



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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September 21, 2018

Dr. Janice K. Jackson
Chief Executive Officer
Chicago Public Schools, District #299
42 West Madison Street
Chicago, IL 60602

Via electronic mail

Re: OCR Docket #05-18-1298
XXX School

Dear Dr. Jackson:

This is to notify you that the U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Chicago Public Schools District 299 (District), alleging discrimination on the basis of disability. Specifically, the complaint alleges that the District discriminated against Student A, XXX at XXX School (School) on the basis of disability (food allergies), when, since XXX, the School:

1. Failed to conduct an evaluation and consider the placement options as required by the Section 504 regulation at 34 C.F.R. 104.35(c), prior to developing Student A's Section 504 Plan;
2. Failed to implement the provisions of Student A's Section 504 Plan when XXX exposure to food allergens XXX;
3. Exposed Student A to known food allergens on multiple occasions; and
4. Refused to modify its lunchroom policy to create an allergen-free table XXX.

In addition, the complaint alleges the District retaliated against the Complainant for advocating on behalf of Student A when the School Principal:

5. Excluded her from the XXX; and
6. Denied her request for a copy of XX incident report regarding Student A.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance and public entities, respectively. These laws also prohibit retaliation for certain protected activities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant. After carefully considering all of the information obtained during the investigation, OCR determined that there is insufficient evidence to establish that the District subjected the Complainant to retaliation in violation of Section 504 and Title II as alleged in Allegations 5 and 6. On June 12, 2018, the District expressed interest in voluntarily resolving Allegation 1 – 4 under Section 302 of OCR’s *Case Processing Manual*.¹ OCR determined that Allegations 1 – 4 are appropriate for resolution under Section 302 of the CPM.

Legal Standard

Discrimination Generally

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Evaluation, Re-evaluation and Placement Determinations

The Section 504 regulation at 34 C.F.R. § 104.35(a), requires a recipient to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(c), requires a recipient, when interpreting evaluation data and making placement decisions, to draw upon information from a variety of sources, ensure that information obtained from all sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student and meaning of the evaluation data, and the placement options.

Free Appropriate Public Education (FAPE)

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s disability. The Section 504 regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The development and implementation of a Section 504 Plan is one means by which FAPE may be provided.

¹ <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

Reasonable Modifications

The regulation implementing Title II at 28 C.F.R. § 35.130(b)(7) requires a public entity to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

In determining whether a reasonable modification is legally required, the recipient must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the recipient must allow it unless doing so would fundamentally alter the nature of the service, program, or activity. Even if a specific modification would constitute a fundamental alteration, the recipient is still required to determine if other modifications might be available. However, a recipient is not required to make modifications that would result in an undue administrative or financial burden.

Retaliation

The Section 504 regulation, at 34 C.F.R. § 104.61, incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by the regulation or because the individual has made a complaint, testified, assisted or participated in any manner in an investigation, hearing or proceeding under the regulation or opposed any act or policy that is unlawful under the regulation.

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

1. an individual experienced an adverse action caused by the recipient; and
2. the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and
3. there is some evidence of a causal connection between the adverse action and the protected activity.

To be considered adverse, an action must significantly disadvantage an individual or reasonably deter an individual from engaging in future protected activities. Minor slights or annoyances are insufficient to constitute adverse actions. In determining whether the recipient took the adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between

protected activity and adverse action, the recipient’s treatment of the individual compared to similarly-situated individuals, or the recipient’s deviation from established policies or practices.

If all of the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

District and School Policies and Procedures

The District has adopted the following policies² that are relevant to this complaint: Comprehensive Non-Discrimination Title IX and Sexual Harassment (Board policy 16-0525-PO1); Combined Americans with Disabilities Act and 504 Policy (Board policy 12-0125-PO1); Food Allergy Management (Board policy 11-0126-PO2); Student Records Retention (Board policy 13-0424-PO1); and Parent & Student Rights to Access to and Confidentiality of Student Records (Board policy 16-0928-PO1). The District also provided OCR a copy of the School’s Visitor Policy.

Non-Discrimination and Retaliation Policies

Board policies 16-0525-PO1 and 12-0125-PO1 prohibit discrimination based on disability. These policies also prohibit retaliation. The policies describe how individuals can file complaints alleging discrimination based on disability and also alleging retaliation, identify the complaint recipients, and detail the investigative process, including timeframes for the District’s investigation. These policies were in effect during the 2017-2018 school year.

Section 504 Plans for Students with Severe Food Allergies

Two District policies (Board policy 12-0125-PO1 and 11-0126-PO2) govern students with life-threatening allergies. Together, these policies establish how District schools develop Individual Health Care plans and Section 504 Plans, mandate training for school staff on preventing and managing allergic reactions, govern required documentation and medical authorization to permit staff and students to administer medication in case of an allergic reaction, set standards for information that Schools are to include in a student’s plan to prevent allergic reactions (i.e., “allergen exposure risk reduction”), require broad dissemination of the plan to school staff, ensure that common food allergens are subject to school-wide management and risk reduction, direct school-level staff to consult with District staff as needed, and provide for annual building level school-allergy response training.

Record Retention, Access and Confidentiality

Under Board policies 13-0424-PO1 and 16-0928-PO1, reports of serious student injury are considered “Temporary Student Records.” Board policy 13-0424-PO1 provides parents the right to inspect and copy such records. School administrators are required to maintain and safeguard

² <https://policy.cps.edu/Default.aspx>

confidential student records. *See* Board policy 16-0928-PO1. These Board Policies do not specify procedures through which parents obtain access to their students' records.

According to the School Principal, the School does not provide parents copies of incident reports documenting a school-based event such as exposure to a known food allergen. The Principal explained that if a parent requests an incident report, the School provides the parent with the Verify Report Number that corresponds to the report as it was entered in the District's incident report tracking system, Verify, and directs the parent to the District's Law Department to request a copy of the specific Verify report.

Cell Phone Use

The District's Student Code of Conduct³ prohibits cell phone use at school. It further provides that "If a principal denies a parent/guardian's request [to use a cell phone], the parent may appeal to the Network Chief or his/her designee."

School Visits

The School's Visitor Policy specifies that "Individuals who engage in any uncooperative or disruptive behavior while on school premises will be required to leave immediately," and "violators to the visitor policy may also be limited from entering the school building during future visits." According to the School Principal, parents or others who violate the Visitor Policy can be addressed verbally by school security or administration, escorted off school grounds if behavior is disruptive, and/or can be banned from School premises if the behavior is egregious.

Background

During the 2017-2018 school year, Student A was XXX.

The District developed a Section 504 Plan for Student A's food allergies. His most recent Section 504 Plan XXX includes an Individual Health Plan and attaches copy of the Emergency Action Plan XXX.

Disability Discrimination (Allegations 1 – 4)

Facts

The Complainant alleged that since XXX, School staff failed to conducted an age-appropriate individualized evaluation of Student A's needs, including how to limit exposure to his food allergens throughout the school day.

The Complainant also alleged that School staff failed to implement the provisions of Student A's Section 504 Plan as written. Specifically, she claims that XXX, School staff exposed Student A to food allergens in violation of his Section 504 Plan. According to the Complainant, on XXX, School staff gave Student A XXX. She claims that after he ingested XXX, staff did not

³ <https://cps.edu/Pages/StudentCodeofConduct.aspx>

XXXXXX, as required by Student A’s Section 504 Plan. According to the Complainant, Student A XXX. The Complainant reports that she also witnessed School staff give XXX to Student A during XXX in the School lunchroom in XXX. She noted that on these occasions Student A did not have a reaction because she intervened to prevent him from XXX.

The Complainant also asserts that School staff refused to modify the School’s lunchroom policy to create an allergen-free table for Student A XXX. Specifically, the Complainant reported that from XXX. The Complainant claims that after she discussed Student A’s lunch eating arrangement with the Principal, the Principal required Student A XXX. The Complainant reported that around XXX informed the Complainant that the School could not designate an allergen free table in the lunchroom for Student A.

According to the Complainant, Student A’s doctor recommended that Student A XXX available but did not recommend specific steps that should be taken to limit his exposure to allergens. The Complainant asserts that School staff and Student A’s Section504 team did not discuss, identify, or implement preventative measures appropriate in the school setting to limit food allergen exposure for Student A.

Conclusion

Prior to the conclusion of OCR’s investigation, the District expressed interest in resolving Allegations 1 – 4 of the complaint. Subsequent discussions with the District resulted in it signing the enclosed Resolution Agreement (Agreement) on September 19, 2018, which, when fully implemented, will resolve the disability discrimination allegations raised in the complaint. The provisions of the Agreement are aligned with the allegations and the information obtained during OCR’s investigation and are consistent with the applicable regulations. Specifically, pursuant to the Agreement, the District will convene a Section 504 Team Meeting for Student A to consider evaluation data and placement options in order to minimize Student A’s exposure to known food allergens and consider whether Student A requires compensatory services. The Agreement also requires the District to provide staff training.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during OCR’s investigation, and consistent with the applicable regulations. OCR will monitor the District’s implementation of the Agreement.

Retaliation (Allegations 5 and 6)

Facts

The Complainant alleged the District retaliated against her for advocating on behalf of Student A when the School Principal excluded her from the XXX and when the Principal denied her request for a copy of XXX-incident report regarding Student A’s XXX.

XXX

The Complainant claims the Principal has not allowed her to XXXXXXXXXXXXXXXXXXXX.

According to the Principal, as a practice, the School does not allow parents into XXX because the room is “very small and there is limited seating area for students.” He reported that the School makes an exception for the parents of preschool, kindergarten and first grade students, allowing them to escort their children XXX during the first week of class only. The Principal maintains that outside of this practice, the only other exception he is aware of was made for the Complainant when he permitted her to visit Student A XXX.

The Complainant reported that she may have seen other parents XXX while she was visiting Student A XXX.

The Principal claims that in XXX staff informed him that the Complainant was using her cell phone to record videos of students in the lunchroom. The Principal maintains that he discussed staff observation with the Complainant and advised her she was prohibited from using her cell phone to take photographs or record videos while in the School because of student privacy concerns. According to the Principal, XXX after he spoke to the Complainant about the prohibition against using cell phones to take photos or record videos while in the School, XXX staff again reported to him that they had witnessed the Complainant using her cell phone to take videos of students XXX. The Principal maintains that XXX observed the Complainant “panning the cafeteria with her cell phone videotaping the students.” According to the Principal, because the Complainant continued to use her cell phone to record videos of students after being advised that such conduct was prohibited, he informed the Complainant that she was prohibited from XXX.

The Complainant confirmed that the Principal told her that she was not allowed to take pictures XXX because of student privacy, but claims that she informed the Principal that she was not taking picture of students and promised not to take photographs again. The Complainant believes the Principal XXX. The Complainant does not allege that she appealed the Principal’s ban on her use of the cell phone XXX

According to the Principal, over the last three school years, the School escorted a parent from school premises and banned the parent from the lunchroom because the parent was intoxicated and belligerent with lunchroom staff. The District and the School did not receive a complaint of discrimination or violation of the laws enforced by OCR from the parent who was escorted off the premises.

The Incident Report

According to the Complainant, XXX, she requested a copy of the incident report that was created related to Student A’s XXX. She asserts that the School Principal told her that the School did not create an incident report because XXX.

According to Principal XXX his staff wrote an incident report regarding XXX (Report). The Principal denies telling the Complainant that the School did not create an incident report and he also denies that the Complainant requested a copy of the Report XXX. The Principal reported that XXX, the Complainant asked whether an incident report had been created XXX. The

Principal asserts that School staff showed the Complainant a copy of the Report but told her that they could not provide her a copy of the Report to keep. According to the Principal, in accordance with the School's procedures, his staff informed the Complainant that if she wanted a copy of the Report she needed to request it from the Law Department and provided her the Verify report number. The District provided OCR a copy of the Report.

The Complainant denies that School staff advised her to contact the Law Department to request a copy of the Report.

Analysis

OCR determined that the Complainant engaged in protected activity throughout the XXX school year when she requested a Section 504 Plan for Student A that would address his food allergies and complained internally about School staff's failure to implement his Section 504 Plan.

XXX

It is undisputed that the Complainant was not permitted to return to XXX. OCR assumed for the purpose of this analysis that the ban XXX constitutes an adverse action, and that there is some evidence of a causal connection between the ban and the Complainant's protected activity, which followed closely in time. Next OCR considered whether the District provided a legitimate, non-retaliatory explanation for banning the Complainant XXX.

In this case, the evidence established that the Principal barred the Complainant from XX because of her repeated violations of the School's cell phone use policy and not because of her advocacy on behalf of Student A.

OCR determined that the Principal made an exception to the XXX for the Complainant, but did not similarly grant her an exception to the cell phone policy generally, or to the specific requirement that visitors not use cell phone cameras to film students in school. Only after the Principal determined that the Complainant continued to record students in the lunchroom with her cell phone after he instructed her not to do so, did the Principal bar her from XXX. The evidence revealed that in doing so, the Principal treated the Complainant in accordance with his treatment of all other parents, XXXX.

Further, the evidence revealed that the Principal did not immediately ban the Complainant XXX, XXX, and then banned her only after he received an additional report that he substantiated with a direct observation of the Complainant filming students.

While the Complainant maintains that she was XXX as proof of the School staff's violation of his Section 504 Plan and denies recording other students with her cell phone, the Complainant does not dispute that the Principal provided her a warning XXX. Nor has the Complainant alleged that she was treated differently than similarly-situated individuals. In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. For the reasons noted above, OCR finds insufficient evidence that the Complainant's protected conduct, rather than her

recording of students, caused the Principal to bar her XXX. Therefore OCR finds insufficient evidence of retaliation. Accordingly, OCR has closed this allegation.

Incident Report

It is undisputed that the School did not provide the Complainant a copy XXX-incident report, although the Principal asserts that School staff showed the Report to the Complainant. Other than the Complainant's assertion, OCR found no evidence that School staff told the Complainant that a Report was not created. In addition, the Principal maintains that School staff told the Complainant that she could obtain a copy of the Report from the Law Department and provided her with the Verify incident number to use in requesting the Report, in accordance with District and School policy. The Complainant denies that the School showed her a copy of the Report or informed her that she could get a copy from the Law Department. Under these circumstances, where the parties presented conflicting testimony, OCR is unable to substantiate the Complainant's assertion that she was denied a copy of the Report. Because OCR is unable to substantiate that the Complainant experienced an adverse action with respect to the Report as alleged, a *prima facie* case of retaliation was not established. Accordingly, OCR has closed this allegation.

This concludes OCR's investigation of the complaint and 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. The complainant may file a private suit in Federal court, whether or not OCR finds a violation.

We appreciate the cooperation you and your staff extended to OCR during the investigation of this complaint. In particular, we wish to thank Ms. Dalila P. A. Bentley, EOCO Administrator. OCR looks forward to receiving the District's first monitoring report, which is due by October 31 2018. If you have any questions, please contact Tamara Perry, Attorney, at 312-730-1510 or by email at Tamara.Perry@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney

Enclosure

cc: Dalila P. A. Bentley, via electronic mail
Susan Best, via electronic mail