



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

December 17, 2018

TJONES@FairfieldSchools.org

Re: Complaint No. 01-16-1261
Fairfield Board of Education

Dear Superintendent Dr. Toni Jones:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against Fairfield Board of Education (District). The complaint alleged that the District failed to implement the Student's Section 504 plan (504 plan) to provide a XXXX and XXXX environment in XXXX 2015 as required under the Student's 504 plan, when food was consumed in a designated food-free zone and students did not wash their hands after eating, as required in the Student's 504 plan (Allegation 1). Additionally, the complaint alleged that the District retaliated against the Complainant for advocating on behalf of the Student when, in XXXX 2015, the Student's teacher announced to the classroom that she would not be XXXXXXXXXXXXX as she has done in previous years due to food allergies and the school's allergy policy – which isolated and embarrassed the Student (Allegation 2). As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement (Agreement).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or their implementing regulations, or who files a complaint, testifies, assists, or participates in a proceeding under these laws.

Preliminary Investigation

During the investigation, OCR reviewed and analyzed documents provided by the Complainant and the District including but not limited to: the Student's 504 plan; the District's allergy policy; a list of all students in the Student's classroom and their XXXX and/or XXXX allergy, if any; and copies of documentation, including but not limited to e-mails, correspondence, internal and external memoranda, and meeting minutes and notes, pertaining to the Complainant's reporting her concerns about the alleged lack of implementation of provisions of the Student's 504 plan related to the Student's XXXX and XXXX allergy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Background

The Student has a XXXX and XXXX allergy. The Student's Section 504 plan called for the implementation of the Student's Individualized Health Care Plan (IHCP) in all school settings, including field trips. The Student's IHCP provides that the Student will only eat food brought from home and that the only food allowed in the classroom is "snacks." The IHCP further provides that the Student and others in the class will wash their hands after eating. There were XXXX students in the class who had XXXX allergies, including the Student.

The District has a policy for students with life threatening food allergies, including XXXX and XXXX allergies. The policy states that all in-school celebrations shall be food-free and all elementary schools will designate food-free zones, to include the gymnasium. The Complainant informed OCR that the Student's 504 plan does not state that the Student's classroom or other spaces in the school are required to be XXXX and XXXX free because during a Section 504 team meeting, the District stated that given the School's allergy policy there was no need for that provision to be in the Section 504 plan.

On XXXXXXXX 2015, before the school day had begun, parents were invited to watch their children participate in XXXXXXXX. The XXXXX was held by the XXXXXXXX, who provided the parents and students in attendance with XXXX, XXXX, and XXXX. Some parents had also brought their own beverages into the gymnasium. The Complainant and the Student were present for the XXXXXXXX. The Complainant told OCR that she informed the Student's teacher that XXXXXXXXXX spilled on the floor and she requested it be cleaned up to prevent further contamination. The Complainant stated the teacher contacted the janitor and the spill was cleaned. However, the Complainant alleges that the teacher failed to implement the Student's 504 plan when she failed to direct the students to wash their hands after consuming the food prior to students entering the classroom. The Complainant states that the Student informed her that their teacher offered students wipes upon entry into the classroom but did not give a wipe to each student or ensure that each student used the wipe to clean his/her hands. The Student informed the Complainant that only two students took the wipes that were offered and wiped their hands.

The District acknowledges that food and beverages were served during the XXXXXXXX in the school gymnasium, in violation of the school's food-free zone policy. According to the District, once the Complainant told the Principal that there were food and beverages in the gymnasium, the Principal responded by speaking with the XXXXXXXXXX who confirmed that food was served in the gymnasium. The Principal reminded the XXXXXXXX that the gymnasium was a food-free zone, and had the gymnasium cleaned to prevent future allergen exposure. The Principal also spoke with the two teachers who participated in the XXXXXXXX and confirmed that the students and staff in attendance had either washed their hands or used hand wipes (provided by the Complainant for the Student's class) prior to returning to their classrooms. The District states the Student knew and maintained his safety protocol of only eating food brought from home. The Student did not have an allergic reaction.

The Complainant alleges that the same week of the XXXXXXXXXX incident, the Student's teacher XXXXXXXXXXXXXXXXXXXX and informed the students that in previous years she would XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX but due to food allergies and the new allergy policy in the District she was no longer able to do that. The Complainant alleges the students in the classroom groaned with sadness and the Student as a result felt isolated and embarrassed.

The District does not dispute the teacher's previous practice of XXXXXXXXXXXXXXXXXXXX during the XXXXXXXXXX for the students to observe. In XXXX 2015, the teacher XXXXXXXXXXXXXXXXXXXX for the students to enjoy but did not XXXXXXXXXXXXXXXXXXXX. The District informed OCR that the teacher did not recall making any comments about her past practice of XXXXXXXXXXXXXXXXXXXX. According to the Complainant, the teacher knew within the same week that the Complainant had raised concerns about food and beverages being served during the XXXXXXXXXX in the school gymnasium in violation of the food-free zone policy.

Allegation 1

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

In investigating a denial of a FAPE under Section 504, OCR first looks at the services to be provided as written in a student's plan or as otherwise agreed to by the student's team. If OCR finds that a district has not implemented a student's plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a FAPE.

Analysis of Evidence Obtained to Date

OCR's investigation determined that food and beverages were served in the school gymnasium during the XXXXXXXXXXXXXXXXXXXX in violation of the school's food-free zone policy. The District asserts that the gymnasium was immediately cleaned thereafter. In addition, there is conflicting evidence as to whether the provision in the Student's 504 plan concerning handwashing was implemented. OCR has not continued the investigation to resolve this discrepancy, or made any determination as to whether these circumstances resulted in a denial of a FAPE.

Allegation 2

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

In analyzing an individual’s claim of retaliation against a recipient, OCR analyzes whether: (1) the recipient knew the individual engaged in a protected activity;¹ (2) the individual experienced an adverse action caused by the recipient;² and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. However, if any one of the above elements cannot be established, then OCR cannot infer that retaliation occurred and will dismiss a complaint.

OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR examines this reason to determine whether it is a pretext for retaliation, or whether the recipient had multiple motives (illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for taking the adverse action. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the recipient proffered a legitimate, non-retaliatory reason for the action at issue and that the reason was not pretextual, then OCR will find insufficient evidence of a violation.

Analysis of Evidence Obtained to Date

While OCR concludes that the Complainant did engage in protected activity by raising concerns about food and beverages served in the gymnasium, OCR has not yet determined whether the Student’s teacher was aware of the Complainant’s actions, whether the teacher made the alleged statement concerning XXXXXXXXXXXXXXXXXXXX, whether there was a causal connection between the Complainant’s actions and the teacher’s alleged statements, and finally, whether the teacher’s alleged actions were sufficiently adverse to support a finding of retaliation.

Conclusion

Prior to the conclusion of OCR’s investigation and pursuant to Section 302 of OCR’s *Case Processing Manual*, the District expressed an interest in resolving this complaint and OCR determined that a voluntary resolution is appropriate. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations investigated. OCR will monitor the District’s implementation of the Agreement.

¹ A “protected activity” is the exercise of a right that is protected under OCR’s non-discrimination laws.

² An adverse action is something that could deter a reasonable person from engaging in further protected activity.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, you may contact Carla Moniz, Civil Rights Attorney at (617) 289-0047 or by e-mail at Carla.Moniz@ed.gov.

Sincerely,

/s/ Michelle Kalka
Michelle Kalka
Compliance Team Leader

Enclosure

cc: mlaubin@berchemmoses.com