



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 11, 2023

Mr. David Hines, Executive Director
Arizona Interscholastic Association
7007 North 18th Street
Phoenix, Arizona 85020

sent via email only to XXXX@XXXX.XXX

Re: **Arizona Interscholastic Association**
OCR Case 08-21-1090

Dear Mr. Hines:

We write to inform you of the resolution of the above-referenced complaint filed on January 27, 2021, alleging that the Arizona Interscholastic Association (AIA) and all public schools that are members of AIA discriminate based on disability. Specifically, the Complainant alleged that AIA has implemented a policy, since January 2021, that fails to provide student athletes, parents, and other spectators with disabilities exemptions from its face covering policy during athletic competitions and tournaments involving its member schools. On June 23, 2021, the Office for Civil Rights (OCR) of the U.S. Department of Education (Department) opened this allegation against AIA for investigation under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), and their implementing regulations. On May 10, 2023, AIA voluntarily entered into the attached Resolution Agreement (Agreement) to resolve the complaint under Section 302 of OCR's *Case Processing Manual* (CPM).

OCR is responsible for enforcing: Section 504 and its implementing regulation, at 34 C.F.R. Part 104, which prohibit discrimination based on disability in any program or activity operated by recipients of federal financial assistance; and Title II and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The Arizona public school districts that are members of AIA are subject to Title II and Section 504 as public entities that receive financial assistance of the Department. AIA is also subject to these laws and regulations for the reasons stated in our letter opening this investigation. We briefly summarize those reasons below.

AIA is subject to Section 504 because its member districts are recipients of federal financial assistance that have ceded to AIA controlling authority over portions of their interscholastic athletic programs. AIA's control over these portions of the public school districts' high school interscholastic athletic programs also makes AIA an instrumentality of Arizona school districts, and thus, a public entity for purposes of Title II. *See* 28 C.F.R. § 35.104 (defining a public entity under Title II, in part, as "any department, agency, special purpose district, or other instrumentality of a state or states or local government"). Although membership in AIA is

voluntary, public high schools from over 140 recipient school districts in Arizona are AIA members and failure to join AIA as a member precludes public high schools in Arizona from engaging in interscholastic athletic conferences with other Arizona public high schools. AIA also exercises ultimate authority over the qualifications of participating student athletes and coaches, and can sanction and expel such athletes and their public high school athletic programs for violation of AIA rules, like the rule at issue in this investigation, which allegedly required face coverings during athletic competitions and tournaments without offering any disability-based exemptions.

Facts

Based on its investigation to date, OCR has been able to determine the following, including from publicly available information about AIA and its rules regarding face coverings.

- On January 12, 2021, AIA's Executive Board determined that masks would be mandatory for all athletes.
- On January 13, 2021, AIA published winter sports guidance that read, "Face coverings are required for competition for all AIA athletes and strongly recommended during all athletic activities until it is determined that face coverings during competition are no longer needed. ... No face covering exemptions will be honored under any circumstance."
- On January 19, 2021, AIA published a frequently asked questions document that read, "My student-athlete has a medical condition. With a doctor's note, can my student play without a mask? Since participation is voluntary, there are no exceptions regarding mask-wearing at AIA officiated competitions. If a student finds themselves having extreme difficulty wearing a mask, it might be in the child's best interest to be seen by their doctor for evaluation and avoid engaging in strenuous sports during this time."
- On January 21, 2021, AIA published revised winter sports guidance that read, "All students, coaches and officials will be required to wear a cloth mask or gaiter for the entirety of a game/contest;" and "Parents/Legal Guardians in attendance at events are required to wear a face covering for the entirety of the contest."
- On March 2, 2021, AIA revised its mask mandate to specify that "all athletes and officials that are actively participating in competitions for the spring season and winter playoffs" are no longer required to wear masks, but that "all students, coaches and officials not actively participating in competition" and spectators were required to continue wearing an approved face covering.
- In July 2021, AIA issued new "Recommended Guidelines for Returning to Athletic Activity." The guidelines encourage but do not require masks.
- On August 29, 2022, AIA published "Recommended Guidelines for Returning to Athletic Activity," which recommends that the following individuals "should" wear a mask: sports medicine team members while in an athletic training facility and administering treatment to athletes; and individuals who have been in close contact with a person who has a positive COVID-19 test. Additionally, the guidelines include the following provision for athletes who test positive for COVID-19 and have no symptoms or mild symptoms: "Athletes with symptoms that resolve by day 5 and who have not had a fever for >24 hours without fever reducing medication prior to return to participation may

return to participation on DAY 6. ... If COVID-19 illness has resolved, athlete may be cleared to return to practice in a mask for all indoor activities and outdoor activities that involve being within 6 feet of other members of the team for longer than a total of 15 minutes daily. If the athlete is not able to wear a mask as described above, then the athlete should not return to practice until DAY 11. The athlete should not be cleared to participate in games through DAY 10 when they may stop wearing a mask.” Finally, the guidelines include the following provision for athletes who test positive for COVID-19, have moderate to severe symptoms, and are cleared by their parent and a qualified medical professional: “If prior to day 11 athlete may return to practice to begin a return to play progression in a mask through day 10.”¹

- The “Return to Play (RTP) Procedures After COVID-19 Infection” on AIA’s undated “COVID-19 Return to Play Form” reads, “Any athlete beginning their RTP on day 6 MUST wear a mask until day 11.”²
- As of this letter’s date, AIA’s “Recommended Guidelines for Returning to Athletic Activity” (August 29, 2022) and “COVID-19 Return to Play Form” remain in place.

Legal Standards and Analysis

Section 504 provides that “[n]o otherwise qualified individual with a disability ... 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); *see also* 34 C.F.R. § 104.4(a). Title II similarly provides that “no qualified individual with a disability shall, by reason of such 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 such entity.” 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.130(a). Under the Section 504 regulation, at 34 C.F.R. § 104.4(b)(1)(i), and the Title II regulation, at 28 C.F.R. § 35.130(b)(1)(i), recipients and public entities, respectively, in providing any aid, benefit, or service, may not, directly or through contractual licensing, or other arrangement, deny a qualified person with a disability the opportunity to participate in or benefit from an aid, benefit, or service.

Title II’s implementing regulations require “[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.” 28 C.F.R. § 35.130(b)(7)(i). Likewise, OCR and the courts have interpreted Section 504’s regulations as requiring reasonable modifications to existing practices to accommodate persons with disabilities. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017). To comply with these obligations, “an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.”

¹ See AIA Recommended Guidelines for Return to Activity - revised 8.24.21_KW (aiaonline.org) at <https://aiaonline.org/files/17051/aia-recommended-guidelines-for-return-to-activity.pdf>.

² See AIA COVID-19 Return to Play Form at <https://aiaonline.org/files/17128/aia-covid-return-to-play-form.pdf>.

See PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001) (analyzing the equivalent “reasonable modifications” requirement under Title III of the ADA).

During the investigation in this case, OCR identified a compliance concern about whether AIA’s mask policies, especially in January 2021, effectively excluded individuals with disabilities who cannot wear a mask or cannot wear one safely from participating in or attending athletic events because the policies did not provide a way to request or obtain reasonable modifications to the mask policies to avoid discrimination based on disability. To fulfill their Section 504 and Title II obligations, recipients and public entities generally must make reasonable modifications to their policies and procedures as needed to accommodate individuals with disabilities, but the evidence OCR has collected to date does not reflect that AIA made such modifications to its mask policies or shared the availability of such modifications with participants in its programs. *See* 34 C.F.R. §§ 104.4(a), (b), 104.37(a), 104.37(c) (Section 504); 28 C.F.R. §§ 35.130(b)(7), 35.149 (Title II).

Conclusion

When fully implemented, the Agreement will address OCR’s compliance concern based on the evidence obtained to date. OCR will monitor the implementation of the Agreement until AIA is in compliance with the terms of the Agreement and the statutes and regulations at issue in the case. OCR will monitor implementation of the Agreement through periodic reports from AIA demonstrating that the terms of the Agreement have been fulfilled. OCR will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and require actions to address such deficiencies. The Complainant will be sent a copy of OCR’s monitoring letters.

This concludes OCR’s investigation of the allegation and should not be interpreted to address AIA’s compliance with any law or regulatory provision, or to address any issues other than those addressed in this letter.

This letter sets forth OCR’s determination in an individual 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 note that the Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that AIA must not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testified, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a separate 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. In the event that OCR receives such a request, we will

seek to protect, to the extent provided by law, personal information, which, if released, could constitute an unwarranted invasion of privacy.

Thank you for AIA's prompt attention to this matter and cooperation. If you have any questions or concerns, you may contact Jason Langberg, the attorney assigned to this case, at (XXX) XXX-XXXX or XXXX@XXXX.XXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Program Manager

Attachment: Resolution Agreement

cc (via email): Jim Dean, Executive Board President (XXXX@XXXX.XXX)
Mark Mignella, Attorney for AIA (XXXX@XXXX.XXX)