support their position, as the District Court correctly found, unlike *Chambers*, there is absolutely no evidence of "serious and repeated" failures on the School District's part. (JA 22 (citing *Chambers*, 537 F. App'x at 97)). Despite parents' conclusory allegations that the District failed to consider T.F.'s needs, again, parents cite no evidence of the record to refute the District Court's findings that "the evidence as a whole demonstrates that Fox Chapel considered Plaintiffs' concerns in formulated plans along with all of the professional involved (T.F.'s physician, school nurse, guidance counselor, principal, etc.)." (JA 22).

Again, to the extent that parents make any specific allegations, these conclusory statements are not supported by the record. Parents allege that the District Court 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 record is clear that the four (4) written 504 Plans proposed by the District were, as more specifically set forth above, appropriate and met T.F.'s needs. They provided reasonable accommodations that at all times, kept T.F. safe and allowed

him to participate in and access his education. Further, as set forth above, parents participated in the development of these 504 Plans for T.F.

As determined by both the Hearing Officer and District Court below, these plans were appropriate and included the basic safety measures necessary to provide T.F. with safe access to a public education. Again, the District did not rely on oral assurances, yet, declined to rewrite its Board Policy into T.F.'s 504 Plans, a decision that parents' own expert found to be appropriate.

The School District did act in ensuring that its entire elementary school staff was trained on food allergies, including identifying and treating anaphylaxis. Parents cite to no evidence to support that this was not done. While the School District chose not to simply adopt the parents' proposed 504 Plans or rewrite Board Policy into T.F.'s 504 Plan, they did not fail to address the proposal concerning the identification and treatment of anaphylaxis and as stated above, provided the necessary training to staff. The Special Education Coordinator did not testify that Fox Chapel declined to inform T.F.'s parents "how things were implemented, what Fox Chapel was doing in order to have a safety plan in place and also to train the staff." (JA 568). To the contrary, she testified that "we addressed it on numerous occasions." (JA 568).

The record reflects that T.F.'s parents notified the District in November, 2010 that T.F. would not be returning to school due to his lunchroom seating – an

issue parents argued strenuously at the administrative due process hearing and District Court level – and not because they failed to obtain reasonable assurances that they could send T.F. to school each day without fear of unnecessary exposure to the risk of anaphylaxis. (JA 27, JA 753). The District Court found that the school district acted appropriately with regard to T.F.'s seating in the lunchroom; a determination that parents do not appeal.

Nevertheless, the school did not display deliberate indifference to T.F.'s rights to FAPE when it initiated criminal truancy proceedings. First, despite yet another unsupported allegation, in response to notification that T.F. would not be returning to school, the Principal did offer to schedule a meeting to address T.S.F.'s concerns. T.S.F. did not respond or attempt to schedule the offered meeting. Second, despite parents' position below that the filing of truancy charges against the family was done in retaliation for advocating for a 504 Plan, both the Hearing Officer and the District Court concluded that the District acted legitimately in filing a truancy citation against the family. (JA 46, JA 27-28). Once again, parents do not challenge this decision on appeal and the issue is therefore waived. Thus, the District Court's determination that the school district acted appropriately must stand.

Once again, what has been clear in parents' arguments at the administrative due process hearing, at the District Court and now at the Third Circuit, is that they

are simply unable to support their conclusory statements, conjecture, or speculation with facts. There is no factual evidence to support that the School District denied T.F. reasonable accommodations or denied T.F. meaningful participation in educational activities or meaningful access to educational benefit.

To the contrary, the facts support that the School District offered and provided T.F. with accommodations to meet his needs, thoroughly trained staff, was ready, willing and able to respond to an emergency and in no way acted with deliberate indifference toward T.F. or his family. As such, the District Court appropriately granted summary judgment in favor of the School District.

CONCLUSION

For the reasons set forth herein, Appellee, Fox Chapel Area School District, requests this Honorable Court deny T.F.'s and his parents' appeal and uphold the Memorandum Opinion and Judgment Order entered by the U.S. District Court for the Western District of Pennsylvania dated November 5, 2013, which granted the School District's Motion for Summary Judgment and Denied T.F. and his Parents' Motion for Summary Judgment. As such, remand to the District Court is unnecessary.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, the undersigned, hereby make the following certifications with regard to the filing of the within Brief of Appellee:

1. That I am a member of the Bar or the United States Court of Appeals for the Third Circuit;

2. That this Brief complies with the type-volume limitation of Fed.R.App.P. 5 because this Brief contains 12,326 words, excluding the parts of the Brief exempted by Fed.R.App.P.;

3. That the text of the PDF file and Hard Copies of this Brief are identical;

4. That a virus check was performed on the PDF and Hard Copies of this Brief, using Symantec Anti-Virus software, and that no virus was indicated; and

5. This Brief also complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007 in 14 pt. font, Times New Roman.

s/ Patricia R. Andrews, Esq.
Counsel for Fox Chapel Area School District

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system on May 29, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system and via First Class, U.S. Mail, postage prepaid.

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