



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08614-21

AGENCY DKT. NO. 2022-33413

C.T. ON BEHALF OF S.T.,

Petitioners,

v.

PARSIPANNY TROY HILLS BOARD

OF EDUCATION,

Respondent.

Kristen Sinclair, Esq. for petitioners, (Morgan, Bornstein & Morgan, attorneys)

Katherine Gilfillan, Esq. for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: February 14, 2022

Decided: February 23, 2022

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Is S.T. entitled to a medical mask exemption as accommodation in S.T.'s 504 Plan to provide S.T. with a free, appropriate public education (FAPE)? No. A school district denies FAPE when it precludes a disabled student from receiving meaningful educational

benefit because of their disability in the absence of reasonable accommodations. 34 C.F.R. 104.33(b), (c); Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280-81 (3d Cir. 2012).

PROCEDURAL HISTORY

On September 19, 2021, petitioner applied for a due process hearing with the Office of Special Education Programs (OSEP), seeking to include a mask-wearing exemption in her son S.T.'s 504 Plan and require the Child Study Team (CST) to evaluate S.T., and have the exemption in an IEP. The Parsippany-Troy Hills School District (District or Board) denied petitioner's request for a blanket mask exemption.

On October 14, 2021, OSEP transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

On November 18, 2021, petitioner withdrew her claims concerning the CST evaluation and IEP development from this petition. So, whether the denial of the mask exemption in S.T.'s 504 Plan is a denial of FAPE or whether S.T. requires that exemption as a reasonable accommodation are the only issues to be resolved in this case.

On January 18, 2022, I held the hearing via Zoom technology due to the COVID-19 pandemic. The parties submitted written summations in place of a final day of hearing on February 14, 2022, and on that date, I closed the record.

FINDINGS OF FACT

Based on the testimony provided, and my assessment of its credibility, together with the documents presented and admitted¹, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

Background

S.T. was born on October 2, 2013 and is presently eight years of age. S.T. is a second-grader enrolled in the District attending the Intervale Elementary School (Intervale).

In September of 2019, S.T. began attending Kindergarten at Intervale. The District received medical documentation dated August 8, 2019, and September 19, 2019, diagnosing S.T. with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD).

Based, in part, on the medical documentation and S.T.'s classroom performance, the District issued an initial 504 Plan dated October 29, 2019. The initial 504 noted S.T. was disruptive in class which interfered with learning. When unable to complete work, not being first, or the winner, S.T. would become aggressive or melt down. The October 29, 2019, 504 Plan identified the following necessary accommodations:

- preferential classroom seating near the teacher with the ability to stand
- bands on S.T.'s chair and desk for movement
- a scoop rocker provided for sitting assignments
- classwork modification broken into smaller fragments at teacher discretion
- small group testing with time extension at teacher discretion

¹ The parties presented a joint stipulation of facts and joint exhibits. This decision incorporates the stipulated facts within the findings of fact.

- as needed behavioral consultation with the school's behaviorist
- a behavioral modification plan with earned rewards for on-task behavior

COVID-19 Pandemic and Masks in Schools

On March 16, 2020, Governor Philip D. Murphy issued Executive Order No. 104, which, among other things, closed public schools to in-person learning based on the COVID-19 pandemic.

In compliance with Executive Order No. 104, the District transitioned to virtual instruction on March 18, 2020, and remained in remote status through the remainder of the 2019-2020 school year. S.T. completed his kindergarten year on virtual instruction and moved to the first grade for the 2020-2021 school year.

The New Jersey Department of Education (NJ DOE) issued a guidance document, The Road Back — Restart and Recovery Plan for Education, relative to the re-opening of schools for the 2020-2021 school year.

On August 14, 2020, Dr. Barbara Sargent, the District's Superintendent of Schools, issued correspondence to District families regarding schools' re-opening, which included instructions and restrictions on students' attendance on in-person learning. In a hybrid model, the District returned to in-person learning in September of 2020, providing students' attendance on a half-day schedule within a cohort model. Students attended school in-person for one week and attended school virtually the following week. The District required all students and staff members to wear facial coverings throughout the school day and remain socially distanced to the fullest extent possible when in-person. This hybrid model required S.T. and his fellow cohort students to wear a mask approximately four to five hours a day for four days for two weeks, or a total of twenty hours, and S.T. did so.

On or about April 12, 2021, the District combined cohorts for all levels. Students attended school five days per week on a half-day schedule, without a week off. The District still required students and staff members wear facial coverings throughout the school day and remain socially distanced when possible. Full-day instruction began on June 1, 2021 and continued to the last day of education of the school year on June 18, 2021.

The District recognized that students might have difficulties wearing masks for extended periods and provided “mask breaks” where students would be permitted to remove their masks. The District continued to allow students to remove masks while eating, during recess when recess took place outside, and when engaging in outdoor physical education activities. Eating times encompassed breakfast, lunch, and a snack break. The District added a mask break at approximately 2:30 p.m. and the end of the school day. If possible, teachers would conduct classes outside, where students could remove masks. Essentially, Intervale students received a mask break approximately every ninety minutes each school day.

On June 28, 2021, the NJDOE released The Road Forward (TRF), a fifteen-page document providing updated health and safety guidance for schools for the 2021-2022 school year.

On August 6, 2021, Governor Philip D. Murphy signed Executive Order number 251, mandating that all public schools, including the District, maintain mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district excepting limited circumstances.

On August 20, 2021, Dr. Barbara Sargent, the Superintendent of Schools issued correspondence and a Frequently Asked Questions Document to all District families regarding the re-opening of schools for the 2021-2022 school year. This notice addressed the mandatory use of masks indoors and the limited exceptions to that mandate.

On September 1, 2021, NJDOE updated the TRF guidance. Specifically, the TRF addressed the importance of mask-wearing and the limited exceptions permitted by the Executive Orders requiring all staff and students to wear masks in indoor school settings. The TRF identifies the permitted exceptions of EO-251. Relevant to this case, the Order's first paragraph lists the following exceptions:

1. When doing so would inhibit the individual's health, such as when the individual is exposed to extreme heat indoors;
2. When the individual has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove a face mask without assistance;
3. When a student's documented medical condition or disability, as reflected in an Individualized Education Program (IEP) or Educational Plan pursuant to Section 504 of the Rehabilitation Act of 1973, precludes use of a face mask.

[ibid.]

This tribunal also takes judicial notice of other Executive Orders concerning mask-wearing in schools. The Governor's Executive Order No. 253 (EO-253) of August 23, 2021, referenced in the TRF, also addresses indoor mask-wearing in public schools required by EO-251. <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-253.pdf>. In particular, EO-253 references EO-251's indoor school mask-wearing requirement and clarifies that "individuals seeking a medical exemption from mask-wearing under Paragraphs 1(a) – (c) of that Order to produce written documentation from a medical professional to support the exemption. Self-attestations and parental attestations are not sufficient for this purpose." Ibid.

Although the Governor anticipated ending these directives in January 2022, he issued Executive Order No. 280 on January 11, 2022, again declaring a State of Emergency due to the COVID pandemic's increasing infection rates. <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-280.pdf>. On that date, the Governor

also issued Executive Order No. 281, continuing the mandates outlined in Executive Orders 251 and 253 and others addressing the pandemic. <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-281.pdf>. The public health emergency persists. See Executive Order No. 288, <https://nj.gov/infobank/eo/056murphy/pdf/EO-288.pdf>.

Although current mask mandates may end soon, the petitioner believes that there is uncertainty about whether the Governor could again require masks relative to COVID 19.

Petitioner's Requests for Mask Breaks and Mask Exemptions

On May 4, 2021, petitioner requested that S.T. receive more mask breaks during the day to assist with breathing and focus. Without requiring any amendment to the S.T.'s 504, the District immediately provided S.T. with an additional outdoor mask break.

On August 31, 2021, the District received an email from the petitioner indicating that she would be dropping off paperwork exempting S.T. from wearing a mask. Dr. Greenfield completed a mask exemption form listing Centers For Disease Control (CDC) medical criteria. Dr. Greenfield signed the form noting S.T. could not tolerate a face-covering because of a medical condition. Specifically, Dr. Greenfield reported S.T.'s ADHD diagnosis, "? sensory issues," and "rule out" a mood disorder per the pediatric neurologist, and [an undefined] "history of difficulty with mask-wearing." Dr. Greenfield supplied no treatment records. Petitioner acknowledges that Dr. Greenfield did not diagnose S.T. with a sensory processing disorder. Instead, the pediatric neurologist, Dr. Bennett diagnosed S.T. with sensory processing issues.

The District forwarded petitioner's request to the District's physician, Dr. William Gluckman, for review. Dr. Gluckman is board certified in emergency medicine and qualified as an expert in school medicine. Dr. Gluckman worked with the District in developing IEP's and 504 Plans for approximately fifty to one hundred students with

ADHD. His practice focuses on emergency medicine, and his treatment of individuals with ADHD is short-term in duration. However, Dr. Gluckman is neither a psychologist nor a neurologist. Dr. Gluckman did not meet with S.T. or speak with petitioner before rendering his decision. Moreover, petitioner highlights that Dr. Gluckman reviewed no formal mask guidance in his determination.

Dr. Gluckman provided the District with a verbal denial of a blanket mask exemption for S.T. but indicated that additional mask breaks would be appropriate. The District verbally relayed the information to the petitioner.

Petitioner requested a copy of the denial and sought a meeting to discuss S.T. Petitioner also has a kindergartner in the District that can wear a mask without the concerns that S.T. faces or requiring additional mask breaks. This fact supports the sincerity of petitioner's request for a mask exemption for S.T.

On or about September 16, 2021, the District received a written copy of Dr. Gluckman's determination on the initial mask exemption request. Dr. Gluckman highlights that Dr. Greenfield returned his phone call concerning S.T.'s mask exemption request and that they spoke. Dr. Gluckman documented the nature of this conversation in the denial letter and believed that he and Dr. Greenfield agreed that a blanket exemption was unnecessary, that the District could offer S.T. additional mask breaks as needed instead, and work on mask tolerance. Yet, petitioner never agreed to mask tolerance training by the school.

Petitioner believes that Dr. Gluckman mischaracterizes the conversation with Dr. Greenfield, who understood that S.T. was having difficulty wearing a mask in school. Petitioner maintains that she spoke to Dr. Greenfield after his discussion and that he was on the "same page" regarding S.T.'s need for a mask exemption. Yet, Dr. Greenfield did not testify or offer additional medical information to contradict Dr. Gluckman's version of the conversation.

Dr. Gluckman described his review of the mask exemption request as a balancing of risks and benefits or the need for S.T.'s mask exemption and the protections needed by other students during the pandemic. In performing his review, Dr. Gluckman considered medical documentation, school records, and his conversation with Dr. Greenfield. Significantly, Dr. Gluckman rejected that the District instructed him to deny the mask exemption request. Instead, Dr. Gluckman made his independent determination.

On October 6, 2021, petitioner first forwarded medical information from the nurse practitioner at S.T.'s pediatric neurologist practice concerning S.T.'s sensory processing difficulties and resulting problems wearing a mask. The nurse practitioner explains that mask-wearing caused S.T. sensory problems that led to a regression in his education. Thus, the nurse practitioner advised that S.T. requires a medically necessary exemption from the mask mandate. The petitioner again requested the District grant S.T. a complete mask exemption with this record.

However, Dr. Gluckman reviewed information from the school concerning S.T.'s favorable academic achievement inconsistent with the nurse practitioner's statement. Thus, on October 12, 2021, Dr. Gluckman again denied the mask exemption request noting his disagreement with the nurse practitioner's assertions about S.T.'s academic performance regression and found no justification to provide the exemption.

Here, I **FIND** Dr. Gluckman's testimony to be credible and that he considered appropriate information in making his determination, weighing S.T.'s need for the exemption, S.T.'s academic performance, and the reasons for the school mask mandate. Notably, while petitioner suggests that Dr. Gluckman did not review formal guidance for mask exemptions, Dr. Gluckman reviewed Dr. Greenfield's exemption form that listed the CDC exemption criteria, which mirror the Executive Order's directive.

S.T.'s Subsequent 504 Plans and Educational Progress

S.T.'s kindergarten progress report from the school year 2019-20 assessed mid-year and end of year performance using categories of "satisfactory" or "unsatisfactory" or "not graded" for social and personal development and study habits. From mid-year to end-of-year, the teacher recorded little change in these areas. The teacher assessed specific skills such as reading and writing numerically. Specifically, a one means the student needs support; a two equates to approaching or beginning to meet standards; a three indicates meeting standards or "grasps and applies key concepts, processes, and skills," whereas a four exceeds standards. When graded, the teacher graded S.T. with a two or three. Most areas remained unchanged from mid-year to end-of-year. Many mid-year mathematics assessments are blank, precluding comparative assessment. However, the teacher noted no regression in categories she assessed for mid-year and end-of-year math skills. To be sure, I **FIND** that no area supports a decline in S.T.'s progress from mid-year to end-of-year in his kindergarten year. Moreover, S.T.'s class discussion participation, sportsmanship, and understanding and application of art concepts and skills improved. However, I also **FIND** that these reports are less relevant to masks or impacts mask-wearing had because S.T. attended kindergarten in-person without a mask or virtually.

Ms. O'Donnell has a degree in elementary education and has been the school counselor at Intervale since 1999. On June 17, 2021, Ms. O'Donnell, the school psychologist and 504 Plan coordinator, and S.T.'s first-grade teacher, Ms. Derogatis, conversed via email to update S.T.'s 504 Plan for the second grade. Ms. O'Donnell explains that it is more effective to discuss 504 Plan changes for the following year with the current teacher that has worked with and evaluated the student over that period to determine strategies for overcoming any issues observed. In preparing a 504 Plan or revision, Ms. O'Donnell's normal course is also to review the student's academic progress records.

Ms. Derogatis noted that S.T. had issues with focus, completing assignments, and fidgets at his desk. Ms. Derogatis did not attribute S.T.'s focus concerns to in-school mask-wearing from April through June 2021. Although aggressive behaviors were part of S.T.'s initial 504, Ms. Derogatis saw less of such behaviors while in first grade. Ms. Derogatis recommended the District continue S.T.'s current 504 Plan's accommodations and suggested some additional ones. Specific additions to the 504 included breaking down writing tasks into smaller parts or shortening the writing task, providing an object for fidgeting when needed, and reading aloud assignment and task directions, when necessary, especially for math. Ms. O'Donnell initially drafted a revised 504 plan dated June 17, 2021, but then realized the draft failed to update S.T.'s current concerns, which she corrected.

Petitioner did not request a change of the June 17, 2021, 504 Plan, including more mask breaks. Yet, S.T. only attended in-school instruction for a half-day four days a week when the parties created the 504 Plan. Thus, I **FIND** that petitioner's failure to seek a mask exemption at that time is not dispositive to whether additional accommodations were necessary upon S.T.'s return to school for the 2021-22 year with full-day instruction.

S.T. completed his first-grade year. Although Ms. Derogatis did not testify, Ms. O'Donnell reported that S.T. did well that year, partly based on his school records and her own experience in S.T.'s class. Generally, Ms. O'Donnell performed class lessons once a month, assisted with large projects, and observed students if asked by a parent or teacher.

S.T.'s first-grade trimester progress report compiles comments from all teachers in each subject. Few notations are specific to S.T.; instead, the comments focus on what the class worked on during the year. Still, remarks made by Ms. Derogatis suggest S.T. did well, and she recommended continued schoolwork over the summer with online programs. Ms. O'Donnell also served as substitute in S.T.'s first grade class for several days.

Notably, Fountas and Pinnell Literacy Assessment (FPLA) noted considerable improvement from mid-year to end-of-year during the first grade school year. Teachers assess reading skills at independent and instructional levels using the FPLA. Independent level means the ability to accurately read and understand without assistance, while instructional level indicates a student requires some guidance or direction. Letters correlate to levels from A to Z, with improvement noted by letters increasing alphabetically. The 2020-21 first grade assessment noted S.T.'s independent mid-year level as an E and his instructional level as F. The end-of-year independent level assessment revealed S.T. reached level I, and his instructional level was now at level J. Indeed, I **FIND** that a preponderance of the evidence exists to support that S.T. made academic progress in first grade.

On September 9, 2021, Ms. O'Donnell, forwarded a draft email to Mr. Waack, Intervale's long-standing principal, for his review before sending the email to petitioner concerning S.T. and a requested mask break on September 8, 2021, the first day of school. The email states that S.T. came to her office to tell her that the mask caused him difficulties focusing. Further, the email advised petitioner that Ms. O'Donnell spoke with S.T.'s teacher to ensure that he got enough breaks. Ms. O'Donnell also told the teacher to send S.T. to her office when S.T. expressed concerns about mask-wearing. Ms. O'Donnell intended to formalize an updated 504 Plan once meeting with petitioner. Even though Ms. O'Donnell serves as the 504 Plan coordinator for Intervale, Ms. O'Donnell would not be able to address a mask exemption. Instead, the District required the school physician to make the determination.

In asking Mr. Waack to review the draft email, Ms. O'Donnell stated that she did not "want to put in writing anything that could hurt us." Ms. O'Donnell explained that she was mindful of the petitioner's mask exemption request, wanted to ensure Mr. Waack was aware of the incident and often sought review of communications to parents when there are known concerns. Mr. Waack directed no changes, and Ms. O'Donnell sent the email to petitioner as written earlier.

Although petitioner takes issue with Ms. O'Donnell's statement when sending this email to Mr. Waack, I **FIND** her explanation sincere, credible, and without intent to cover up that S.T. had an issue with mask-wearing on the first day of school.

On September 13, 2021, the parties met and discussed the school's general mask break schedule. At the meeting, the District added more mask breaks to S.T.'s 504 Plan. On the draft, Ms. O'Donnell highlighted the mask breaks already in place for all students to determine the inclusion of other breaks for S.T. consistent with Dr. Gluckman's recommendation. The extra breaks involve S.T. leaving the class, taking a walk around the building, sitting with Ms. O'Donnell or Mr. Waack in their respective offices or outside, weather permitting. The finalized 504 Plan for second grade, dated September 14, 2021, notes that breaks would be at either the teacher or S.T.'s discretion. Ms. Tsakanias wanted the ability to suggest mask breaks if she observed that S.T.'s behavior supported the need for a break, even if not requested by S.T. Petitioner electronically signed S.T.'s 504 Plan dated September 14, 2021.

In second grade, Ms. O'Donnell substituted for four or five days in S.T.'s class, taught a class lesson once a month, helped with large projects, and occasionally met with S.T. for anxiety. Ms. O'Donnell checked in with S.T. weekly or at either the teacher's or S.T.'s direction when he was upset. Ms. O'Donnell's one-on-one meetings with S.T. did not usually address masks, but more with frustration and how to relax, breathe, and find a happier place.

Ms. O'Donnell discussed S.T.'s educational progress with Ms. Tsakanias, S.T.'s second grade teacher, who indicated S.T. was doing well overall. In particular, S.T.'s math levels were now at the beginning third-grade level. Ms. O'Donnell concurred with S.T.'s kindergarten through second grade teachers that he has "grown" in educational pursuits, has many friends, tries very hard to complete assignments, and asks for help when needed. Her observations noted that S.T. exhibited appropriate classroom behavior, including S.T.'s ability to participate in class, and showed no apparent anxiety.

Ms. Tsakanias, S.T.'s second-grade teacher, is certified in elementary education K-6, began teaching at Intervale in 2008, most years serving as a second-grade teacher. Ms. Tsakanias documented S.T. above the class average in all subjects but writing for the first marking period. S.T. completed nearly all assignments, even in writing, consistently.

S.T.'s reading assessments in September 2021 noted an independent level K and an instructional level L, increased from the spring of 2021. However, Ms. Tsakanias explains that S.T. is now reading at an independent level of L and instructional level N, expected for a third-grader. Similarly, the initial September 2021 math assessment revealed a score 85%, and the following chapter assessment shows a score of 91%. Further, Ms. Tsakanias highlights that S.T. obtained a 100% on his chapter four math assessment.

Ms. Tsakanias considers S.T. to advocate for himself and that he is making progress in all areas but struggles with writing. S.T. expressed a dislike of writing and an inability to focus on writing tasks, regardless of any impact from mask-wearing. Ms. Tsakanias notes that S.T.'s 504 included offering S.T. a "break" and a "mask break." Those breaks could consist of taking a walk around the building or moving his body to shake out the "wiggles." Notably, the 504 requires that the teacher break down writing tasks into smaller tasks and that S.T. take breaks from school assignments when needed.

Neither Ms. Tsakanias nor Ms. O'Donnell believes that S.T. requires an all-day mask exemption to make progress academically.

Here, I **FIND** that Ms. Tsakanias was straightforward in her testimony concerning S.T.'s notable academic progress during second grade, supported by grade book assignment completion and grade reports through November. Indeed, I **FIND** a preponderance of the evidence exists to establish S.T. derives considerable benefit from his educational program in-district on par with his non-disabled peers and did so even when wearing a mask.

On September 21, 2021, petitioner emailed Mr. Waack that S.T. requested a mask break during writing, but that Ms. Tsakanias declined S.T.'s request and advised S.T. to focus. Ms. Tsakanias felt that issue was one of focus during writing, a known issue for S.T. She assisted him with the writing assignment that he completed successfully. Notably, Ms. Tsakanias acknowledges that there was some initial confusion about the type of break S.T. was requesting. Once aware of the problem, Ms. Tsakanias spoke with S.T. to clarify his requests and assured him that he would get one if he sought a mask break. As to mask breaks or breaks generally, Ms. Tsakanias noted that S.T. asks for far less than he did at the beginning of school.

On October 1, 2021, the District also received notification that S.T. struggled with mask-wearing on the school bus. The District changed the bus seating, allowing S.T. to sit at the front of the bus, further distancing him from peers, open windows weather permitting, and remove his mask when anxious.

Notably, on October 4, 2021, S.T. became teary-eyed and frustrated with wearing a mask in class, and Ms. Tsakanias had S.T. speak with Ms. O'Donnell. Ms. O'Donnell did not consider the October 4, 2021, incident a "panic attack." On that day, she and S.T. took an outside mask break where they also discussed the earlier bus episode and coping strategies S.T. could employ when frustrated. S.T. was able to return to class and continue his lessons. Ms. O'Donnell similarly noted that S.T. takes fewer mask breaks now than at the beginning of school.

While petitioner agrees that S.T. is an intelligent student capable of advocating on his behalf, he expresses frustration with the need to wear a mask and its impact on his focus.

Intervale documented eleven mask breaks requested by S.T. through November 1, 2021. In other words, S.T. did not request mask breaks daily. Initially, Intervale noted just the time of the request but later began recording the time used for the break. Generally, breaks were five to ten minutes. Aside from the one occasion on September

21, 2021, I **FIND** the District denied no mask break requested by S.T. Moreover, I **FIND** Ms. Tsakanias credibly explained that she rejected the request because S.T.'s break request was unclear. Regardless, she helped S.T. focus, leading to S.T.'s writing assignment completion, and directed S.T. to clarify what break he needed to avoid later confusion.

S.T. broke his finger in November 2021, and the District reviewed and re-issued S.T.'s 504 Plan to accommodate his injury and added "talk to text" capabilities and assistance in writing through the teacher or an assigned buddy. For instance, S.T. would review and complete math problems, and his buddy would write down the answer. When the injury resolved, the District left the "talk to text" capabilities in place, concluding that this feature helped S.T., especially with writing, an area of known difficulty for S.T.

DISCUSSION AND CONCLUSIONS OF LAW

Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits the exclusion of disabled individuals from participating or obtaining benefits under programs receiving federal funding:

No otherwise qualified individual with a disability in the United States, as defined in . . . [29 U.S.C. § 705(20)] shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
[29 U.S.C. § 794(a).]

Similarly, the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213, prohibits discrimination against all persons with disabilities, including school-aged children, and it applies to public agencies and schools. Title II of the ADA prohibits public entities from denying a disabled individual the benefits of services, programs or activities offered by the public entity. 42 U.S.C. §12132.

Under Section 504, “disability’ means . . .(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(1). Notably, Section 504 applies to “all of the operations of” a local school district. 29 U.S.C. § 794(b). This definition is broader than the definition of a disabled child under the Individuals with Disabilities Education Act [IDEA], 20 U.S.C. §§1400 to 1482, which is limited to children having impairments specified in the statute and regulation who, because of those impairments, need special education and related services. See 20 U.S.C. 1401(3).

Essentially, Section 504 prohibits federally funded programs from discriminating against an otherwise qualified individual solely based on their disability. 29 U.S.C. § 794(a). While “the IDEA governs the affirmative duty to provide a public education to disabled students, [Rehabilitation Act] embod[ies] the negative prohibition against depriving disabled students of public education.” C.G. v. Pennsylvania Dept. of Educ., 734 F.3d 229, 234 (3d Cir. 2009) (citing W.B. v. Matula, 67 F.3d 484, 492-93 (3d Cir. 1995)). As such, “the IDEA provides a remedy for inappropriate educational placement decisions, regardless of discrimination, while the [Rehabilitation Act] prohibit[s] and provide[s] a remedy for discrimination.” Ibid, (citing Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 901 (D.N.J. 2003)).

Federal regulations implementing Section 504 mandate that schools provide a “free appropriate public education [FAPE]” to students with disabilities. 34 C.F.R. § 104.33(a) (2018). To meet the [FAPE] requirement under Section 504, schools must provide, at no cost, regular or special education and related aids and services designed to meet the needs of the student. §§ 104.33(b), (c). Yet, the [FAPE] requirement slightly differs from the IDEA in that the measure of whether the education conferred under Section 504 is sufficient is that it must meet the student's needs “as adequately” as the needs of a non-disabled student [,] §§ 104.33(b), (c). Educational programming must also meet the procedural obligations provided in the regulations. §

104.33(b)(1)(ii). Here, petitioner does not offer a procedural challenge but rather contests the provision of FAPE.

Moreover, qualified disabled students must receive the same educational opportunities as other students within the district's jurisdiction. Every school district is obligated to provide a FAPE to qualified disabled students in the regular education environment. 34 C.F.R. § 104.34 (a). A school district must place a student with a disability in the regular education environment with other non-handicapped students unless that student's education cannot be achieved satisfactorily, even with support aids and services. ibid. In determining the appropriate accommodations necessary to address a student's disability, a school district must consider multiple sources of information, including the student's academic "aptitude or achievement level." 34 C.F.R. § 104.35 (b).

To prevail on a Section 504 claim alleging the denial of a FAPE, a claimant must show that: (1) they are handicapped or disabled as defined under the statutes; (2) they are otherwise qualified to participate in the program at issue; and (3) they were precluded from participating in a program or receiving a service or benefit because of their disability. Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009).

Here, S.T. meets the first two requirements. Indeed, the parties agree that S.T. has a disability as contemplated by the statute and is otherwise qualified to attend public school in the District. Thus, the focus is whether S.T. is precluded from participating in his educational program because of his disability.

School districts must provide qualifying students with an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" and abilities. Andrew F. v. Douglas County School District, 137 S. Ct. 988, 1001 197 L. Ed. 2d 335 (2017); K.D. by & through Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 254 (3d Cir. 2018). In evaluating whether a school district furnishes

FAPE, courts must inquire into individual students' potential and educational needs. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).

However, a school district is not required "to maximize the potential of handicapped children" or to provide every level of special services. Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 199 (1982); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000). Still, "the provision of merely 'more than a trivial educational benefit'" does not equate to the "meaningful benefit requirement." Ridgewood, 172 F.3d at 247.

The Court in Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280-81 (3d Cir. 2012), explains what appropriate means in terms of Section 504 accommodations:

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. However, § 504 does not mandate "substantial" changes to the school's programs, and courts "should be mindful of the need to strike a balance between the rights of the student and h[er] parents and the legitimate financial and administrative concerns of the [s]chool [d]istrict." (internal marks and citations omitted).

[ibid.]

Here, the District has legitimate safety concerns surrounding the COVID-19 pandemic, and the Executive Order's in-school mask mandate binds it despite petitioner's expressed doubt as to the efficacy of mask mandates. Parents and educators throughout the country brought suits challenging mask mandates and mask optional policies for school age students due to the COVID pandemic. See e.g., S.B. v. Lee, 2021 U.S. Dist. LEXIS 195663, * ___ F. Supp. 3d ___, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021), Hayes v. Desantis, 2021 U.S. Dist. LEXIS 178707, (S.D. Fl. Sept. 15, 2021); Doe v. Del. Valley Sch. Dist., 2021 U.S. Dist. LEXIS 218514 (M.D. Pa. Nov. 11, 2021), Northland Parent Assn. v. Springs, 2021 U.S. Dist. LEXIS 230930, ___ F. Supp. 3d ___, (W.D. Mo. Nov. 29, 2021).

In New Jersey, one District Court evaluated the in-school school mask mandate imposed by Governor Murphy and concluded that his actions were rational despite the potential for educational disadvantage:

The United States Supreme Court instructs us that "schools must teach by example the shared values of a civilized social order." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986). One such value is that, when faced by a common catastrophe like a pandemic, we must all make some sacrifices to protect ourselves and our more vulnerable neighbors. Citizens on both sides of this issue surely have in common a concern for our children's welfare, although they may differ as to how that goal should be pursued. And all must admit that these [mask mandates] impose some hardship upon those who are required to wear masks while in school buildings. Considered apart from their health benefits, the masks may also be seen to have educational disadvantages. Nevertheless, the decision to impose the in-school mask mandate is a rational one, and its burden on students and others is easily justified by the government's interest in controlling the spread of COVID-19 while maintaining in-person schooling. . . . The [mask mandate], however, are not meant only to protect children. Schools employ many teachers and staff members who are at high risk of hospitalization and death from COVID and can contract it from children. What is more, many students live with older or immunocompromised family members who are also at higher risk of serious illness from COVID. So even if COVID-19 posed no danger at all to children, it could be rational to require masks in school to reduce secondary infections and protect more vulnerable people from illness.

[Stepien v Murphy, 2021 U.S. Dist. LEXIS 235344, 2021 WL 5822987, at *1, 7.]

Indeed, I **CONCLUDE** consideration of the need for mask mandates during a health crisis is a valid District concern to be weighed against the student's rights and accommodation needs. While I believe that petitioner spoke with Dr. Greenfield after his conversation with Dr. Gluckman, Dr. Greenfield did not testify and took no steps to correct any misunderstanding he had with Dr. Gluckman. Moreover, Dr. Gluckman's belief that Dr. Greenfield agreed with the additional mask breaks rather than an exemption was

consistent with his written denial, drafted after considering multiple sources of information and considering risks to other individuals. Notably, the unexplained “history of difficulty with mask-wearing” noted by Dr. Greenfield was not observed by Ms. O’Donnell or reported by S.T.’s first-grade teacher during the 2020-21 school year. Further, there is no evidence to suggest that mask-wearing caused any academic decline as the nurse practitioner states to support the medical need for S.T.’s mask exemption. In other words, I **CONCLUDE** that the medical evidence petitioner supplied, and to be relied upon in granting a mask exemption under Executive Order No. 253, is insufficient to justify the mask exemption under S.T.’s 504 Plan or that his disability precludes him from wearing a mask.

In essence, petitioner maintains that the District failed to provide S.T. with a 504 Plan that was substantively appropriate and individualized to his disability by not allowing blanket mask exemption. However, the District voluntarily added a mask break for S.T. during the 2020-21 school year, and petitioner did not request additional mask breaks when creating the June 17, 2021, 504 Plan for second grade. When faced with S.T.’s concerns regarding mask-wearing in second grade during full-day instruction, the District revised the 504 Plan on September 14, 2021. Significantly, S.T. or his teacher can request a mask break when S.T. reported mask-wearing difficulty or when the teacher observed that S.T. might need a mask break even if S.T. did not request one. Thus, I **CONCLUDE** that the 504 Plan, in an accessible manner, incorporated additional accommodations specific to S.T.’s mask-wearing concerns related to his disabilities, above and beyond what the District provided to all students, that allowed for S.T.’s meaningful academic achievement. Undeniably, S.T. struggles with writing, and the 504 Plan includes further accommodations to address this subject, which have assisted his ability to complete writing assignments. Therefore, I further **CONCLUDE** that the failure to provide S.T. with a mask exemption did not deny him FAPE and that the offered accommodations are reasonably calculated to afford S.T. meaningful access to educational services.

ORDER

Given my findings of fact and conclusions of law, together with the record as a whole, the petition of appeal is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. §1415(i)(1)(A) and 34 CFR § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. §1415(i)(2); 34 CFR 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.



February 23, 2022

DATE

NANCI G. STOKES, ALJ

Date Received at Agency

February 23, 2022

Date Mailed to Parties:

February 23, 2022

ljb

APPENDIX

WITNESSES

For petitioner:

C.T.

For respondent:

Donna O'Donnell
Alexandra Tsakanias
Christopher Waack
William Gluckman, D.O.

EXHIBITS

Joint:

- J-1 Copies of medical documentation dated August 8, 2019 and September 19, 2019, confirming S.T.'s diagnosis of ADHD
- J-2 504 Plan dated October 29, 2019
- J-3 Governor's Executive Order dated March 16, 2020, closing public schools for in-person learning.
- J-4 S.T.'s report card for the 2020-2021 school year (1st grade)
- J-5 NJ DOE's guidance document (The Road Back – Restart and Recovery Plan for Education) for the 2020-2021 school year
- J-6 Correspondence from Dr. Sargent, dated August 14, 2020, regarding reopening of schools
- J-7 S.T.'s 504 Plan – reissued November 18, 2020
- J-8 C.T.'s request that S.T. receive more breaks during the day
- J-9 District's response to S.T.'s request for additional breaks
- J-10 Email chain between S.T.'s first grade teacher and guidance counselor regarding S.T.'s 504 Plan for second grade

- J-11 Finalized 504 Plan dated June 17, 2021
- J-12 S.T.'s first grade report card
- J-13 Updated copy of NJ DOE's guidance document (The Road Back – Restart and Recovery Plan for Education) for the 2021-2022 school year
- J-14 Governor's Executive Order #251 mandating all public schools use face mask
- J-15 Correspondence from Superintendent of Schools, dated August 20, 2021, regarding re-opening of schools for the 2021-2022 school year and Frequently Asked Questions Document
- J-16 Email from C.T. regarding S.T. being exempt from wearing a mask
- J-17 C.T.'s request for a copy of the District's denial and request for a meeting
- J-18 Draft of S.T.'s 504 Plan for the 2021-2022 school year (from Sept. 13, 2021, meeting)
- J-19 S.T.'s Finalized 504 Plan for the 2021-2022 school year
- J-20 Dr. Gluckman's written determination regarding S.T.'s mask exemption
- J-21 Second request for mask exemption from C.T. with supporting medical documentation
- J-22 The District's denial of mask exemption and Dr. Sargent's email to C.T.

For petitioner:

- P-1 Not in evidence.
- P-2 Not in evidence
- P-3 Not in evidence
- P-4 Not in evidence
- P-5 Not in evidence
- P-6 Emails of October 8, 2021, between Ms. O'Donnell, C.T., and Mr. Waack
- P-7 Not in evidence
- P-8 Not in evidence

For respondent:

- R-1 Not in evidence
- R-2 Not in evidence

- R-3 September 2021 Prerequisite Skills Inventory Math
- R-4 November 15, 2021, Letter to parent re: broken finger
- R-5 Temporary 504
- R-6 Not in evidence
- R-7 Fountas and Pinnell Instructional Information
- R-8 Gradebook Assignments, Grade 2
- R-9 Record of breaks Sept. 2021- Nov 2021
- R-10 Gradebook Entries, Grade 2
- R-11 Fountas & Pinnell Benchmark Assessment
- R-12 Not in evidence
- R-13 Not in evidence
- R-14 Not in evidence
- R-15 Not in evidence
- R-16 Not in evidence
- R-17 Not in evidence
- R-18 Not in evidence
- R-19 Email C. Waack to C. T., September 21, 2021
- R-20 Email C. Waack to C. T., September 22, 2021
- R-21 Email C. Waack to K. Cortright, October 4, 2021
- R-22 Email C. Waack to C. T., October 8, 2021
- R-23 Resume, D. O'Donnell
- R-23 Resume, C. Waack
- R-24 Resume, A. Tsakanias
- R-25 Not in evidence.
- R-25 Not in Evidence
- R-26 Resume, Dr. William Gluckman