UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:22-CV-63-KAC-DCP**
	)	
KNOX COUNTY,	)	
	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO A PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER

Defendant Knox County Board of Education ("KCBOE") submits this Motion and Memorandum of Law regarding Plaintiff's request for a Temporary Restraining Order and/or Preliminary Injunction.[1]

BACKGROUND

Plaintiff Jane Doe is a freshman student at L&N STEM Academy in the Knox County School system. L&N STEM Academy is a magnet high school focused on the disciplines of science, technology, engineering, and math.[2] The academic program is based on full-year classes with a typical course load of 8 simultaneous classes. L&N STEM Academy further uses an

[1] KCBOE has agreed to waive service of the Amended Verified Complaint and will submit a formal answer to the complaint at a later time.

[2]See Exhibit 1, L&N STEM Academy Handbook, Vision Statement, Pg. 2. "The L&N STEM Academy is a leader in STEM education through unique and innovative course offerings, faculty participation in international organizations, and facilitating national and international collaborative efforts for our students. As a platform school, we seek to establish global partnerships to develop and enhance research-based practices. Our faculty delivers inquiry-based instruction in small learning communities, challenging students to solve real-world problems. Through a design thinking approach, students develop critical thinking skills to become empathetic and collaborative citizens. Students own their learning outcomes, preparing them for success in postsecondary education. Graduates of the L&N STEM Academy are characterized by their professionalism, service, and integrity."

integrated curriculum and project-based instruction with 1:1 technology implemented throughout the school. [Exhibit 1].

Ms. Doe asserts that she suffers from misophonia, which causes her emotional distress in the presence of certain sounds. [Doc. 2-1, Pg. 2]. Although Ms. Doe has primarily identified "eating sounds" as her main "triggers," school and medical documentation note that Ms. Doe is triggered by "mouth noises" in general, such as eating and drinking, loud breathing/yawning, sniffling, typing, pen clicking etc. Additionally, Ms. Doe suffers from migraines. Ms. Doe has a 504-plan due to her misophonia *and* migraines at L&N STEM Academy that provides her the following accommodations while at school:

- Preferential seating away from distractions.
- Her personal use of noise cancelling device (e.g., headphones or hearing aid), alone or combined with a microphone on the teacher to amplify the teacher's voice.
- Reduction of classroom distractions.
- Student is allowed additional movement and/or water breaks.
- Breaks from the classroom when needed.
- Alternative location for lunch.
- Extra time to complete assignments and testing.
- Copies of notes and materials used in class when she was not present.
- Alternate assignments and assessments when needed by student due to absences from class.
- Testing done in an alternate location or setting.[3]

[3] A redacted version of Ms. Doe's 504 Plan at L&N STEM Academy is attached to this filing as proposed sealed Exhibit 2. KCBOE has filed a Motion to place this exhibit under seal out of an abundance of caution as the 504 plan includes two notes from her medical providers. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)("a defendant may introduce certain pertinent documents if the plaintiff fails to do so.").

Courts can "consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *see also Weiner v. Klais & Co. Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (noting documents that a defendant attaches to a motion to dismiss are also considered part of the pleadings if referred to in the complaint and central to the claim). Clearly, in a case where the Plaintiff has alleged a violation of Section 504 of the Rehabilitation Act, the Plaintiff's *504 plan* is central to her claim.

Ms. Doe is passing the majority of her classes at L&N STEM Academy.[4] However, Ms. Doe asserts that pursuant to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, the only way she can be granted "access" to KCBOE programming is for KCBOE to ban chewing/eating in all of her academic classes, including an elective "Genius Hour" offered at the school that overlaps the lunch period.

STANDARD

"[A] preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). It is "never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. "A plaintiff must affirmatively demonstrate his entitlement to injunctive relief." *Roden v. Floyd*, No. 2:16-cv-11208, 2018 U.S. Dist. LEXIS 216622, at *6-7 (E.D. Mich. Nov. 13, 2018).

In determining whether to issue a preliminary injunction (or temporary restraining order), the Court must examine four factors: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Leary*, 228 F.3d at 736 (citing *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en*

[4] The L&N STEM Academy is an academically rigorous school. It is not unusual for a freshman such as Ms. Doe to be failing one or more classes as they become accustomed to the workload and demands of the school. See Exhibit 1, Handbook, Pg. 19, Transfer Policies ("We believe students are responsible for their learning and success, and we demonstrate that with open technology and flexible scheduling. Some students struggle in this environment. They have difficulties handling the freedoms we provide. In most cases, this struggle turns out to be a positive experience.")

banc)). "These factors are not prerequisites" but are factors that are to be balanced against each other. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998) (citation omitted).

Plaintiff cannot establish a strong likelihood of success on the merits or that she will suffer irreparable harm. For the reasons set forth below, KCBOE has not violated the ADA and Section 504 and Plaintiff is therefore highly unlikely to succeed on the merits.

ARGUMENT

THE LAW DISFAVORS A MANDATORY PRELIMINARY INJUNCTION

Although Plaintiff has phrased her relief as requesting an injunction, the actual relief she is requesting is an *affirmative* order. Plaintiff is seeking a mandatory injunction against KCBOE. Mandatory injunctions are *disfavored* by the courts: "Mandatory injunctions are disfavored, and for good reason." *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 236 (4th Cir. 2014). Although the same factors must be weighed in granting either a prohibitory or a mandatory injunction, where "a preliminary injunction is mandatory—that is, where its terms would **alter**, rather than preserve, the status quo by commanding some positive action . . . the requested relief **should be denied** unless the facts and law ***clearly favor*** the moving party." *Glauser-Nagy*, 987 F. Supp. at 1011 (**emphasis** added). This reasoning has been followed by many District Courts in the Sixth Circuit. *Shirley v. Hynes-Simms*, No. 3:21-cv-00467, 2021 U.S. Dist. LEXIS 150874, at *29 (M.D. Tenn. Aug. 11, 2021); *Mayes v. Rodela*, No. 1:20-cv-00057, 2021 U.S. Dist. LEXIS 4345, at *21-22 (M.D. Tenn. Jan. 8, 2021); *King v. Hoskins*, No. 3:18-cv-891, 2018 U.S. Dist. LEXIS 171128, at *5 (M.D. Tenn. Oct. 3, 2018); *McNutt v. Centurion Med.*, No. 2:17-CV-212, 2018 U.S. Dist. LEXIS 18070, at *14 (E.D. Tenn. Feb. 5, 2018); *see also Vargas v. Janow*, No. 3:21-cv-00574, 2021 U.S. Dist. LEXIS 211524, at *37 (M.D. Tenn. Nov. 1, 2021); *Dixon v. Metro*

Nashville Police Dep't, No. 3:20-cv-00991, 2021 U.S. Dist. LEXIS 88342, at *12 (M.D. Tenn. May 7, 2021)(denying mandatory preliminary injunctions where plaintiff did not "clearly demonstrate" the factors.)

PLAINTIFF CANNOT ESTABLISH A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

PLAINTIFF HAS FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES AS REQUIRED BY THE IDEA

Although Plaintiff has carefully avoided any claims under the IDEA or its requirement that students with disabilities receive a "free and appropriate public education," ("FAPE") KCBOE asserts that the gravamen of her complaint is an alleged denial of FAPE. By way of summary, the IDEA was enacted by Congress "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. Section 1400 (d)(1)(A). In order to provide FAPE, a district must offer an educational program "that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (U.S. 2017).

> A dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE with the local or state educational agency (as state law provides). See §1415(b)(6). That pleading generally triggers a '[p]reliminary meeting' involving the contending parties, §1415(f)(1)(B)(i); at their option, the parties may instead (or also) pursue a full-fledged mediation process, see §1415(e). Assuming their impasse continues, the matter proceeds to a 'due process hearing' before an impartial hearing officer. §1415(f)(1)(A); see §1415(f)(3)(A)(i). Any decision of the officer granting substantive relief must be 'based on a determination of whether the child received a [FAPE].' §1415(f)(3)(E)(i). If the hearing is initially conducted at the local level, the ruling is appealable to the state agency. See §1415(g). Finally, a parent unhappy with the outcome of the administrative process may seek judicial review by filing a civil action in state or federal court. See §1415(i)(2)(A).

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 749 (2017). This is not a situation where Ms. Doe alleges that she cannot safely access a school building. *See e.g. Doe v. Perkiomen Valley Sch.*

Dist., No. 22-cv-287, 2022 U.S. Dist. LEXIS 21079, at *24-25 (E.D. Pa. Feb. 7, 2022)("Because this case concerns Plaintiffs' alleged inability to access on-site school learning, due to the optional masking policy, at its core, it involves accessing the facility rather than accessing the curriculum. The case is therefore not a FAPE-based claim and no administrative exhaustion requirement applies.")(emphasis added); *Arc of Iowa v. Reynolds*, 2022 U.S. App. LEXIS 2110, 2022 WL 211215, at *7 (8th Cir. Jan. 25, 2022) (finding that exhaustion was not required because student "**d[id] not challenge the substantive quality of his education**; only the physical safety associated with it")(**emphasis** added); *G.S. v. Lee*, No. 21-cv-02552-SHL-atc, 2021 U.S. Dist. LEXIS 182934, at *34-35 (W.D. Tenn. Sep. 17, 2021)("For instance, G.S. could have a need to attend a form of therapy at a public gym, or S.T. could need to access the public library that could only be obtained with protection from exposure to COVID-19....As such, the gravamen of Plaintiffs' complaint is not to seek a FAPE, but rather to seek 'non-discriminatory access' to their public schools by way of a reasonable accommodation.")

In an attempt to circumvent the exhaustion requirement, Plaintiff has included a conclusory allegation that "L&N is causing physical harm" to Plaintiff, as well as the of the words "safely access her education." [Doc. 8, Pg. 9, ¶17; Pg. 10, ¶20]. However, Plaintiff has put forth absolutely no factual allegations that the issue at hand is about some sort of potential "physical harm." Indeed, Plaintiff's medical expert opined that Ms. Doe's "frequent need to escape from triggers has [caused] a gap in learning...." [Doc. 2-2, Pg. 4, ¶10]. In fact, the primary evidence that Plaintiff puts forth that she is being denied "access" to her education is that she used to be a "straight A student" and now she is not. [Doc. 8, Pg. 6, ¶17].[5] Moreover, Plaintiff then emphasized that by failing to provide her requested accommodation (a classroom ban on eating), KCBOE is

[5] Plaintiff's Complaint contains a numbering error, which results in there being two sets of paragraphs 13 – 24. KCBOE has attempted to account for this error by providing page number references as well as paragraph numbers.

"negatively affecting Jane Doe's grades and learning." *Id.* Here, Plaintiff Doe *is* directly challenging the "substantive quality of [her] education," *Arc of Iowa*, 2022 U.S. App. LEXIS at 2022.[6]

Fry proposes two questions to determine if the gravamen of a case involves consideration of FAPE. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017). "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?" *Id.* Clearly that answer is no in this case. Plaintiff Doe cannot go into a public theater or public library and assert that the sound of other people chewing/drinking is impacting *her grades or ability to learn.* Moreover, unlike a public theater or library, mandatory attendance laws require that Plaintiff receive an education. Tenn. Code Ann. §49-6-3001.

"[S]econd, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* The answer to this question is also "No." An adult visitor or employee at a public school could not bring a claim against a school for failing to educate them, or that other student's actions are impeding their *learning*.

> Take two contrasting examples. Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps. In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-

[6]Plaintiff can say that she does not need "specialized instruction," but it certainly sounds like she is alleging that she needs a specialized plan for her instruction. KCBOE would direct this Court's attention to educational tools such as the Functional Behavior Assessment ("FBA") and Behavioral Intervention Plan ("BIP") as both are frequently used by Individualized Education Program ("IEP") teams under the IDEA. 34 CFR 300.324 (a)(2)(i). The purpose of an FBA is to isolate a target behavior and to determine the function of the target behavior. Generally speaking, a target behavior is one that interferes with a student's ability to progress in the curriculum. Once the target behavior is identified, a positive behavior intervention plan can be prepared to address the target behavior with positive support strategies and interventions. A student's need for behavioral interventions and supports must be decided on an individual basis by the student's IEP team. 71 Fed. Reg. 46,683 (2006).

> world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education.
>
> . . .
>
> But suppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in mathematics. That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial? The difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE, thus bringing §1415(*l*) into play.

Fry, at 743. KCS asserts that *Fry v. Napoleon Cmty. Sch.*, 197 L.Ed.2d 46, 51 (U.S. 2017), clearly places applies to this matter and contends that Plaintiff must exhaust her administrative remedies through a due process hearing before advancing to other courts.

PLAINTIFF HAS FAILED TO STATE A CLAIM OF DISCRIMINATION UNDER THE ADA OR SECTION 504

Assuming *arguendo* that this Court determines that Plaintiff does not need to exhaust her administrative remedies, she still cannot demonstrate a strong likelihood of success on her claims. A plaintiff bringing a claim of discrimination under Section 504 must show, directly or indirectly, that (1) she is disabled under the statute; (2) she is "otherwise qualified" to participate in the program; and (3) she was excluded from participation in, denied the benefits of, or subjected to discrimination under the program **solely by reason of his disability**. *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008); *see also Clemons v. Shelby Cnty. Bd. of Educ.*, 818 F. App'x 453, 464 (6th Cir. 2020).

Likewise, to establish a *prima facie* case of discrimination under the ADA, Plaintiff must show "that [s]he (1) is disabled under the statutes, (2) is 'otherwise qualified' for participation in

[a state or local government] program, and (3) 'is being excluded from participation in, denied the benefits of, or subjected to discrimination' because of [her] disability or handicap." *Gohl v. Livonia Pub. Schs. Sch. Dist.,* 836 F.3d 672, 682 (6th Cir. 2016). The plaintiff must also establish that "but for [her] disability, the discrimination would not have occurred." *Id.*; *Cooley v. W. Mich. Univ.*, No. 17-2245, 2018 U.S. App. LEXIS 8738, at *7 (6th Cir. Apr. 5, 2018).

Although Plaintiff alluded to educational and/or physical harm she is enduring, the facts are that she is being provided *numerous reasonable accommodations*, she is attending her chosen school, she is accessing the curriculum at that school and accessing her classes. In fact, the only support for her allegations that she is being denied access to her education is the *implication* that she is no longer a straight A student, but even that is merely implied, since Plaintiff did not include an accounting of her actual grades. There are no allegations that Plaintiff has been excluded from "participation in, denied the benefits of, or subjected to discrimination [in]" KCBOE's services or programming "because of their disability or handicap." *Gohl,* 836 F.3d at 682.

Plaintiff has made *no* attempt to allege that she has been denied access to the same curriculum, teachers, courses, report cards, or any other hallmarks of education as her non-disabled peers. Her only assertion is that her triggers have required her to leave the classroom on occasion. KCBOE would note that Plaintiff continually neglects to mention that she has misophonia *and* migraines. Plaintiff has often missed school/classes due to her *migraines* i.e., she is not only leaving class when "triggered." [Exhibit 2, 504 Plan and Medical Documentation]. As noted above, she has a 504 plan that provides accommodations to address any issues that might arise from having to leave class (regardless of the cause), including her being allowed to take breaks from class, extra time on assignments, and to receive notes/materials for anything she may have missed in class. Plaintiff has failed to raise a "substantial" question—or even allege—that she has been

denied access to L&N STEM Academy. Thus, KCBOE has not violated her rights to access under the ADA or Section 504.[7]

KCBOE IS ALREADY PROVIDING PLAINTIFF WITH REASONABLE ACCOMMODATIONS

The crux of the matter is that Plaintiff has not asserted she has been *denied* access; rather, she is arguing that her access is not happening *in the manner she prefers*. But neither the ADA nor Section 504 entitle the Plaintiff to the reasonable accommodation of her choice.

Ms. Doe has a 504 plan that provides her the following accommodations while at school:

- Preferential seating away from distractions.
- Wearing a noise cancelling device herself and/or having the teacher use a microphone to amplify the teacher's voice.[8]
- Reduction of classroom distractions.
- Student is allowed additional movement and/or water breaks.
- Breaks from the classroom when needed.
- Alternative location for lunch.
- Extra time to complete assignments and testing.
- Copies of notes and materials used in class when she was not present.
- Alternate assignments and assessments when needed by student due to absences from class.
- Testing done in an alternate location or setting.

Because KCBOE has provided reasonable accommodations that address Plaintiff's concerns regarding her misophonia and migraines, it has satisfied the requirements of the ADA and Section 504.

Under the relevant law, a disabled person is "otherwise qualified" for a program if she could meet its requirements with a reasonable accommodation. *See Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998); *see also* 29 U.S.C. § 794(d); 28 C.F.R. § 41.53. "And when that holds true, a denial of the requested accommodation may amount to

[7]Plaintiff's argument that this case is about "safe access" does not stand up in the face of her Complaint. There is *nothing* to support the proposition that Plaintiff cannot physically enter her school and in fact, she does so *every* day.

[8] The teacher's microphoned voice could be directly transmitted to the student's headset via Bluetooth technology.

unlawful discrimination." *Doe*, 926 F.3d at 243. However, a plaintiff is not entitled to "every accommodation he requests or the accommodation of his choice." *Yaldo v. Wayne State Univ.*, 266 F. Supp. 3d 988, 1010 (E.D. Mich. 2017). A person is entitled *only* to a "reasonable" public accommodation of his disability, and *not* to the "best possible" accommodation. *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App'x 162, 167 (6th Cir. 2003)(unpublished)(citing *Dong ex rel. Dong v. Bd. of Educ.*, 197 F.3d 793, 800 (6th Cir. 1999)); *Hankins v. Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996)("As the Supreme Court has held in analogous circumstances, an employee cannot [demand] a specific accommodation if another reasonable accommodation is instead provided."). Therefore, when an individual already has "meaningful access" to a benefit to which he or she is entitled, no additional accommodation, "reasonable" or not, need be provided. *A.M. v. N.Y.C. Dep't of Educ.*, 840 F. Supp. 2d 660, 680 (E.D.N.Y. 2012); *see also Keller v. Chippewa Cty.*, 860 F. App'x 381, 386-87 (6th Cir. 2021) ("Though Keller may not have received the precise type of medical treatment that he would have preferred, undisputed facts show that he received 'meaningful access' to medical treatment.")

In short, if KCBOE is already providing a reasonable accommodation, then no further accommodations are required by law. *Gaines v. Runyon*, 107 F.3d 1171, 1178 (6th Cir. 1997) ("The Rehabilitation Act does not impose a duty to provide every accommodation requested.").

KCBOE DOES NOT HAVE A DUTY TO IMPLEMENT AN INEFFECTIVE REASONABLE ACCOMMODATION

Additionally, it is hard to imagine how KCBOE could *effectively* implement Plaintiff's desired accommodation, i.e., banning chewing in the classroom. First, Plaintiff is highly triggered by more than just chewing. Indeed, according to her own medical records, Plaintiff is triggered by mouth noises in general (such as chewing, eating, lip smacking, and gulping) as well as other more common noises that simply cannot be controlled, such as scratching, skin rubbing together,

sniffing and *typing*. Moreover, as noted by her medical expert, Plaintiff is *highly sensitive* to these sounds, and can be triggered in "milliseconds." [Exhibit 2, Medical Documentation; Declaration of Dr. Storch, ¶9]. Even regarding Plaintiff's requested ban on eating and chewing, it is entirely possible that Plaintiff will hear sounds that her teachers cannot even detect and be triggered *before* a teacher could intervene to prevent those activities. Furthermore, would a ban on eating in the classroom actually prevent "mouth" noises? What if a nervous student is chewing on a pen cap or their nails? Even if the sound were then located and identified, Plaintiff would still be in emotional distress from hearing the sound in the first place. If KCBOE cannot provide the reasonable accommodation requested by Plaintiff, it could not have violated either the ADA or Section 504. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 409, 99 S. Ct. 2361, 2369 (1979) (finding no violation where the plaintiff could not have benefited from any reasonable accommodation). Therefore, Plaintiffs' chances of success on those claims are extremely small.

PLAINTIFF'S REQUESTED ACCOMMODATION IS INHERENTLY UNREASONABLE

Despite allegations to the contrary, this case is not about whether KCBOE has a "policy" regarding food in classrooms, or whether teachers can or cannot ban eating in their individual classes; the question for this Court is whether the ADA or Section 504 of the Rehabilitation Act requires a ban on other students engaging in the normal activities of eating, drinking, or chewing when Plaintiff is in the classroom or attending an optional elective study hall.[9] Plaintiff has asserted that the ADA requires modifications to *the behavior of other students* as *her* reasonable accommodation. Plaintiff's only support for this theory is a citation to a preliminary injunction

[9] Note that this 80-minute study hall is specifically designed to coincide with lunch, and sometimes even overlaps two lunch blocks, yet Plaintiff's suggested accommodation is that all students truncate their lunch to fifteen minutes to accommodate her needs.

regarding mask mandates that has no precedential value for this Court and was not even decided *on the merits*.[10]

KCOBE asserts that a reasonable accommodation is inherently *un*reasonable when it impedes the rights of others. "A third party's 'rights [do] not have to be sacrificed on the altar of reasonable accommodation.'" *Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 492 (6th Cir. 2019)(quoting *Temple v. Gunsalus*, No. 95-3175, 1996 U.S. App. LEXIS 24994 (6th Cir. Sept. 20, 1996).[11]

This principle has been applied numerous times in Title VII cases. *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002) (holding that a reasonable accommodation that violates an established seniority system is not reasonable); *Henderson v. Delta Airlines, Inc.*, No. 19-10441, 2021 U.S. Dist. LEXIS 24393, at *19 (E.D. Mich. Feb. 9, 2021) (discussing that a reasonable accommodation cannot impact the work schedule or amount of work given to another employee); *Averett v. Honda of Am. Mfg.*, No. 2:07-cv-1167, 2010 U.S. Dist. LEXIS 11307, at *30-31 (S.D. Ohio Feb. 9, 2010) and *Mitchell v. Univ. Med. Ctr., Inc.*, No. 3:07CV-414-H, 2010 U.S. Dist. LEXIS 80194, at *21-23 (W.D. Ky. Aug. 9, 2010) (both holding that it is not a reasonable accommodation to infringe on the religious freedom of other employees); *McDonald v. Potter*, No. 1:06-CV-1 Lee, 2007 U.S. Dist. LEXIS 57983, at *94 (E.D. Tenn. Aug. 7, 2007) (discussing how a mandatory scent-free policy would be burdensome and unworkable).

This is applied with equal force in cases concerning the Fair Housing Act ("FHA"). The FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges

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[10] To be clear, KCBOE has appealed the Preliminary Injunction cited by the Plaintiffs as precedential to the Sixth Circuit Court of Appeals. As of the date of this filing, no decision has been rendered by that court. KCBOE has extensively briefed the issue of that case being an unprecedented expansion of the ADA, and its briefs are available to this court through the PACER system.

[11] This case involved interpretation of the Fair Housing Act, but courts have borrowed the analysis of "reasonable accommodation" under the FHA from the §504 of the Rehabilitation Act. See further analysis, *infra*.

of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of" that person. Additionally, the FHA defines "discrimination" to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Davis*, 945 F.3d at 489. The FHA adopted the concept of a "reasonable accommodation" from § 504 of the Rehabilitation Act, and therefore the FHA engages in a similar analysis of "reasonable." *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001). In characterizing a "reasonable accommodation" under the FHA, this Court has explained:

> The word 'accommodation' means 'adjustment.' 1 *Oxford English Dictionary* 79 (2d ed. 1989); *The American Heritage Dictionary of the English Language* 11 (3d ed. 1992). Like the word 'modification,' therefore, 'accommodation' is not an apt word choice if Congress sought to allow "fundamental changes" to a housing policy. Consider two examples: One would naturally say that a blind tenant requests an accommodation from an apartment's 'no pets' policy if the tenant seeks an exemption for a seeing eye dog. But one would not naturally say that a tenant with allergies requests an accommodation from an apartment's 'pet friendly' policy if the tenant seeks a total pet ban. The former tenant seeks a *one-off adjustment*; the latter seeks a *complete change*. The word 'accommodation' includes the first, but not the second, request.

Davis, 945 F.3d at 490 (internal citations removed)(*emphasis* in original).

In determining whether a policy constitutes a reasonable accommodation under the FHA, courts routinely reject accommodations that interfere with the rights of third parties. *Id.* at 492 (holding that a tenant's request to ban smoking in the condominium complex where she resided to ease her asthma symptoms was not a reasonable accommodation because the smoking ban fundamentally altered the complex's smoking policy and "would intrude on the rights of third parties"). Similarly, this Court has also rejected a tenant's request to force his neighbor out of the apartment complex in violation her lease to accommodate tenant's mental-illness-induced

screaming and door slamming at all hours of the night. *Groner*, 250 F.3d at 1046-47. As the Court explained, "[b]ecause [the apartment complex] has a legitimate interest in ensuring the quiet enjoyment of all its tenants, and …there [was] no showing of a reasonable accommodation that would have enabled Groner to remain in his apartment *without significantly disturbing another* tenant," the tenant's request was denied. *Id.* at 1047; *see also*, *Temple*, 1996 U.S. App. LEXIS 24994 at *2 (unpublished table decision) (holding that the Fair Housing Act did not require a landlord to evict a neighboring tenant in order to accommodate the plaintiff's multiple-chemical-sensitivity disorder) (*Emphasis* added).

The only way to enforce Plaintiff's desired "reasonable accommodation" is to directly impact the rights of other students in her classroom; this is inherently *unreasonable* and poses an undue burden to KCBOE. To illustrate a contrasting situation, significant allergies are a fairly common issue for students, and schools often provide reasonable accommodations for students with significant allergies. These reasonable accommodations are typically limited to discouraging students from bringing the allergen to school or providing allergen-free options for the student to pick from, as opposed to blanket bans specifically because they would be difficult to police.[12]

Likewise, when a student with asthma wanted a mandatory rule banning fragrances in the building, the Court held that "a mandatory policy also limits the choices of the non-disabled population at [school]." *Hunt v. St. Peter Sch.*, 963 F. Supp. 843, 853 (W.D. Mo. 1997). The school

[12] *Office for Civil Rights*, 107 LRP 71146, (March 22, 2007) (The district addressed the parents' food contamination concerns by advising a teacher to cease offering food to students as a reward, reminding classmates to bring peanut-free snacks, and only providing closed milk cartons to students versus opened ones that are more likely to contain allergens.); *Office for Civil Rights*, 120 LRP 25590, (June 12, 2020) (district resolved a claim by agreeing to provide allergen-free food to a student at school and school events); *see also Oregon State Educational Agency*, 102 LRP 34074, (November 12, 2002) (school district posting signs in student's classroom reminding students to wash their hands after handling allergens was a reasonable accommodation and the school did not have to impose a blanket prohibition on any food product because it would an undue administrative burden for the district to police the behavior of parents)(copies of the above are attached to this motion).

already had a voluntary fragrance-free policy in place as a reasonable accommodation. The Court looked to employment law cases and noted "an employer is not required to make accommodations that would violate the rights of other employees." *Id.* "There is nothing in the Act to suggest that the non-disabled population was expected to give up or substantially alter their lifestyle." *Id.* The Court opined at great length of the benefits of a voluntary scent free policy versus a mandatory policy:

> A mandatory policy, however, goes far beyond educating parents, students and teachers about Stephanie's allergies. Plaintiffs fail to recognize that a voluntary policy gives the school substantial flexibility and continued control over the management of their program. If the policy becomes mandatory, the school must enforce it or risk leading students and staff to conclude that compliance with the rules is not really required. Schools, like courts, are at risk of undermining the credibility of the institution when they make orders that cannot be enforced. Plaintiffs also fail to recognize that a mandatory rule is often resisted more vigorously than a voluntary policy.
>
> ...
>
> Plaintiffs attempt to minimize the foregoing concerns by pointing to the dress code policy at St. Peter, and they suggest that it would be a simple matter to add scents to the things which the students could not wear. The fallacy in the argument is that a violation of the dress code is quickly apparent. Scents are more personal and would require a closer inspection than would be comfortable for either the administrator or the interloper. Sniffing may be appropriate in the wild kingdom but not in an elementary school.
>
> ...
>
> The burden of such a mandatory policy is best illustrated by Mrs. Hunt's own response when confronted with irritants outside the school. On Easter weekend in 1996, Stephanie played in houses where dogs and cats were present. Mrs. Hunt did not require those dogs or cats to be removed, nor did she forbid Stephanie to play where she would be exposed to irritants. Likewise, on that same weekend, Mrs. Hunt did not require her relatives to leave a family gathering because some of them were wearing scents. Instead, Stephanie played in the basement while the adults remained upstairs.

Id at 852-53. This analysis is especially relevant in the light of the fact that Plaintiff is highly triggered by mouth noises in general, as well as sounds like skin rubbing together, sniffing and *typing*. Would this ban apply to students chewing on their lips? Or just moving their mouth? Would it ban students from chewing on pencils or pen caps? How could a

teacher with significant less sensitive hearing than Plaintiff be expected to hear that noise?[13]

PLAINTIFF CANNOT ESTABLISH THAT SHE WILL SUFFER IRREPARABLE HARM

In evaluating the harm that will occur upon whether or not the stay is granted, courts generally consider three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Mich. Coal. of Radioactive Materials Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "[T]he harm must be both certain and immediate, rather than speculative or theoretical." *Id.* Aside from vague allegations that Plaintiff is enduring some sort of "physical harm," there is nothing to support that Plaintiff will suffer any harm, much less an "irreparable harm." She is attending school, she is attending her classes, she is accessing KCBOE programming, and she is being provided reasonable accommodations under her 504-plan. There is nothing to demonstrate a need for a temporary restraining order or a preliminary injunction.

THE REMAINING FACTORS CLEARLY WEIGH AGAINST PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION

The issuance of an injunction would cause substantial harm to KCBOE's programming. L&N STEM Academy is a unique school that thrives and relies on its teachers' authority to individually direct their classrooms. Each teacher establishes his or her own classroom culture with its set of rules and social mores. Some teachers lean more towards individual freedom, while some are stricter. But inhibiting these teachers' options in the manner requested by the Plaintiff directly

[13] Although Plaintiff has not asked, yet, for it as a reasonable accommodation, KCBOE must ask "what about typing?" If typing is a trigger for Ms. Doe which she has not asked for an accommodation regarding, then how will she avoid being triggered each and every day in a school with one-to-one technology? (One-to-one technology means that every student has a computer which he or she is expected to bring to school and use throughout the day.) Conversely, if Plaintiff were to ask for a ban on devices with keyboards, the very purpose of the STEM magnet school—its raison d'etre—is lost. The purpose of STEM schools is to teach students about scientific and technical matters and for them to become acquainted with and use the tools of technology.

infringes on their ability to teach. [14] Additionally, although Plaintiff suggests that it is a "rare" student who will demonstrate a medical necessity to eat in class, KCBOE asserts that there are actually many students who have such a need.[15] Similarly, KCBOE objects to the theory that only students with a "medical" condition will demonstrate a need to eat food or snack. Defendants hope that this Court will take judicial notice that teenagers eat at prodigious rates. Forcing other children to sit next to Plaintiff hungry just to avoid their making "mouth noises," *is* harmful. Finally, as discussed above, the requested injunction would cause an undue burden on L&N STEM Academy staff just from the difficulty in enforcing a mandatory "chewing" ban in any classroom Plaintiff is in. How much time will a teacher spend searching out "mouth noises" audible only to Plaintiff due to her sensitivity? Even more so in the purely elective "fun" time that is the Genius Hour which deliberately overlaps the lunch hour.

Moreover, the public interest lies in letting the judicial process work as it is intended. Plaintiff has argued that public interest lies in enforcing the ADA and Section 504. Plaintiff has a 504 plan that grants her accommodations in the classroom. This case is not about whether the ADA is to be "enforced," but about differences in opinion as to what is the appropriate reasonable accommodation. Clearly, that is a matter best decided after a full exploration of the facts, including discovery and a trial on the merits. No Plaintiff is entitled to a temporary restraining order "as of

[14] The culture of the L&N STEM Academy is to provide students with a great deal of autonomy. In essence, students there receive the physical academic freedom that most students do not encounter until college. That is a vital part of L&N's culture, and Plaintiff's requested accommodation(s) would damage that culture.

[15] E.g., students who suffer from diabetes or other blood-sugar disorders, who need to be able to eat upon need; students who, like Plaintiff, suffer from migraines and need snacks/drinks to be available; or students with anxiety or concentration issues. Furthermore, due to its unusual schedule, athletic team practices occur either very early in the morning or later in the evening that is normal. L&N has cross country teams, track teams, golf, tennis, crew, and swim & dive teams. Additionally, many of its students play on the teams of other (non-KCBOE) organizations. These early/late practices times or need to travel immediately afterschool, mean a student must often eat when and how they can beforehand, in order to prepare their bodies for the athletic events.

right." *Winter* at 24. "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. "A plaintiff must affirmatively demonstrate his entitlement to injunctive relief." *Roden*, 2018 U.S. Dist. LEXIS at *6-7. Plaintiff has failed to do so.

CONCLUSION

For the reasons stated above, KCBOE asks that this Court deny Plaintiff a preliminary injunction or temporary restraining order.

Respectfully submitted,

s/Amanda Lynn Morse
Amanda Lynn Morse (BPR # 032274)
Deputy Law Director
Suite 612, City-County Building
400 Main Street
Knoxville, TN 37902
(865) 215-2327

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on the date recorded by the Court's electronic filing system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular United States Mail, postage prepaid. Parties may access this filing through the Court's electronic filing system.

s/Amanda Lynn Morse
Amanda Lynn Morse

Special Ed Connection

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South Windsor (CT) Public Schools

Office for Civil Rights, Eastern Division, Boston (Connecticut)

01-06-1200

March 22, 2007

Related Index Numbers

10.065 Procedural Safeguards
405.030 Discrimination
405.065 Procedural Safeguards
405.076 Section 504 Plans

Ruling

Despite alleging that a Connecticut district failed to implement the food safety provisions in their sons' Section 504 plans, the parents of two brothers with food allergies failed to show that the district discriminated against their sons on the basis of their disability. OCR nonetheless ordered the district to revise its procedural safeguards to comply with Section 504.

Meaning

The prompt investigation of an alleged implementation failure is a district's best response to a Section 504 claim. If a district receives reports that a teacher or other staff member has disregarded certain provisions in a student's 504 plan, it should discuss the matter with the employee as soon as possible and stress the importance of the employee's compliance. Here, the district properly addressed the parents' food contamination concerns by advising a teacher to cease offering food to students as a reward, reminding classmates to bring peanut-free snacks, and requiring students to drink from closed milk cartons.

Case Summary

Acknowledging that foods containing milk and peanuts occasionally made their way into the classrooms of two brothers with food allergies, OCR still determined there was insufficient evidence that a Connecticut district failed to implement the siblings' 504 plans. OCR concluded that the district's quick response to the parents' reports of food violations effectively prevented any further incidents. The parents alleged several violations of the students' 504 plans. For example, they maintained that one of their son's

teachers used food as a treat or reward in class. An investigation revealed that the teacher did in fact offer food as a treat on one occasion. However, OCR noted that the district immediately spoke with the teacher about the incident. "While this may have constituted a breach of a specific provision in [the student's] Section 504 plan, it was a single exception to the general practice of not using food as a treat or a reward, and it never happened again," OCR wrote. OCR pointed out that the teacher reminded her students about her class's "peanut-free" policy after she received reports that some children had brought in snacks containing peanuts. Furthermore, OCR observed, the district removed classmates from the other child's lunch table when they were observed drinking milk from open plastic containers rather than closed cardboard containers. Finding that the district took reasonable steps to remediate any implementation failures, OCR concluded that it did not discriminate against the brothers. OCR nonetheless ordered the district to revise its procedural safeguards to comply with Section 504.

Judge / Administrative Officer

Carolyn F. Lazaris, Program/Administrative Manager

Full Text

Dr. Robert Kozaczka, Superintendent

South Windsor Public Schools

1737 Main Street

South Windsor, Connecticut 06074

Dear Superintendent Kozaczka:

The United States Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint that was filed against the South Windsor School District (District). The Complainants alleged that the District denied their sons, C and N, a free appropriate public education (FAPE); harassed N; and retaliated against the Complainants. Based on its investigation, OCR found insufficient evidence to support a violation relative to the FAPE, harassment and retaliation allegations. During the course of our investigation, however, we did identify compliance concerns regarding the District's grievance and due process procedures, which the District has voluntarily addressed through a resolution agreement (copy enclosed). The legal standards that OCR applied, and a summary of the facts and analysis on which we based our conclusions, follow.

This case was investigated under Section 504 of the Rehabilitation Act of 1973, and its implementing regulation at 34 C.F.R. Part 104 (Section 504), and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability, including harassment. Both laws also prohibit retaliation. Section 504 at 34 C.F.R. Section 104.61 (incorporates by reference 34 C.F.R. Section 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964); Title II at 28 C.F.R. Section 35.134. The District is subject to the requirements of Section 504 because it receives Federal financial assistance from the United States Department of Education (Department), and it is subject to the requirements of Title II because it operates a public school system (public entity).

Issues

Based on the Complainant's allegations, OCR investigated the following issues:

Whether the District discriminated against C and/or N, by denying him/them a free appropriate public education [34 C.F.R. Sections 104.33(a) and (b), 104.35(c), and 28 C.F.R. Section 35.130(a) and (b)(1)(i-v)] (FAPE).

Whether the District harassed N, by a member of the cafeteria staff allegedly making comments to him because of his disability [34 C.F.R. Section 104.4(a) and (b) (ii) and (vii) and 28 C.F.R. Section 35.130 (a) and (b)(iv) (harassment).

Whether the District retaliated against the Complainants, by not allowing them to serve as parent representatives on its Food Allergies in Schools Committee (Committee), because they advocated for their sons' rights under Section 504 and Title II [34 C.F.R. Section 104.61 and 28 C.F.R. Section 35.134 (a) and (b)] (retaliation).

As part of our investigation, OCR considered all of the information that the Complainants provided, information we received from the District, and information that we gathered independently. We also interviewed the Complainants and District staff and conducted an on-site visit to the District.

Summary of Facts and Analysis

FAPE

The Complainants alleged that the District discriminated against their sons, C and N, during the 2005-2006 school year, on the basis of their disabilities, by not implementing aspects of their Section 504 plans. The Complainants told OCR that both of their sons receive services under Section 504 only for food allergies, and that neither receives special education services. Both C's and N's respective Section 504 plans call for a variety of actions to be taken by the District to minimize the risk of both students being exposed to allergens, and to ensure that District staff and bus drivers are educated and trained in the dangers of food allergies and are familiar with the contents of C's and N's Section 504 plans. The Complainants alleged that, by not implementing their sons' Section 504 plans, the District put them at risk health-wise and excluded them from some school activities. Relative to this allegation, OCR investigated whether the District discriminated against C and/or N, by not implementing provisions of their Section 504 plans and denying him/them a FAPE.

The Section 504 regulation at 34 C.F.R. Section 104.33(a) requires that recipients of funding from the Department, such as the District, that operate a public elementary or secondary education program or activity provide a FAPE to each qualified person with a disability who is in the recipient's jurisdiction. Section 104.33(b) of the regulation states that the provision of an "appropriate" education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled person are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 104.34-104.36. Because the Title II regulation at 28 C.F.R. Part 35 does not contain any specific FAPE requirements, OCR uses the Section 504 standards to determine compliance under Title II with respect to FAPE issues.

With respect to the implementation of specific provisions of C's and N's Section 504 plans, the Complainants alleged:

- During the 2005-2006 school year, C's teacher was using food as a treat or reward.

- Prior to June 5, 2006, several children in C's class were eating peanut-containing snacks in the classroom.

- During the 2005-2006 school year, food from the outside was coming into C's classroom without the requisite notice to the Complainants to ensure that the food was allergen free.

- During part of the 2005-2006 school year, the bus drivers did not have a copy of the emergency procedures.

- Cafeteria staff and the supervisory aide did not review N's Section 504 plan.

- Cafeteria staff and the supervisory aide did not "receive education regarding food allergies and food safety in the cafeteria."

- During the 2005-2006 school year, children seated at N's table in the cafeteria were drinking milk from open plastic containers, rather than from the "required" cardboard containers.

The Complainants alleged that on several occasions during the 2005-2006 school year, C's teacher used food as a treat for students, contrary to C's Section 504 plan. The District denied that this happened several times, but acknowledged that in March 2006, C's teacher did use food as a treat. We also found, however, that as soon as the matter was brought to the attention of the District, District staff spoke with the teacher, and she never used food again as a treat or reward. Our investigation also revealed conflicting evidence concerning whether during the 2005-2006 school year students in C's classroom ate peanut-containing snacks. According to C's teacher, she did not observe any peanut-containing snacks being brought into the classroom, but after the Complainant's assertion that peanut snacks had been brought into C's classroom, she reminded the class of the peanut-free policy, and she informed C that he should inform his teacher or other staff if he observes a peanut-containing snack in class. According to C's teacher there were no reports of peanut snacks in the classroom after the Complainants notified the District of the Complainant's concern. The Complainants acknowledged that, once this matter was brought to the attention of the District, it stopped and, to the Complainant's knowledge, has not happened since. OCR has concluded that these facts do not rise to the level of a denial of a FAPE under Section 504. While this may have constituted a breach of a specific provision in C's Section 504 plan, it was a single exception to the general practice of not using food as a treat or reward, and it never happened again. We were not able to substantiate that peanut-containing snacks were brought into the classroom, but we found that once the Complainants asserted that this had happened, the District took appropriate actions, such as speaking with the teacher and sending notices to parents, concerning the prohibition of peanut-containing products in the classroom and these actions were effective in preventing further such incidents.

With respect to the Complainant's allegation that the District allowed food to come into C's classroom without providing the Complainants with the requisite notice to ensure that the food was allergen free, we found that C's Section 504 plan was not explicit regarding the requirement of advance notice to the Complainants. The plan "strongly suggested" that non-food items be sent in for birthday celebrations, and that the Complainants would be "notified well in advance" of curriculum-based events that would involve food. The word "suggested" indicates that this is a recommendation, rather than a requirement, and consequently, the fact that this may have happened would not constitute a violation of the terms of the Section 504 plan, or a denial of a FAPE. With respect to the phrase "well in advance," our investigation revealed that this language appears under item eight of C's 504 plan and only applies to curriculum-based events. The only curriculum-based event referenced in the Complainant's original complaint was the Lewis and Clark expedition that OCR did not accept for investigation. C's Section 504 plan does not require that the District send the Complainants notice of birthday celebrations well in advance of the event. Consequently, because the provision relating to birthday celebrations was only a suggestion, not a requirement, we found insufficient evidence to support the Complainant's allegation that this provision of the plan was not implemented. We are making no determination regarding the notice requirement with respect to the Lewis and Clark expedition because we did not accept that for investigation due to a lack of a sufficient factual basis for us to investigate.

Regarding whether the bus drivers lacked a copy of the emergency procedures, OCR found that item 5 of C's Section 504 plan required that the District give an "Emergency Bus Plan" to the bus driver, for review, at the beginning and the middle of the school year. Item 2 of N's previous Section 504 plan that is the subject of this case, states that the District must give the bus driver an "Emergency Care Plan," and item 4 states that the school nurse must review the "Emergency Care Plan" with the bus driver at the beginning of the school year and at "mid-year to evaluate its efficiency and effectiveness." The District asserted that it had followed the terms of both C's and N's Section 504 plans and provided the "Emergency Bus Plan" to the bus driver for review at the beginning and the middle of the school year.

The Complainants stated that based on their conversations with the bus drivers, they did not believe that the drivers were given the emergency bus plans at the beginning of the 2005-2006 school year, but the Complainants agreed that the District had provided the emergency plans and reviewed them with the driver around the middle of the 2005-2006 school year. The District asserted that the school nurse had in fact shared the emergency bus plans with the bus company, in accordance with school policy, at the beginning of the school year. When OCR interviewed the school bus company's operations manager, she confirmed that she and C's and N's bus drivers had been given the procedures, which she summarized. Additionally, the Complainants and the District reported to OCR that, for the 2006-2007 school year, the District has given C's and N's bus drivers and bus company emergency procedures. The Complainants noted that a bus company representative also attended a Section 504 meeting on August 24, 2006. Based on this information, OCR was unable to substantiate the Complainant's allegation that the District failed to provide the bus drivers with an Emergency Bus Plan as required by the Complainant's sons' Section 504 plans. Consequently, we were not able to establish from these facts that the District did not implement this provision of the plan.

With respect to the Complainant's allegations that cafeteria staff and the supervisory aide did not review N's Section 504 plan, and did not "receive education regarding food allergies and food safety in the cafeteria," OCR found that item 8 of N's previous Section 504 plan requires cafeteria staff and the supervisory aide to review his plan. Item 8 of N's previous Section 504 plan also requires cafeteria workers to receive education about food allergies and food safety. The District asserted that cafeteria staff and the supervisory aide did review N's Section 504 plan, and received education regarding food allergies and food safety in the cafeteria. Interviews with cafeteria staff and the supervisory aide confirmed that, during 2005-2006, cafeteria staff had reviewed N's Section 504 plan and they were aware of food allergy and food safety expectations. The interviews also confirmed that they had received additional training following the 2005-2006 school year. While the Complainants disputed the District's claim that the staff was aware, OCR could not substantiate the Complainant's allegation that the cafeteria staff and the supervisory aide did not review N's Section 504 plan, and did not receive education regarding food allergies and food safety in the cafeteria.

With respect to the Complainant's allegation that children seated at N's table in the cafeteria were drinking milk from open plastic containers, rather than from the "required" cardboard containers, OCR's investigation revealed that this may have happened on one or two occasions during the 2005-2006 school year. We found, however, that the District has since taken steps to prevent this from recurring (speaking to and removing students from N's table), and the Complainants confirmed, and OCR observed on November 16, 2006, that children seated at N's table in the cafeteria are now drinking milk from closed cardboard containers, rather than from open plastic containers. Although OCR found evidence to indicate that open milk containers were present on a couple of occasions at N's table, which was prohibited by his previous Section 504 plan, we concluded that these isolated instances of open milk containers at N's table did not rise to such level that N was denied a FAPE under Section 504.

Based upon all of the above information, OCR concluded that there was insufficient evidence that the District denied C and N a FAPE by failing to implement specific aspects of their respective Section 504 plans.

Harassment

The relevant portions of the Section 504 regulation states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance (34 C.F.R. Section 104.4(a)). The regulation also prohibits recipients such as the District from directly or indirectly aiding or perpetuating discrimination on the basis of disability, and from otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others. (34 C.F.R. Section 104.4(b)(1) (vii)). OCR construes these regulatory provisions to include the right of qualified students with disabilities to be free from harassment on the basis of disability.

Both Section 504 and Title II implicitly prohibit the creation of a hostile environment on the basis of disability. A disability-related hostile environment exists when pervasive and persistent incidents of disability-related, harassment occur, or when the incidents are of such severity, that harassment adversely affects the student's enjoyment of or benefit from the recipient's educational program. OCR defines disability-related "harassment" as intimidating or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. If OCR determines that the recipient had actual or constructive notice of the disability-related hostile environment, then OCR examines the timeliness and effectiveness of the recipient's response. When OCR investigates a claim of disability-related harassment, we consider whether a recipient investigated the claim and took sufficient action to correct the hostile environment. The recipient's actions must be reasonably calculated to both stop and prevent the harassment.

Initially, the Complainants alleged that a member of the cafeteria staff harassed N in front of his peers by subjecting him to degrading, offensive and humiliating comments that were related to his disability. During our investigation, the Complainants identified the comments as stating to N in front of his classmates, "tell your mother to relax so that we don't have to use these wipes" and "you're big now, you need to speak up and tell your friends to move if they're too close to you or if they're throwing food." The Complainants told OCR that, on April 13, 2006, the Complainants reported this incident to the principal and that the principal failed to take any action against the cafeteria worker. The District reported to OCR that its investigation could not substantiate the Complainant's allegation, and during our interview of the cafeteria worker, she unequivocally denied that she ever made those comments. Although OCR was unable to substantiate that the alleged comments were in fact made, we nonetheless looked at the severity, frequency, and pervasiveness of the alleged comments to determine whether they would rise to the level of disability-based harassment under Section 504 or Title II. The Complainants stated that both comments were made only once at the same time, and that the Complainants are not aware of any similar comments having been made since. Based on this information, OCR determined that even if we had been able to establish that the comments were actually made (which we were not), we could not conclude that that they were sufficiently severe or pervasive to create a hostile environment, or to constitute a violation of Section 504 or Title II. These isolated comments on that one day simply do not rise to the level of severity or persistence or pervasiveness to interfere with or deny N's participation in or receipt of benefits, services, or opportunities in the District's program.

Retaliation

The Complainants alleged that the District retaliated against them, by not allowing either of them to serve as parent representative on its Committee formed to provide input to the District on addressing food allergies in the schools, because, throughout the 2005-2006 school year, the Complainants asserted rights protected under Section 504 and Title II by disagreeing with the District about the content and implementation of their sons' Section 504 plans. The Complainants reported to OCR that, beginning around February 2006, they telephoned and sent a letter to the District to express interest in serving on its future Committee. The Complainants asserted that at a Section 504 meeting in April, 2006, they again asked if the Committee had been formed, to which the Director allegedly responded that she did not know who would chair the Committee and that she had no information about the Committee. The Complainants asked the Director to let them know when the information became available, but allegedly the Director did not inform them. The Complainants also told OCR that, later, they asked the Assistant Superintendent, who also is the District's Section 504 Coordinator, about the Committee. The Complainants said that she informed them that the Committee already had been formed and had met, and that the Director was chairing the Committee and was responsible for compiling the District's guidelines.

Relative to this allegation, OCR investigated whether the District retaliated against the Complainants, by not allowing them to serve as the parent representative on its Committee, because they had advocated for their sons' rights under Section 504 and Title II. As discussed below, OCR found insufficient evidence

to prove retaliation.

When OCR investigates an allegation of retaliation, it uses a five-step analysis to determine if retaliation has occurred. The five steps of the analysis are:

1. Whether the complainant participated in a protected activity.

2. Whether the district was aware of the complainant's participation in the protected activity.

3. Whether the district took adverse action against the complainant contemporaneously with or subsequent to his/her participation in the protected activity. If the action did not occur contemporaneously with or subsequent to the district becoming aware of the complainant's participation in the protected activity, OCR cannot proceed to the fourth step, and it would not be able to find sufficient evidence to prove a violation of 34 C.F.R. Section 104.61 or 28 C.F.R. Section 35.134(b).

4. Whether there is an inferable causal relationship (that is, a logical connection) between the adverse action and the complainant's participation in the protected activity.

5. If steps one through four exist, OCR then asks the district to identify the reason for taking the adverse action against the complainant. OCR must analyze the district's reason to determine if the reason is a pretext for retaliation or if the reason is legitimate and non-retaliatory. If the district's reason is a pretext for retaliation, sufficient evidence of retaliation will exist to prove a violation of 34 C.F.R. Section 104.61 and 28 C.F.R. Section 35.134(b).

The first step in establishing retaliation is to determine whether the Complainants participated in a protected activity. As evidenced in the section of this letter that concerns the FAPE issue, throughout the 2005-2006 school year, the Complainants informed the Director and others in the District that they disagreed with the District about the content and implementation of their sons' Section 504 plans. This action establishes that the Complainants participated in a protected activity.

The second step in establishing retaliation is finding whether the District was aware of the Complainant's participation in the protected activity. OCR received documentation of communications between the Complainants and the District, verifying the disagreements referenced in the preceding paragraph. This information establishes that the District was aware of the Complainant's participation in the protected activity.

The third step in establishing retaliation is to determine whether the District took adverse action against the Complainants contemporaneously with or subsequent to their participation in the protected activity. The Complainants alleged that the District ignored their requests to serve as a parent representative on the Committee after they had expressed their interest in serving and did not appoint them to the Committee. OCR found that the District did, in fact, form the Committee during the spring of 2006 and that the Complainants were not selected as the parent representative on the Committee. According to the District, the Committee was formed for the purpose of developing guidelines for the District on how to address the needs of students with food allergies; the Committee met twice for this purpose; and the Committee has no continuing responsibilities or plans to meet again in the future.

Case law on retaliation suggests that "adverse action" is an action that adversely affects a person's work, education, or well-being in a serious, lasting and often tangible manner. An action also may be considered "adverse" if it reasonably might have the effect of deterring a person from engaging in protected activity.

In this instance, OCR could not identify any specific, serious or lasting harm that the Complainants or their children suffered as a result of them not being appointed to the Committee. The Complainants asserted that their exclusion from the Committee limited their ability to participate in the activities of the Committee. OCR noted, however, that the purpose of the Committee was quite limited and the

Committee was active for only a short time. OCR found, moreover, that any harm that the Complainants may have suffered was ameliorated to a significant extent by the Committee's allowing them to submit comments and suggestions for consideration by the Committee. While the Complainants dispute whether their written input was actually considered by the Committee, two District employees who served on the Committee confirmed to OCR that the Complainant's input was in fact received and considered by the Committee. Further ameliorating the harm the Complainants alleged was the fact that another parent was appointed to the Committee and brought a parental perspective to the work of the Committee. OCR was told by the District that the person selected as the parent representative on the Committee was chosen because she expressed an interest in serving on the Committee and because she was thought to be a good parent representative who was knowledgeable about the issues, would work well with others, and would represent the interests of the school community.

OCR also found little evidence to suggest that the Complainant's non-selection for the Committee would likely deter them or others from advocating on behalf of children with food allergies. As the Complainants have acknowledged, their advocacy on behalf of their children has not abated since their non-selection to the Committee. Moreover, the Complainants were not the only parents of children with allergies who were not appointed to the Committee. The District informed OCR that 79 students with identified food allergies were enrolled in the District, and only one such parent was appointed to the Committee. Like the Complainants, all of the other parents of children with food allergies were not selected for the Committee. Under these circumstances, OCR cannot find that the District's non-selection of the Complainants for the Committee would likely deter them or others from advocating for the rights of children under Section 504.

In brief, OCR found insufficient evidence to conclude that the Complainants or their children suffered "adverse action" as result of their non-selection for the Committee. OCR found little or no evidence to indicate that the Complainants or their children were materially and significantly harmed by their non-appointment or that their non-appointment reasonably would deter the Complainants or others from advocating on behalf children under Section 504 or Title II. Absent evidence of "adverse action," OCR cannot conclude that the District retaliated against the Complainants or their children in violation of Section 504.

Because OCR found insufficient evidence of "adverse action," OCR is not required to consider steps 4 and 5 of its standard retaliation analysis. OCR gathered additional information, however, on the process and criteria used by the District to select a parent representative for the Committee and found nothing in this information to suggest that the Complainant's non-selection was retaliatory.

Specifically, OCR interviewed the Nurse Coordinator and Director about the process used to select the parent representative to the Committee. OCR found that the Nurse Coordinator selected the parent representative from a list of ten parents of children with food allergies developed by the District's school nurses. The school nurses were asked to propose parents as candidates for Committee membership based on the parent's familiarity with food allergy issues and their ability to work cooperatively with others in order to carry out the Committee's work efficiently and effectively. According to the District, the nurse at the Complainant's sons' school did not propose the Complainants as a candidate for consideration as parent representative on the Committee, and thus the Complainants were not selected as the representative. The District stated to OCR that it did not believe the nurse's decision was retaliatory. The District explained that the school nurses were told to base their decisions on the criteria mentioned above and that no specific parents were identified for inclusion or exclusion as possible candidates. When OCR sought to interview the nurse in the Complainant's sons' school to inquire about the reasons the Complainants were not proposed, we were unable to contact her because she had retired from the District. OCR was unable, therefore, to identify the specific reasons underlying the nurse's decision. Without this information, it is not possible to scrutinize the motivation underlying the Complainant's non-selection more closely. Nothing found by OCR in this investigation, however, indicated that the motivation of the nurse or others involved in the selection process was retaliatory.

To support the Complainant's allegation of retaliation, they asserted that they informed the Director of their interest in serving on the Committee in February 2006, prior to the Committee's formation; that they were informed that the Committee had not been formed at that time; and that, despite their expression of interest, they were not informed of the Committee's creation until April 2006 when they inquired at a team meeting for one of their children. The Complainants contend that the District deliberately ignored their expression of interest and did not appoint them in retaliation for their on-going disagreements with the District over services for their children. As indicated above, however, the Complainant's non-selection as the parent representative on the Committee did not turn on if and when they informed the District of their interest in the Committee. Although the parent chosen to serve on the Committee had in fact expressed interest in serving on the Committee, the District informed OCR that parents were not required to have expressed interest in the Committee before their names were proposed by the school nurses.

In addition, OCR was unable to prove that the Complainants informed the District of their interest in the Committee prior to the selection of the parent representative. When we reviewed the Complainant's letter of February 12, 2006, to the District, in which they claimed that they asked the District about them serving on the Committee, we found that the letter did not mention the Committee. The Complainants also were unable to provide any other evidence corroborating their assertion that they informed the District of their interest in February. Both the Complainants and the District agreed that they expressed interest in serving on the Committee at the team meeting for their son on April 5, 2006. The District maintained, however, that this was the first time the Complainants had expressed this interest and that the representative to the Committee had already been selected by that time. Thus, OCR could not corroborate the Complainant's assertion that they informed the District of their interest in February and that the District ignored that expression of interest in picking a different parent representative. In fact, the evidence tends to support the District's position. While OCR was unable to pinpoint the exact date on which the parent representative was selected, evidence from the representative as well as the District suggests that the selection occurred in late March, prior to the April 5th team meeting.

Based on this information, OCR concluded that there is insufficient evidence to establish that the District retaliated against the Complainants by not selecting them to serve as a parent representative on the Committee. As stated above, OCR could not prove that that the Complainants or their children suffered "adverse action" as a result of the District's actions. Moreover, OCR found no other evidence to indicate that the District's actions were retaliatory.

Due Process Rights

During our investigation of the FAPE issue in this complaint, we obtained a copy of the District's grievance procedures and procedural safeguard rights. We reviewed these documents and determined that they were not fully consistent with the requirements of Section 504.

The implementing Section 504 regulation at 34 C.F.R. Section 104.7(b), requires a recipient to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by the regulation. A similar requirement for public entities is found at 28 C.F.R. Section 35.107(b) of the regulation for Title II. At Section 104.36, the regulation requires a recipient that operates a public elementary or secondary education program to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of individuals who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents/guardian of the individual to examine relevant records, an impartial due process hearing with opportunity for participation by the individual's parents/guardian and representation by counsel, and a review procedure.

Although both 34 C.F.R. Section 104.7(b) and 34 C.F.R. Section 104.36 require the establishment of procedures by which individuals may challenge decisions and actions by school districts as violative of Section 504, the requirements of the two provisions are separate and distinct, and there are important differences in the nature of the disputes that the two provisions are intended to address and in how the

two provisions need to be implemented. The grievance procedures required by 34 C.F.R. Section 104.7(b), which apply to all types of recipients of Federal financial assistance, are available to address "any action" that may violate Section 504. These procedures are required under Section 504 in order to promote the resolution of disputes at the local, institutional level. The grievance procedures must incorporate "appropriate due process standards," but OCR generally has allowed the decision makers under these procedures to be employees of the recipient. By contrast, the "impartial due process hearing" and "review procedure" required by 34 C.F.R. Section 104.36, which apply only to school districts providing elementary and secondary education, are intended to address only particular kinds of disputes under Section 504 -- disputes regarding the identification, evaluation and placement of students with disabilities who need or are believed to need special education and related aids and services. Because of the need for an "impartial" hearing process under this provision, OCR requires that decision makers under Section 104.36 be independent of the control of the school district (i.e., not school district employees or officials).

The importance of these distinctions in the two procedures is further underscored by one of the other Section 504 regulatory requirements that specifically applies to the identification, evaluation and placement of students with disabilities who need or are believed to need special education and related aids and services. This requirement, set forth in 34 C.F.R. Section 104.35(c), is that school district decisions regarding the placement and services for such students be made by a group of persons knowledgeable about the needs of the student, the evaluation data, and the placement and service options. OCR generally interprets this requirement to prohibit high-level school district officials, such as school principals or superintendents, from modifying placement decisions made by a Section 504 student placement team. As a general proposition, therefore, even though the language of 34 C.F.R. Section 104.7(b) is broad in scope and covers "any action" that may violate Section 504, OCR considers it inappropriate for educational placement decisions made by a Section 504 team to be reviewed under a school district's grievance procedures because the decision-maker is generally a single individual who is not "impartial" as required by 34 C.F.R. Section 104.36.

On October 18, 2006, the District gave the Complainants "Notice of Parent/Student Rights under Section 504 of the Rehabilitation Act of 1973" (rights). It also gave the Complainants "Administrative Regulations regarding Section 504 of the Rehabilitation Act of 1973" (grievance procedure). These documents establish that the District has a system of procedural safeguard rights, through which to challenge its decisions that relate to identification, evaluation, and placement of students with disabilities, and that it has a grievance procedure. The grievance procedure that the District gave to the Complainants explicitly stated that it could be used to address District decisions that relate to identification, evaluation, and placement of students with disabilities, and it allowed for grievance decisions relating to identification, evaluation, and placement matters to be reviewed and ruled upon solely by the superintendent. The grievance procedure indicated that an impartial due process hearing was available to address identification, evaluation, and placement issues only upon appeal to a hearing officer, after the grievant exhausted the grievance procedure. Thus, the District did not afford the Complainants direct access to an impartial due process hearing as required by 34 C.F.R. 104.36, and it allowed a single school employee (i.e., the superintendent) to reject or modify the decisions of a Section 504 team relative to identification, evaluation, and placement decisions.

The grievance procedure that the District gave the Complainants allowed for an appeal of the superintendent's decision to an impartial hearing officer. While this might mitigate the grievance procedure's lack of impartiality, the grievance procedure was written in such a way as to imply that a grievant must exhaust the grievance procedure as a prerequisite to eventually presenting the matter grieved to an impartial hearing officer. Additionally, the grievance procedure indicated that the only way to present the matter to an impartial hearing officer was to request that the superintendent refer the matter to the impartial hearing officer.

When OCR asked District staff about the grievance procedure and the system of procedural safeguards, including how each is implemented, they told OCR that they never had received a request for a due process hearing. Consequently, they did not know how they would process such a request or if a grievant must exhaust the grievance process, then appeal the decision on the grievance, before allowing an impartial due process hearing.

Based on this information, OCR determined that the District failed to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards required by 34 C.F.R. Section 104.36. The District's system of procedural safeguards did not afford direct access to an impartial due process hearing, allowing for a hearing only as an appeal after exhausting its grievance procedure. OCR also determined that the District's grievance procedure, which vested authority solely in the superintendent to make decisions concerning matters related to the identification, evaluation, and placement of students, and which contemplated an impartial due process hearing only as an appellate process within the context of the grievance procedure, was not consistent with the requirements of Section 504, at 34 C.F.R. Sections 104.35 and 104.36. These sections of the regulation require a group of persons or team, as described above, to make such decisions.

The District agreed to resolve these matters, as recorded in the enclosed agreement, which was signed on December 21, 2006. OCR will monitor the District's implementation of the action that it agreed to take and, in a future communication, OCR will let the Complainants know the result of the monitoring.

Conclusion

As discussed above, OCR concluded that sufficient evidence exists to support a violation relative to the procedural safeguard rights issue; but that insufficient evidence exists to support a violation relative to the FAPE, harassment and retaliation issues that OCR investigated. Following negotiations, the District agreed to resolve the procedural safeguard rights issue. Therefore, effective the date of this letter, OCR has closed the investigation of this complaint, and will monitor the District's implementation of the action that it agreed to take to resolve the procedural safeguards issue.

This letter addresses only the matters discussed in it. It should not be construed to cover any other matter regarding the District's compliance with Section 504, Title II or any other law for which we have enforcement authority. Please note the Complainants may file a private suit in court pursuant to Section 203 of the Americans with Disabilities Act.

We appreciate the Complainant's bringing this matter to our attention. Please let Marianne Zammuto, Equal Opportunity Specialist; or Eric D. Olick, Civil Rights Attorney, know if the Complainants have questions or concerns about this letter or about our disposition of the Complainant's complaint. Their respective telephone numbers are (617) 289-0034 and (617) 289-0021, and their e-mail addresses are marianne.zammuto@ed, and eric.olick@ed.gov. If the Complainants have any other questions regarding our conclusions in this letter or any other matter, please feel free to contact Ralph D'Amico, Compliance Team Leader by telephone at (617) 289-0044. The Complainants may telephone me at (617) 289-0111.

Regulations Cited

34 CFR 104.61
34 CFR 104.33(a)
34 CFR 104.33(b)
34 CFR 104.35(c)
28 CFR 35.130(a)
28 CFR 35.130(b)(1)(i)
28 CFR 35.130(b)(1)(ii)
28 CFR 35.130(b)(1)(iii)

28 CFR 35.130(b)(1)(iv)
28 CFR 35.130(b)(1)(v)
34 CFR 104.4(a)
28 CFR 35.134(a)
28 CFR 35.134(b)
34 CFR 104.7(b)
28 CFR 35.107(b)
34 CFR 104.36
34 CFR 104.4(b)(1)(vii)
34 CFR 104.4(b)(1)(ii)

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Poudre (CO) School District

Office for Civil Rights, Western Division, Denver (Colorado)

08-20-1289

June 12, 2020

Related Index Numbers

405.047 Food Allergies
10.047 Food Allergies
37.015 Specific Conditions, Allergies

Ruling

OCR found that a Colorado district may have discriminated against a grade schooler with food allergies and other disabilities when it allegedly failed to provide him appropriate accommodations and an opportunity to participate in certain activities with his peers. However, OCR closed the parent's complaint once the district promised to resolve the potential Section 504 and Title II violation by convening the student's 504 team, issuing a training memorandum to all relevant staff, and ensuring the student's participation in co-curricular and extracurricular activities.

Meaning

Exposure to an allergen in the school environment may cause a life-threatening reaction in a student with food allergies. To ensure that the student can safely access all school activities, the district must consider the student's dietary needs and offer him appropriate accommodations. At the beginning of the school year, the district should have consulted with the parent to develop an allergen-free breakfast, lunch, and snack menu for the child. Doing this would have enabled the student to regularly attend classes and participate in school-sponsored activities, including the Honor Choir, Safety Patrol, and school plays, with his peers.

Case Summary

Allegations that a Colorado district refused to offer allergen-free food to a grade schooler during the school day indicated that the district may have treated the student differently due to his disability. Without determining whether the district violated Section 504 and Title II, OCR concluded that the district could resolve the potential compliance concerns by convening the student's 504 team to discuss his dietary

needs and issuing a training memorandum to all relevant staff. OCR explained that a district must ensure that a student with a disability has an equal opportunity to participate in and benefit from all district programs and activities. Section 504 and Title II also requires the district to provide FAPE to all eligible students with disabilities, OCR added. In her complaint to OCR, the parent alleged that because the district failed to provide the student allergen-free breakfast and lunch, she had to attend school and arrange food provisions for the student. The parent also contended that the district denied the student an opportunity to try out for the Honors Choir, join the Safety Patrol, and participate in a school play due to his disability. Before OCR could complete its investigation, the district offered to resolve the complaint through a resolution agreement. In the agreement, the district pledged to issue a training memorandum informing staffers of Section 504 and Title II requirements and the confidentiality requirements under FERPA. The district also promised to convene the student's 504 team to discuss his participation in school-sponsored activities, his individual dietary needs, and approved foods he may have at school events. Finally, the district agreed to send the parent a letter stating that the student will have an equal opportunity to participate in all co-curricular and extracurricular activities during the 2020-21 school year. OCR closed the complaint.

Judge / Administrative Officer

Angela Martinez-Gonzalez, Supervisory General Attorney

Full Text

Dear Superintendent Smyser:

We write to inform you of the resolution of the above-referenced complaint, filed on February 21, 2020, against Poudre School District ("District"), alleging discrimination based on disability. Specifically, the Complainant alleged that the District, at [ ] ("School"), engaged in the following discrimination:

1. School staff treated the Student differently based on disability during [ ] by requiring his Mother to attend and arrange food provisions for the Student.

2. The Student was harassed by his homeroom teacher throughout the 2019-2020 SY based on disability. The Complainant specified that the homeroom teacher has:

a. announced the removal of the Student's "[ ] (reward system);"

b. "forced [the Student] to sit to the side of the class and watch his class rather than participate directly in [ ] preparation activities;"

c. denied the Student an opportunity "to contact his mother at school through use of a Smartwatch while others possessed cell phones and were [al]lowed to do so in the hallway;"

d. accused the Student "in front of peers of having caused property damage after he re-set a floor plate to be flat on the ground so a third student would not trip and fall;"

e. consistently made negative and embarrassing comments about the Student around classmates;

f. "identified [the Student] openly with disabilities in a way which highlighted them as an inconvenience for her;" and

g. gave the Student an award which highlighted him at an assembly for peers and parents and peers for his disability accommodation.

3. District staff retaliated against the Student and Mother after she: (a) attempted to enforce the Student's rights a student with a disability; and (b) filed a previous Office for Civil Rights (OCR) complaint against the District (case 08-16-1346). The alleged adverse retaliatory actions were as follows:

a. While the Student's placement was homebound ([ ]-[ ] 2019), School staff denied him the opportunity to try out for Honors Choir, the opportunity to participate with the Safety Patrol, and several months of free breakfast and lunch.

b. During a meeting on [ ], 2020, the District's director of student services did not allow the Mother to speak, talked over her, and used an aggressive tone toward her.

c. During a meeting on [ ], 2019, the District's assistant superintendent intimidated the Mother, used a threatening tone toward her, and postured and leaned toward her.

d. On [ ], 2020, the District's assistant superintendent ordered that all communications from the Mother to School staff be sent through the School's principal.

e. The District failed to complete a Section 504 plan and healthcare plan for the Student.

f. The District failed to provide the Student with allergen-free breakfasts and lunches.

g. The District denied the Student a role in the school play.

h. The District denied the Student "the opportunity to participate in the [ ]."

i. The District denied the Student opportunities to use a smart watch to call his mother (from [ ] 2019 to [ ] 2020).

The Office for Civil Rights (OCR) of the U.S. Department of Education ("Department") is responsible for enforcing: Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and its implementing regulation, at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination based on disability in any program or activity operated by recipients of federal funds from the Department; and 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 based on disability by public entities, regardless of whether they receive federal financial assistance. As a recipient of federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

On May 15, 2020, we notified the District that OCR was opening an investigation of the allegations. Prior to OCR issuing a data request, the District expressed an interest in taking voluntary action to resolve the Complainant's allegations. We determined that it was appropriate, pursuant to Section 302 of OCR's Case Processing Manual (CPM), to resolve the allegations with an agreement ("Agreement") without conducting an investigation. On May 26, 2020, we sent the District a proposed Agreement. The District sent OCR a fully executed Agreement on June 12, 2020. Enclosed is a copy of the signed Agreement.

When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. OCR will monitor implementation of the Agreement through periodic reports from the District demonstrating that the terms of the Agreement have been fulfilled. We will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. The Complainant will be copied on our monitoring letters. If the District fails to implement the Agreement, we will take appropriate action, which may include enforcement actions.

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

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 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.

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.

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 your 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 ([ ]) [ ]-[ ] or [ ]@[ ].

Resolution agreement

Poudre School District

OCR Case 08-20-1289

Poudre School District ("District") enters into this Agreement to resolve allegations in the above-referenced case. This Agreement does not constitute an admission of liability, non-compliance, or wrongdoing by the District. The District assures the U.S. Department of Education, Office for Civil Rights (OCR) that it will take the following actions to comply with the requirements of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), as amended, 29 United States Code (U.S.C.) Section 794, and its implementing regulation, at 34 Code of Federal Regulations (C.F.R.) Part 104, and Title II of the Americans with Disabilities Act of 1990 ("Title II"), 42 U.S.C. Section 12131 et seq., 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.

Prior to OCR issuing a final determination pursuant to Section 303 of OCR's Case Processing Manual (CPM), the District agreed to resolve allegations in this case pursuant to Section 302 of the CPM. Accordingly, to resolve the allegations, the District agrees to implement the following terms and fulfill the following reporting requirements.

TERM I - Training Memorandum: The District will disseminate a training memorandum ("Memo") regarding:

A. prohibited different treatment based on disability under Section 504 and Title II;

B. staff-on-student harassment based on disability under Section 504 and Title II;

C. prohibited retaliation under Section 504 and Title II; and

D. confidentiality under the Family Educational Rights and Privacy Act (FERPA).

The Memo will be:

E. pre-approved by OCR;

F. disseminated by the first day of the 2020-2021 school year (SY) for students (i.e., August 17, 2020); and

G. disseminated to all staff at [ ] ("School"), the District's Director of Student Services, and the District's Assistant Superintendent of Elementary Schools.

Reporting Requirement A - Within 30 calendar days of this Agreement being signed, the District will submit to OCR a draft of the Memo. The District will promptly and fully address OCR's feedback, if any, until the District receives notification from OCR that the Memo is approved and no further reporting is required for Reporting Requirement A.

Reporting Requirement B - By August 28, 2020, the District will submit to OCR documentation showing that Memo was disseminated as required by Term I.[1] The District will promptly and fully address OCR's concerns, if any, until the District receives notification from OCR that no further reporting is required for Reporting Requirement B and Term I.

TERM II - Team Meeting: Within 60 calendar days of this Agreement being signed, the District will convene a group of knowledgeable people ("Team") to discuss, at a minimum:

A. the Student's participation in school-sponsored activities,[2] including, but not limited to, any necessary limitations;

B. the Student contacting his mother ("Mother"), including using a smart watch to call her, during school and school-sponsored activities;

C. food for the Student at school and school-sponsored activities, and ensuring that the Mother is not required to purchase non-District food for the Student to consume at school or school-sponsored activities;

D. ensuring that the Mother is not required to attend school-sponsored activities in order for the Student to participate in the activities;

E. District staff using a trauma-informed approach in working with the student;[3]

F. Identification (by name, email address and telephone number) of a District staff member who is designated to receive and promptly respond to concerns from the Student or Mother regarding implementation of the Student's Section 504 plan and regarding alleged harassment by District staff; and

G. the process for the Mother's communications with school staff.

The Team will include, at a minimum:

H. a qualified, neutral facilitator;

I. an individual who is qualified to provide insights into the Student's disability-related dietary needs and meeting those needs at school and school-sponsored activities;

J. an individual who is qualified to provide insights into the Student's disabilities and meeting his needs related to those disabilities at school and school-sponsored activities;

K. an individual who is qualified to provide insights into trauma-informed approaches in working with the student at school and school-sponsored activities;

L. an administrator and the Section 504 Coordinator at the Student's assigned school for the 20202021 SY; and

M. the Mother.

The District will ensure that:

N. the Team meeting is consistent with the procedural requirements of Section 504;[4]

O. any decisions made at the meeting reflect the judgment of the Team, not the judgment of a single individual;

P. the Complainant is invited to the meeting and permitted to invite persons knowledgeable about the Student to attend the meeting; and

Q. the Team carefully considers all information provided by the Complainant and her invitees. Within 10 calendar days after the meeting, the District will:

R. notify the Complainant, in writing, of the decisions made at the meeting;

S. provide the Complainant with a copy of the Student's updated Section 504 plan and healthcare plan (if one is created or updated); and

T. provide the Complainant with a copy of the applicable procedural safeguards.

Reporting Requirement A - Within 20 calendar days of the Team meeting, the District will submit to OCR:

i. copies of all communications with the Mother related to the meeting, including documentation showing that the Mother:[5]

a. was invited to participate in the meeting and informed that she could invite others knowledgeable about the student;

b. was notified of the decisions made at the meeting and provided with a copy of the Student's updated Section 504 plan and health plan (if one was updated or created); and

c. received a copy of the procedural safeguards;

ii. a list of the individuals who attended the meeting, including:

a. each individual's name and title or position; and

b. indications of who fulfilled the roles specified in Term I(H)-(L);

iii. notes or minutes from the meeting reflecting:

a. the information that the Team considered in reaching its decisions; and

b. that the Team carefully considered input from persons knowledgeable about the Student;

iv. copies of:

a. the Student's updated Section 504 plan; and

b. any other plans created or updated for the Student.

The District will promptly and fully address OCR's feedback, if any, until the District receives notification from OCR that no further reporting is required for Reporting Requirement A and Term II.

TERM III - Student Participation in Co-Curricular and Extra-Curricular Activities

The District will send the Mother a letter stating that - consistent with the terms of his Section 504 plan and, if applicable, his health plan - the Student will have an equal opportunity to participate in all co-curricular and extra-curricular activities. If the Student's school for the 2020-2021 SY has Honors Choir, Safety Patrol, school plays, or the [ ], the letter will specify that the Student will have an equal opportunity to participate in that activity or those activities. The letter will be pre-approved by OCR and sent by the first day of the 2020-2021 SY for students.

Reporting Requirement A - Within 30 calendar days of this Agreement being signed, the District will submit to OCR a draft of the letter. The District will promptly and fully address OCR's feedback, if any, until the District receives notification from OCR that no further reporting is required for Reporting Requirement A

Reporting Requirement B - By August 28, 2020, the District will submit to OCR documentation showing that the approved letter was sent to the Mother by the deadline specified in Term III. The District will promptly and fully address OCR's feedback, if any, until the District receives notification from OCR that no further reporting is required for Reporting Requirement B and Term III.

Term IV - Harassment Investigation

The District will investigate whether, during the 2019-2020 SY, the Student was harassed based on disability by his homeroom teacher ("Teacher"). The investigation will be thorough and impartial.[6]

If the investigation reveals that the Teacher harassed the Student based on disability, the District will take prompt and effective steps that are reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring (including taking any warranted disciplinary action).

Reporting Requirement A - By August 28, 2020, the District will submit to OCR:

i. the name(s), title(s) or position(s), and qualifications of the individual(s) who conducted the investigation;

ii. a description of the investigation;

iii. copies of records from the investigation;[7]

iv. the determination regarding whether harassment occurred, and if so, the determination regarding whether the harassment was disability-based; and

v. if the District determined that the Teacher harassed the Student based disability, a plan that is reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

The District will promptly and fully address OCR's feedback, if any, until the District receives notification from OCR that no further reporting is required for Reporting Requirement A.

(Conditional) Reporting Requirement B - If the District determines that the Teacher harassed the Student based on disability, the District will, within 30 calendar days of receiving OCR's notification that no further reporting is required for Reporting Requirement A, submit a report on implementation of the plan created pursuant to Reporting Requirement A(v), including supporting documentation. The District will promptly and fully address OCR's feedback, if any, until the District receives notification from OCR that no further reporting is required for Reporting Requirement B or Term IV.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. Sections 100.9-10), or judicial proceedings to enforce this Agreement, OCR will give the District written notice of the alleged breach and 60 calendar days to cure the alleged breach.

The District understands that by signing this Agreement, it agrees to provide the foregoing information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the District understands that, during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and are in compliance with Section 504, and its implementing regulation, and Title II, and its implementing regulation. Upon completion of the obligations under this Agreement, OCR will close this case.

For the District:

/s/ 6/11/20
Dr. Sandra Smyser, Superintendent Date

[1]e.g., a copy of an email that shows all recipients and attachments; or a list of all School staff with signatures (and dates) attesting to receipt of the Memo.

[2]e.g., co-curricular activities, extra-curricular activities, and fieldtrips

[3]Trauma-informed schools prepare teachers to understand and recognize the symptoms of trauma and to support students displaying behaviors associated with trauma. See American Institutes for Research, Supporting Trauma Recovery, https://safesupportivelearning.ed.gov/trauma-recovery; The National Child Traumatic Stress Network, Trauma-Informed Systems - Schools, https://www.nctsn.org/trauma-informed-care/creating-trauma-informed-systems/schools; American Psychological Association, Trauma, https://www.apa.org/topics/trauma/index.html; Colorado Department of Education, Trauma-Informed Approaches in Schools: Keys to Successful Implementation in Colorado, https://www.cde.state.co.us/pbis/traumainformedapproachesarticle.

[4]i.e., 34 C.F.R. §§ 104.35-36

[5]For purposes of this Agreement, "communications" include, but are not limited to, all emails, letters, text messages, electronic messages, and forms.

[6]The investigation will include, at a minimum, interviews of the Student, Mother, Teacher, and any other potential staff eyewitnesses. The investigation will consider, but will not necessarily be limited to, whether the Teacher:

a. announced the removal of the Student's "[ ] (reward system);"

b. "forced [the Student] to sit to the side of the class and watch his class rather than participate directly in [ ] preparation activities;"

c. denied the Student an opportunity "to contact his mother at school through use of a Smartwatch while others possessed cell phones and were [al]lowed to do so in the hallway;"

d. accused the Student "in front of peers of having caused property damage after he re-set a floor plate to be flat on the ground so a third student would not trip and fall;"

e. consistently made negative and embarrassing comments about the Student around classmates;

f. "identified [the Student] openly with disabilities in a way which highlighted them as an inconvenience for her;" and

g. gave the Student an award which highlighted him at an assembly for peers and parents and peers for his disability accommodation.

[7] e.g., records reviewed, witness statements, interview notes, recordings reviewed, etc.

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Cascade School District

Oregon State Educational Agency

22418
DP 02-122

November 12, 2002

Related Index Numbers

405.019 Classroom Accommodations
405.076 Section 504 Plans

Ruling

The district offered an appropriate Section 504 accommodation plan designed to meet the requirements of a fourth grade student with a severe allergy to peanuts and tree nut products. The parents unsuccessfully argued the plan did not adequately protect their daughter from exposure to those products, also asserting that several of its provisions were vague and open to interpretation.

Meaning

Generally, if a student's allergies impact the ability to attend school or jeopardize his or her health, the student is covered under Section 504. The district must develop a plan to remove the substance(s) from the student's environment or otherwise adjust the child's placement so as to eliminate or minimize his or her exposure to the substance(s) while at school. In this case, the ALJ determined the district satisfied its Section 504 obligation of meeting the student's individual needs as adequately as it met the needs of students without disabilities.

Case Summary

In addition to asserting their daughter's Section 504 plan was too vague, the parents believed it did not assure their daughter would not be exposed to products containing nuts or peanuts, which could cause life-threatening symptoms. However, the ALJ determined the district's November 2001 plan offered services and accommodations that allowed the student to safely access school as adequately as the district allowed for safe access to students without disabilities. The new plan, proposed in January 2002, also met Section 504 requirements, the ALJ found. The plan required the student's teachers to post a

sign reminding students to wash their hands if they handle nut products. The IHO refused to require the school to impose a blanket prohibition on any food product without a label or to ban parents from sending homemade treats, stating it was an unacceptable interference of individual rights and went beyond the applicable standard. The parents were also concerned about their daughter's ability to safely access mandatory school-sponsored events, but the district's plan provided the same protection for the student as she received in school. For nonmandatory extracurricular activities, the ALJ determined it would be an undue administrative burden for the district to police the behavior of other participants and prohibit the distribution of any food the might contain nut products.

Judge / Administrative Officer

Weisha Mize, Administrative Law Judge

Full Text

Final Order

History of the Case

On July 19, 2002, R.P.'s parents D.P and M.P. (Parents) filed a request for a "due process" hearing with the State Superintendent of Public Instruction under Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, Title V, Sec. 504, Sept. 26, 1973, 87 Stat. 394, codified at 29 U.S.C. 794).

The District requested a waiver of the requirement to hold a due process hearing within 45 days of the date of request. That request was granted.

Pursuant to OAR 581-015-0081 a prehearing conference was held on August 9, 2002 to discuss evidentiary issues and procedural matters and to rule on prehearing motions. The prehearing conference was by telephone and was tape recorded.

A hearing was held on September 26 and 27, 2002. Administrative Law Judge Weisha Mize of the Hearing Officer Panel presided. The Hungerford Law Firm represented the District. Mary Broadhurst, Attorney at Law, represented the parent.

Testifying on behalf of Parents were Karen Nye, Turner Elementary School cook, Kent Klewitz, former Turner Elementary School principal, and D.P. Testifying on behalf of the Department were Suzanne Warren, Special Programs Coordinator, Carol Cochran, Willamette Educational Service District (ESD) nurse, Dawn Moorefield, Turner Elementary School principal, Tammy Burlison, Turner Elementary School third grade teacher, Dr. James Baker, pediatric allergist.

At the request of the parties, the record was held open to allow receipt of a transcript of the proceedings and submission of post-hearing briefs. The District's brief was received by electronic mail October 25, 2002 and by regular mail, together with cases relied on, on October 28, 2002. Parents' brief was received electronically on October 25, 2002 and by regular mail on October 29, 2002, at which time the record was closed.

Issues

1. During the 2001-2002 school year, did the District violate Section 504 by failing to offer R.P. a 504 Plan that was designed to meet her individual needs as adequately as the needs of students without disabilities are met? If so, should Parents be reimbursed for the costs they incurred in having R.P. tutored, and should R.P. receive compensatory education?

2. Currently, is the District violating Section 504 by failing to offer R.P. a 504 Plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met? If so, is Parents' proposed 504 Plan dated January 14, 2002 adequate to address R.P.'s needs, and should it be

adopted and implemented?

Evidentiary Ruling[1]

District's Exhibits D1- D20 were admitted without objection. Parents' Exhibits S1-S12, S14-S22, and S25-S30 were admitted without objection.

Findings of Fact

R.P. is a student in Cascade School District. She is currently in the fourth grade. R.P. has a severe allergy to peanuts[2] and tree nut products. Ingestion of peanuts, tree nuts, peanut or tree nut products, or products which include or have been processed with peanuts or tree nuts cause life threatening symptoms such as difficulty breathing and may lead to an anaphylactic reaction. Touching an item which has been touched, or being touched, by someone who has touched peanuts, tree nuts or peanut or tree nut products or products which include peanuts or tree nuts may cause hives or a rash around R.P.'s mouth and at the place of contact.

R.P.'s parents developed a health protocol with the school and the ESD nurse. It contained detailed information regarding the need to not give R.P. any products containing nuts, the need to avoid contact with R.P. prior to hand-washing when peanuts or tree nuts had been handled, the need to read all labels prior to distributing food, training students and personnel, and medication administration. A training in the health protocol was given on January 5, 2001.

Despite this protocol, R.P. was exposed to peanuts at school on January 12, 2001. R.P.'s parents met with school personnel on February 2, 2001 and requested that a more detailed plan be developed to address R.P.'s safety throughout her day, including providing student and personnel training, safety on field trips, safety in the cafeteria, and responsibilities for actions.

On February 23, 2001, R.P.'s parents met with the (then) school principal, Kent Klewitz, and the District's Special Education Director, Suzanne Warren. Parents were presented with, and reviewed, a situational flow chart and process responsibility list. Parents had not requested that the school be nut free, but had asked for a consistent environment, where either nuts were not used, or if used, a plan be developed to ensure hand-washing. Tr. 398. R.P.'s parents were informed that the school cafeteria would no longer prepare or distribute foods that had peanut or nut products.

R.P. was determined to be a student with a disability under Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, Title V, Sec. 504, Sept. 26, 1973, 87 Stat. 394) on March 16, 2001, when she was in the second grade. The major life activity which R.P.'s impairment was found to substantially limit was her breathing. Ex. S-12. R.P.'s eligibility was based on a February 2001 handwritten note from Dr. Charles Wagner, R.P.'s allergy specialist since she was 13 months old.[3] Dr. Wagner indicated that R.P. had a severe peanut allergy and that exposures could result in life threatening symptoms which would respond only to Epinephrine. Dr. Wagner made no recommendation for accommodations for R.P. other than that she be allowed to carry an "Epi-pen"[4] on her person at all times. Ex. S11.

Following R.P.'s determination of eligibility, an April 2001 "Medical Statement for Student with Special Diet Needs" was completed by Dr. Hugh Baskin, R.P.'s pediatrician. Dr. Baskin suggested that either ingestion or touching could cause an anaphylactic reaction, and recommended that all peanut and/or tree nut products be eliminated from R.P.'s diet and that USDA substitution guidelines for protein replacement be followed. Ex. D1 at 6.

On March 16, 2001, the 504 team drafted a 504 Accommodation/Modification Intervention Plan for R.P. that listed the following specific accommodations/interventions needed:

-Steps will be taken to eliminate nut products and nut oils from R.P.'s classroom;

-Allergy-free table will be maintained in the cafeteria;

-Food preparation for R.P. will be nut-free;

-Students will be trained regarding R.P.'s allergy, prevention, and appropriate response;

-Staff (including substitutes) will be oriented, trained, and delegated as appropriate regarding R.P.'s allergy, prevention, intervention and treatment;

-Medication for treating R.P.'s allergic reaction will be available to R.P. in any school setting, including field trips; and

-R.P.'s safety will be maintained on the bus. Ex. S13.

The 504 plan referenced an attached Transportation Medical Protocol and a Health Management Protocol. The 504 plan "packet" also included a chart of USDA approved menu planning options for the national school lunch program. Ex. D1 at 7-10.

The 504 plan was finalized on April 20, 2001. The 504 Accommodation/Modification Intervention Plan page no longer listed the specific accommodations/interventions needed previously included in the March 16, 2001 Plan, and instructed the reader instead to "see attached protocols." Those protocols were a 4-page Health Management Plan, updated on April 16, 2001, a 1-page Transportation Medical Protocol, updated on March 22, 2001, a 3-page Process Responsibility List, a 3-page, 3-tier orientation protocol, and an 8-page "Situational Flowchart"[5] setting out the expected outcome, the person responsible, and the time lines for actions in the following issues or steps:

-Allergy Free Table

-Food Preparation

-Training for all students, including non-English speaking students

-Training for all staff, including substitutes

-Health Management Plan

-Field Trips

-Transportation

-Documentation

-Update of 504 plan S14.

9. The Health Management Plan, the Transportation Medical Protocol, the Situational Flowchart and the R.P. Process Responsibility List are referenced in the Specific Accommodations/Interventions found in Section II of the 504 Plan. They provide detailed instructions/directives to staff on the methods and means they are to use to implement the provisions of R.P.'s 504 plan. S14.

Between December 1999 and January 2001, R.P. had five exposures to peanuts for which the Epi-Pen was administered. One exposure involved touch only and did not result in R.P.'s throat feeling tight or in her having difficulty breathing. After April 20, 2001, R.P. had one incident which is not believed to have been an exposure to nuts or peanuts. She has had no contacts with nuts or nut products at school resulting in a reaction since April 20, 2001. Testimony of D.P.

Over the remainder of the spring and through the summer, Parents continued to meet with the District and school personnel to discuss the contents and details of the 504 plan. Parents repeatedly emphasized the importance of preventative action, particularly hand washing by students who had eaten or touched items with peanuts or nuts, and expressed their concerns over the lack of sinks in R.P.'s classroom and in the lunchroom. However, the general consensus was that the April 20, 2001 Plan and attached protocols were working well. Ex. D19.

On August 29, 2001, at a 504 team meeting, Oregon Department of Education 504 Consultant Winston Cornwall opined that the District had gone beyond what was reasonable in developing the spring 2001 504 plan. Warren testimony; Ex. D20. Around this same time, Office for Civil Rights staff member Robin Flavella also suggested that the District may have gone beyond what was legally necessary in drafting R.P.'s spring 2001 504 Plan. Warren testimony.

On October 5, 2001, Parents received a letter from the Special Education Director, Suzanne Warren, reporting that school personnel and the ESD nurse had met the previous week to review implementation of R.P.'s 504 plan, and that overall things were going very smoothly. However, because of the several attached plans, protocols, flowcharts and lists, the District felt that the entire document was becoming difficult to use, particularly when changes were needed. The District proposed retaining the first part of the Plan, which was specific to R.P., as the Plan proper, and separating out the portions of the Plan which detailed the specific actions required to implement the Plan. A copy of the Plan, with the proposed modifications, was being sent to Parents. Parents were asked to consider these proposed changes in preparation for a meeting which had not yet been scheduled. Ex. S17.

Parents called the District and stated their objections to the October 5 proposal. The District responded by letter to Parents objections on October 16, 2001, writing, in relevant part, that the section regarding safety had been moved from page 3 of the Medical Protocol to the part of the 504 Plan addressing Specific Accommodations/Interventions Needed, and was still a part of the Plan, that the District would reinstate symptoms not included in the health protocol, but that the District was rejecting Parents' request to include the [8 page] Situational Flow Chart as part of the Plan. The District explained that it would continue to do the things included on the chart as they were the specific steps needed to implement the Plan, but that it needed the freedom to implement necessary changes in the Flow Chart without convening a 504 team meeting to do so. In order to address Parents' concerns about "faithful" Plan implementation, however, the District proposed regular meetings, beginning with weekly frequency and then less frequently as team members were confident that things were working well. Ex. S18.

Even with the precautions in the Plan and the detailed instructions for implementation, on October 18, 2001, R.P.'s teacher allowed a parent to bring in birthday treats which had nuts in them for another student. The following day, R.P. was on a field trip. Several students who were on the same bus as R.P. jumped in a bin of nuts, despite instructions to parent volunteers, causing concern for R.P.'s possible exposure.

The District reiterated its position in a letter from its legal counsel to Parents' counsel on October 26, 2001, noting specifically that "[A]lthough the District will continue to utilize the Situational Flowchart and Process Responsibility List with staff as needed to ensure implementation of the 504 Plan, those documents are not part of the Plan," but rather describe the methods by which the components of the Plan will be carried out, thus allowing the District to retain the flexibility needed to change the methods for fulfilling the Plan. Ex. S19.

The Health Management Plan, the Transportation Medical Protocol, the Situational Flowchart and R.P. Process Responsibility List were modified and updated in October 2001. On October 31, 2001, Parents received the updated and modified 504 Accommodation/Intervention Plan for R.P. dated November 15, 2001. The Health Management Plan and the Transportation Medical Protocol are referenced in the Specific Accommodations/Interventions found in Section II of the 504 Plan. The Situational Flowchart and R.P. Process Responsibility List are not referenced. The Transportation Medical Protocol, Situational Flowchart and R.P. Process Responsibility List were not attached.

The following specific Accommodations/Interventions Needed are listed, differing from the March 2001 Plan's list in several respects; deletions are shown in brackets, additions with underlining:

-Steps will be taken to eliminate nut products and nut oils from R.P.'s classroom.

-Allergy-free table is [will be] maintained in the cafeteria.

-Food preparation for R.P. is [will be] nut-free.

-Students are [will be] trained regarding R.P.'s allergy, prevention, and [appropriate] response (i.e. washing hands after eating nut products, recognizing R.P.'s allergy symptoms and telling an adult).

-Staff (including substitutes) are [will be] oriented, trained, and delegated as appropriate regarding R.P.'s allergy, prevention, intervention and treatment (*see* Health Management Plan attached*);

-Medication for treating R.P.'s allergic reaction is [will be] available/accessible to R.P. in any school setting, including field trips.

-R.P.'s safety is [will be] maintained on the bus (*see* Transportation Medical Protocol attached*).

*These documents will say "Reviewed and updated quarterly."

The Health Management Plan specifies that prevention is the best way to keep R.P. safe and that her severest reactions are from ingestion, from getting oil from any nut on her skin from objects when other children touch them after eating food with nuts or nut oil and not washing before touching the object, or by direct touch when other children touch R.P. after eating food with nuts or nut oil and not washing before touching R.P.

Parents were not satisfied with the proposed removal of the Situational Flowchart and R.P. Process Responsibility List and the District's determination to treat these documents as providing detailed instructions or methods for implementing the remainder of the Plan. Mrs. P. noted in her "chronolog" on October 31, 2001 that the school had removed the language regarding reading labels from the Plan and that "no protection provided within the cafeteria and allergy free table -- unsure whether food is nut free and who is safe to sit next to R.P. Removed language of taking [steps] to protect R.P. while she is in her reading classroom." Ex. D19.

Parents removed R.P. from the school on October 31, 2001 and informed the District that R.P. would not attend school as there was no protection in place for her safety. Ex. D19.

Dr. Wagner, R.P.'s allergist, met with Mrs. P and Parents' (then) attorney on November 2, 2001 to review the proposed changes made in R.P.'s Plan and compare them with the March 16, 2001 Plan. Dr. Wagner noted that the main concern was for R.P.'s safety and what the school should accept as its responsibility. Mrs. P. subsequently wrote in her chronolog that Dr. Wagner felt that the March 2001 plan was the minimum necessary to keep R.P. safe and that he agreed with Parents' plan to keep R.P. home until they had assurances from the school regarding a nut free classroom, meals, and a plan for safety within the cafeteria. He was asked to sign a letter on R.P.'s behalf regarding the proposed changes made in R.P.'s Plan. He did not do so. Ex. D18, D19.

Dr. Baskin, R.P.'s pediatrician, subsequently submitted a letter on November 8, 2001, stating his recommendation for R.P.'s removal from school until the Health Management Plan and 504 plan had procedures implemented which would likely prevent another anaphylactic response. He endorsed the 504 Plan and attachments dated March 16, 2001 through April 19, 2001, together with the modifications made at the August 29, 2001 504 team meeting, Ex. S21.

At Parents' request, the 504 team convened again in December 2001. Both parties were represented by legal counsel. As a result of the meeting, negotiations continued between legal counsel throughout December, in an attempt to reach a mutual agreement regarding the content of the 504 plan. Although District staff believed the 504 plan to be legally adequate, the District agreed to numerous changes to the 504 plan in an attempt to reach agreement with Parents. Primary areas of disagreement were:

-Whether children would be required to wash their hands after eating lunch brought from home, or be given verbal cues/reminders.

-The timing and manner in which students would be cued or trained in R.P.'s allergy.

-The manner in which the allergy-free table would be "maintained".

-The manner in which school-sponsored after-school events which R.P. was mandated to attend and at which food is served in the cafeteria would be made safe for R.P.

-Whether express language would be included in the Plan to require reading labels.

-Whether the Plan should include the Situational Flowchart and Process Responsibility List.

-Whether the District would or could, as suggested by the requested Plan specifics, guarantee R.P.'s safety. Ex. D3, D4, D5, D6.

The parties reached a tentative agreement immediately prior to winter break. R.P.'s parents allowed her to return for a single day following winter break. Ex. D8.

On January 4, 2002, the District finalized the amended 504 plan, encompassing all of the changes agreed to by the parties during the negotiations between legal counsel in December 2001. The revised plan contained the following detailed provisions:

-In R.P.'s classrooms (home room, reading, math, music, and PE), teachers (including substitute teachers) and adult assistants will:

-Not use any aerosol in the classroom that has nut products in it;

-Not distribute any food item to any child in the classroom that lists nut products in its label or says "may be processed with nut products";

-Either (a) wash hands before starting class, or (b) not touch R.P., unless staff member has chosen to use nut-free hand care products;

-Not use curriculum materials in classroom that contain nut products;

-R.P.'s homeroom, reading and math teachers will have a sign or written cue reminding students to wash their hands if they have handled nut products. Students will be provided a verbal cue at the beginning of the school year.

-Food preparation at school by school employees will either (a) Use no nut products, or (b) If school plans to start using nut products in school-prepared foods again, the principal will notify the parents and the parties will discuss accommodations needed to protect R.P. Parent groups will be informed about R.P.'s allergy and encouraged to provide food that does not contain nuts.

-Sponsored events that occur after school that R.P. is required to attend and where food is prepared and provided by school staff, the District will provide the same protections to R.P. that she receives under the 504 plan during the school day. However, for any events at the school that are run or sponsored by

another organization, or where another organization provides or prepares the food, the District understands that R.P. and her parents will take appropriate steps to ensure R.P.'s safety.

-The school will maintain an allergy-free table in the cafeteria throughout the day, including at breakfast and lunch time. No students with cold lunches are to sit at this table. R.P. is responsible for ensuring that she sits at this table for breakfast and lunch.

- Students are trained regarding R.P.'s allergy, prevention, response (i.e., washing hands after eating nut products, recognizing R.P.'s allergy symptoms and telling an adult). Training will occur within two weeks of the start of school and be school wide, and that either an interpreter or interpreted materials will be used with ELL students who cannot understand the information if it is presented in an English format.

- Staff (including substitutes) are oriented, trained, and delegated as appropriate regarding R.P.'s allergy, prevention, intervention/treatment.

- Medication for treating R.P.'s allergic reaction is available/accessible to R.P. in any school setting, including field trips. R.P. will be accompanied on field trips by an individual knowledgeable about her allergy and her health management plan and trained to administer her medication, including the Epi-Pen.

- R.P.'s safety is maintained on the bus.

Ex. D7. The USDA approved menu planning options, the Health Management Plan and the Transportation Medical Protocol were attached. The Situational Flowchart and R.P. Process Responsibility List were not attached.

Counsel for R.P. subsequently informed the District that R.P.'s parents sought additional changes to the January 4, 2002 504 plan. Ex. D8. R.P.'s parents again removed her from school after one day of attendance, and R.P. did not return for the remainder of the 2001-02 school year.

On or about January 14, 2002, the District received a 3-page fax from R.P.'s parents, setting out additional language that they believed needed to be included in R.P.'s 504 plan. This proposal was similar in many respects to the District's January 4, 2002 proposed plan, with much of the differences being found in the manner in which a specific accommodation was phrased.[6] However, Parents' January 14, 2002 proposal also included much of the content of the Situational Flow Chart and Process Responsibility List, set out as the following additional Specific Accommodations/Interventions not clearly or expressly found in the District's proposal[7], and which are in dispute in this hearing:

-Send a note home to parents of classmates twice a year explaining R.P.'s life-threatening allergy and informing them of the policy that no peanut or tree nut products will be allowed for parties, activities, etc., and no food will be accepted without a label.[8]

-Notify R.P.'s parents when R.P.'s classroom will have a substitute.

-The allergy-free table will be washed, in compliance with established written procedures, before breakfast and lunch, and supervised by a school employee.

-All students are expected to and are provided an opportunity to wash their hands after eating breakfast and lunch.

-The Parent Teacher Committee will be educated regarding R.P.'s life threatening allergy and informed not to provide food that may be processed with or that contains peanut or tree nuts ingredients for activities that are school mandated to attend.

-Field trips, assemblies and special events: Two Epi-pens will be available on field trips.

-If R.P.'s parents feel that the field trip environment is unsafe, R.P. will not attend nor will she be penalized for not attending.

-Precautions will be taken[9] by the principal or R.P.'s teacher to protect R.P. if an assembly presents content which may contain peanut or tree nuts.

-If cross-age teaching occurs in an environment outside R.P.'s regular classrooms, her teacher is responsible for ensuring R.P.'s safety, including such measures as proper hand washing and washing desk used, if necessary, and materials used do not contain or are not processed with peanut or tree nuts.

-During a fire or fire drill, the school will follow established written procedures to ensure R.P.'s medicine is available at all times.

-If computers are used outside R.P.'s regular classroom, the adult in charge will clean the computer prior to R.P. using it.

-If the Library is used for meetings (student council, ABC meetings, etc.) and food is eaten, the adult in charge will ensure that the tables are washed following the same procedure used in the cafeteria.

-R.P.'s parents are responsible for providing all medications and keeping them current.

-The Health Management Protocol procedures will be followed in responding to or treating an allergic reaction.

-Education, varied for developmental level, is provided to the entire student body regarding R.P.'s allergy, prevention, recognition of allergy symptoms, and how to respond to her allergy within the first two weeks of school and again in January by the ESD school nurse. R.P.'s home room classroom will receive training on the first day of school.

-An interpreter will be used with ELL students who cannot understand the information if presented in English.

-Written materials interpreted in the student's own language may also be used to augment the training.

-If an interpreter is not available the principal will contact R.P.'s parents to develop an appropriate plan of action.

-R.P. and her parents are offered an opportunity to participate in the school wide education of students.

All staff, including substitutes, are trained on either Level 1, 2, or 3 or the Allergy Protocol and Health Management Protocol by the ESD nurse during August or the first week of school. R.P.'s teachers will be trained before the first day of school. The Health Management Protocol will be reviewed and updated quarterly.

-The Transportation Protocol will be followed and reviewed and/or updated as needed but at least every August.

-R.P. will have an assigned seat available on the bus, which will be cleaned (following established written procedures) prior to her use both morning and afternoon.

-Parents will notify the Transportation Department if R.P. will use a different bus route.

-The school will notify the Transportation Department in advance of any field trip or other activity requiring transportation and which R.P. will attend.

-Transportation Department staff will receive Epi-pen training in September and January of each year. Only drivers with training will drive a bus R.P. is on.

-R.P. will carry her medication with her when riding on the bus, will introduce herself to any new or substitute driver, and, if able, will notify the driver if she needs help.

-The school is responsible for developing and maintaining procedures and documentation for ensuring implementation and compliance of (sic) the 504 plan, which records will be available for review on the parents' request. Ex. S26.

The District offered to change R.P.'s placement if Dr. Baskin continued to maintain that she could not attend public school without all of the additions insisted upon by Parents. It is the District position that if the additions proposed by R.P.'s parents and Dr. Baskin were included in the Plan, the 504 Plan would be unworkable and could not be implemented in a public school setting, and thus the least restrictive environment in which parent's proposed 504 plan could be implemented would be home tutoring. Ex. D15.

Mrs. P. testified that she had obtained a review of both the District's January 4, 2002 Plan and Parents' January 14, 2002 504 Plan by Dr. Hugh Sampson of the Food Allergy Initiative. Dr. Sampson is one of the country's most published experts in peanut allergies. Mrs. P. testified that Dr. Sampson was critical of the District's version in the areas of the Transportation plan needing clarity, hand-washing being a concern, and the lack of specific discussion of the methods by which the accommodations would be implemented. In Dr. Sampson's opinion, Parents' much more detailed proposal addressed the concerns about methodology. Testimony of. D.P.

Although the District changed the 504 Plan effective November 15, 2001, and again on January 4, 2002, District asserts that the spring 2001 Plan continued to be implemented throughout the 2001-02 school year, even though R.P. no longer attended, with the exception of one day in January 2002, after November 1, 2001. The school continued all of the practices established in the spring of 2001 in the April 20, 2001 Plan. This included the nut-free kitchen food preparation, maintaining an allergy-free table in the lunchroom, banning nut products from the classroom, and training staff and students. Testimony of Klewitz, Nye, Cochran. However, should R.P. return to school, the District is prepared to implement the January 4, 2002 504 Plan. District brief.

ESD Nurse Cochran has designed and overseen all training regarding R.P.'s allergy. She has conducted 22 training sessions with school staff, bus drivers, and students regarding R.P.'s nut allergy. R.P. has been involved in developing and presenting some of the training. In Nurse Cochran's experience, repeat training during the school year may or may not be necessary, depending on turnover in the student body and staff, evidence of success or difficulty in carrying out the steps contained in the medical protocol, any substantial change in R.P.'s symptoms, and other factors. However, it is unlikely that she could provide all-student or home room training regarding R.P.'s allergy on the first day of school, as she is required to be present in the classrooms of other students who need tracheal suctioning, catheterization, monitoring of feeding tubes, and other services from the very first day in order to attend. Cochran testimony.

Teacher Burlison is able to include information about R.P. in the instruction about classroom rules that she gives students during the entire first week of school. Burlison testimony.

Food may be prepared by Parents and brought into school for any school-sponsored events occurring after regular school hours, such as the fall carnival, spaghetti feed, and open house. A day-care program also uses the cafeteria and provides its own food. However, there are no after-school events that are mandatory for students. Burlison, Klewitz testimony.

The District's practice is to provide up to five hours per week of tutoring for students who are unable to attend school based on medical need. Warren, Moorefield testimony.

Since the time that R.P. has been out of school, she has received approximately 58 hours of tutoring by a tutor hired by Parents. The District has not provided or offered a tutor. Parents believe that as Dr. Baskin advised removing R.P. from school until the District provided a 504 Plan acceptable to Parents, that R.P. is unable to attend school based on medical need and that the District should provide tutoring. Parents have incurred $2247 in tutoring expenses to date. Mrs. P. believes that R.P. may have some gaps in her knowledge and thus requests a compensatory education bank be set up in the amount of hours R.P. should have been receiving tutoring, five hours a week, for the time she has missed school minus the actual amount of tutoring time provided by Parents. Testimony, R.P. closing brief.

Conclusions of Law

37. During the 2001-2002 school year, the District offered R.P. a 504 plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met. The District did not violate Section 504.

38. There being no violation of Section 504, Parents are not entitled to be reimbursed for the costs they incurred in having R.P. tutored, nor is R.P. entitled to receive compensatory education.

3. Currently, the District is offering R.P. a 504 plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met. The District is not in violation of Section 504.

Opinion

Section 504 of the Rehabilitation Act of 1973 was enacted to address discrimination against persons with disabilities. It provides in pertinent part:

"No otherwise qualified individual with a disability in the United States, 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. Section(s) 794(a). Regulations promulgated by the Office for Civil Rights (OCR) to interpret and implement Section 504 are found at 34 C.F.R. Part 104. The OCR is the division of the federal Department of Education that oversees the administration and enforcement of Section 504, including promulgating the regulations found at 34 CFR 100 *et seq.,* and the Americans with Disabilities Act (ADA) of 1990 and related regulations. The civil rights laws enforced by OCR extend to all state education agencies, including elementary and secondary school systems.

To establish a *prima facie* case of discrimination under Section 504, R.P. must show that (1) she is an individual with a disability; (2) she is otherwise qualified to receive the benefit of the program; (3) she was denied the benefits of the program solely by reason of her disability; and (4) the program receives federal financial assistance. (*See Weinreich v. Los Angeles County Metropolitan Transportation Authority,* 114 F3d 976, 978 (9th 1997). It is only the question of whether R.P. was denied the benefits of the program solely by reason of her disability that is in dispute here.

Under Section 504, the corollary to the Individualized Education Program (IEP) required under the Individuals with Disabilities Act (IDEA) is the plan most commonly called a 504 Accommodation Plan (504 Plan) or Individual Accommodation Plan (IAP). The 504 Plan provides for modifications and accommodations which, simply put, allow the student equal access to educational benefits by compensating for the student's disabilities and having the student's access needs met as adequately as those of nonhandicapped students are met. In this case the disagreement between R.P.'s parents and District is, for the most part, either one of disagreement over the specificity of language in the 504 Plan, or of disagreement over the need for a particular accommodation. Parents are essentially asserting that the more detailed 504 Plan is the appropriate one to meet R.P.'s needs, that her needs are safety, and that the best way to keep her safe is to prevent any possibility of exposure.

The District has proposed a certain set of accommodations which are set out in the January 4, 2001 504 Plan, a plan which was the result of meetings of the 504 team and at least one meeting at which Parents' and the District's legal counsels were present. The District opposes the subsequent changes or additions requested by Parents, arguing that the requested additions are either unnecessary, or render the 504 Plan unworkable, unwieldy or ineffective, largely because of the time it would take to find the appropriate accommodation for any particular situation. It asserts that the standard for 504 accommodations in the primary and secondary school setting is one of reasonableness, *citing to Hunt v. St. Peter School,* 26 IDELR 6 (W.D. Missouri 1997) and *J.D. v. Pawlett,* 224 F.3d. 60 (2nd Cir. 2000). Under the District's approach, reasonableness includes such considerations as undue cost and infringement on the rights of other students. The District disputes Parents' assertion that a 1993 letter[10] from the OCR applies here.

Finally, the District asserts that R.P. bears the burden of establishing a *prima facie* case pursuant to Sec. 504, and disputes that R.P. has carried her burden[11] to show that she was denied the benefits of, or the opportunity to access, her educational program in the same way as non-disabled students, or was subjected to discrimination under the District's programs, solely because of her handicap, i.e., because of her nut allergy. On this latter point, it is the District position that no such opportunity was denied and that the accommodations offered in the District's January 4, 2001 504 Plan were adequate.

Parents have requested changes to the accommodations offered by the District, asserting that they are not asking for guarantees that R.P. would not be exposed at school, but that they are, however, insisting on a 504 Plan which emphasizes prevention to protect R.P. from exposures. Parents argue that the "reasonableness" standard is applicable only in the employment setting, *citing* 34 CFR 104.3(k)(1) (sic).[12] Parents also dispute the federal circuit court's holding in *J.D. v. Pawlett School District,* 224 F.3d 60 (2nd Cir. 2000) as "highly suspect," arguing that it relies on two Supreme Court cases dealing with Section 504 in a higher education case and a Medicaid case.[13] Both cases were addressed by the OCR in its 1993 Letter to Zirkel, which, Parents assert, clearly states that the reasonable accommodation standard applicable to higher education and Medicaid (*see Pawlett* at 9) does not apply in the primary and secondary education setting. Parents argue that had the OCR intended for the reasonable accommodations standard to apply to other subparts of the regulations, it would have placed the definition in the general definitions section of the regulations, not just in the Employment Practices Subpart. Parents note that while "there will always be some misguided courts who hold that the "reasonable accommodations" standard applies" to the primary education setting, there is no Supreme Court, Ninth Circuit or Oregon case law binding the ALJ to do so.

34 CFR Part 104, Subpart D (34 CFR 104.31 through 104.39), applies to preschool, elementary, secondary and adult education programs or activities receiving Federal financial assistance. 34 CFR 104.34(a) provides that in the academic setting, the District is to educate, or provide for the education of, each qualified handicapped person in its jurisdiction with non-handicapped persons "to the maximum extent appropriate to the needs of the handicapped person." The same standard applies in the provision of nonacademic and extracurricular services and activities, including meals, recess, and such things as physical recreation athletics, transportation and recreational activities. 34 CFR 104.34(b)

The OCR in the U.S. Department of Education (ED) enforces Section 504 in programs and activities that receive assistance from ED. The OCR also enforces Title II of the Americans with Disabilities Act of 1990 (ADA), which is applicable to state and local governments. Section 504 prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance. Title II of the Americans with Disabilities Act prohibits discrimination on the basis of disability by state and local governments. Both Section 504 and Title II of the ADA prohibit discriminatory treatment of students with disabilities. Section 504 focuses on the elimination of discriminatory treatment based on the student's disability. The ADA's focus includes elimination of discriminatory treatment but moves beyond that to give some consideration to balancing the costs to the program with the need for and appropriateness of the accommodations which, when implemented, will eliminate discrimination or remove barriers to program access.

The OCR did, indeed, tell Professor Zirkel that the FAPE requirement under 34 CFR 104.33 does not implicitly incorporate a reasonable accommodation, reasonable modification, or other cost-conscious limitation as applied to students eligible under Section 504. The OCR notes that Section 104.33(a) guarantees all qualified individuals with disabilities a FAPE, which consists of regular or special education and related aids and services that are designed to meet the individual education needs of qualified persons with disabilities as adequately as the individual education needs of other persons are met, and that are designed and delivered in accordance with the Department's regulation. The OCR emphasized that 34 CFR 104.33 does not require changes beyond those necessary to eliminate discrimination, and that in the lower court cases (including *Rothschild*) denying particular requested educational services, the denials were "almost uniformly because the courts found that discrimination was not occurring." Letter to Zirkel.

Decisions subsequent to this 1993 letter do address the nature of the accommodations and the requirements of Section 504 and the Americans with Disabilities Act (ADA) in the arena of extracurricular activities.[14] Generally, if a requested accommodation would "fundamentally alter" the program, it will not be required. *See, e.g., Montalvo v. Radcliffe,* 29 IDELR 896 (4th Cir. 1999) (Change in instructional style to accommodate HIV positive child would fundamentally alter karate school's program). In the high-school athletic arena, the courts are divided on whether waiver of eligibility requirements would fundamentally alter the athletic program. *See, e.g., Bingham v. Oregon School Activities Association,* 30 IDELR 20 (D Or 1999) (enforcement of interscholastic rule limiting eligibility to 8 consecutive semesters, without exception for disabled students, violates Section 504 and ADA); compare *Frye v. Michigan Athletic Ass'n,* 26 IDELR 432 (6th Cir. 1997) (enforcement of 8-semester rule not discriminatory).

In the area of auxiliary aids and services needed to allow participation in extracurricular activities operated or sponsored by the district, such as the assistance of an aide in order to participate in an after-school day care program or special transportation in order to participate in a field trip, the OCR does not consider such auxiliary aids and services are required by the ADA and Section 504 if they would result in a fundamental alteration in the nature of the program, or cause undue financial or administrative burdens to the district. *See, e.g., Horry County (SC) School District,* 35 IDELR 39 (OCR 2001) (OCR concluded evidence did not support parent's allegation that District violated Section 504 and ADA by failing to provide hearing-impaired student with effective means of communication. OCR found that District made good faith attempts to meet child's communication needs, despite parent's dissatisfaction with District's interpreter services). *Cf Wichita Falls (TX) Indep. Sch. Dist.,* 33 IDELR 167 (OCR 1999) (District agreed to provide hearing-impaired student with sign language interpreter to allow for participation in basketball and other extracurricular activities.)

In this case, Parents assert that the appropriate standard applicable in this case is whether the 504 Plans meet the needs of R.P. as adequately as the needs of other students are met. As specifically applied to R.P.'s case, her need is one of safe access to her educational program and to nonacademic and extracurricular services and activities. The question becomes, then, whether the District has provided accommodations and services which would allow R.P. to safely access school as adequately as the District allows for safe access to students without disabilities. Given R.P.'s specific disability, her allergy to peanuts and tree nut products, the standard essentially proposed by Parents -- safe access -- is appropriate for this case, and is considered to mean "to the maximum extent appropriate" to R.P.'s needs. This standard, however, is subject to the balancing inquiry of whether those accommodations would result in a fundamental alteration in the nature of the program, or cause undue financial or administrative burdens to the District, as allowed under the ADA.

On the question of including detailed language and instructions in the "Section II. 504 Accommodation/Modification Intervention Plan" (A/MIP) found on page 4 of the January 4, 2002 504 Plan or in attached protocols, and whether those protocols are 'methodologies,' as asserted by the District, or encompassed within the broader and less detailed accommodations listed in the A/MIP, I find to be distinctions without differences and not determinative here. What matters for this decision is whether the accommodation allows R.P. equal access to her educational program.

As set out in the notice for hearing and in this Order, the first issue in this case is "[W]hether the District violated Section 504 during the 2001-2002 school year by failing to offer R.P. a 504 Plan that was designed to meet her individual needs as adequately as the needs of students without disabilities are met? If so, should Parents be reimbursed for the costs they incurred in having R.P. tutored, and should R.P. receive compensatory education?"

Parents have stated that the April 2001 504 Plan is acceptable and adequately provides for R.P.'s safety. They object, however, to the November 2001 504 Plan and to the January 4, 2002 504 Plan, both of which were offered during the 2001-2002 school year. Consequently, I consider whether the District violated Section 504 between November 2001 and the end of the 2002 school year by failing to offer R.P. a 504 Plan that was designed to allow R.P. to safely access school as adequately as the District allows for safe access to students without disabilities.

Issue I

I turn now to the question of the November 2001 504 Plan, and consider whether the District's 504 Plan would allow R.P. to safely access school as adequately as the District allows for safe access to students without disabilities.

Parents' primary, if not sole, objection to the November, 2001 504 Plan is that the District removed the references to the Situational Flowchart and the Process Responsibility List from the Specific Accommodations/Interventions found in Section II of the November 504 Plan. It is Parents' position that the reference to these two documents made them a part of the April, 2001 504 Plan and that by reason of this "inclusion," R.P. was spared any exposures. Parents' position is that by removing this reference, these detailed instructions are no longer a part of the Specific Accommodations/Interventions and no longer available to direct required behaviors on the part of the District staff to protect R.P. I am unable to reach the conclusion desired by Parents on this issue.

After November 2001, even though R.P. had been removed from school, the school continued to implement the protocols and protections which would have been implemented had R.P. been in attendance. The cafeteria remained nut-free and the cook continued to read labels. The allergy-free table was washed and put up. Only children who ate hot lunches from the cafeteria were allowed to sit at the table with R.P. Labels were read in class and no peanut or tree nut products were used. Training of staff and students continued. The Health Management Plan and the Transportation Medical Protocol continued to be implemented. The detailed instructions and responsibilities for implementing the 504 Plan as outlined in the Situational Flowchart and the Process Responsibility List continued to be followed.

On Issue 1, I conclude that, even without reference to the detailed instructions contained in the Situational Flow Chart and Process Responsibility List, the District offered a 504 Plan that provided accommodations and services which allowed R.P. to safely access school as adequately as the District allowed for safe access to students without disabilities, and that the 504 Plan was designed to meet her individual needs as adequately as the needs of students without disabilities are met. Consequently, I conclude that Parents should not be reimbursed for the costs they incurred in having R.P. tutored between November 1, 2001 and the close of the 2001-2002 school year, nor should R.P. receive compensatory education.

Issue II

The second issue for hearing is whether the District is currently violating Section 504 by failing to offer R.P. a 504 Plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met? If so, is the parents' proposed 504 Plan dated January 14, 2002 adequate to address R.P.'s needs, and should it be adopted and implemented?

I review the District's January 4, 2002 504 Plan on the issues raised regarding vagueness, adequacy of hand washing requirements, frequency of training, accommodations for after-hours school-sponsored activities, and maintenance of the allergy-free table.

The District proposed a new 504 Plan on January 4, 2002. Parents declined to accept the proposal and countered with a number of proposed alternatives on January 14, 2002. Parents' proposal incorporates most of the provisions of the Situational Flow Chart and Process Responsibility List and inserts them in a three-page Accommodations/Interventions Needed section of the 504 Plan. Parent's proposed 504 Plan would also include the health management protocol and transportation protocol updated on October 25, 2001.

Parents' argue that the District's 504 Plan does not adequately provide for the necessary accommodations to protect R.P., and assert that the language of many of the provisions is vague and open to interpretation. As an example of this alleged vagueness, Parents again assert that the accommodation of reading labels of food brought into the class can not be inferred as the 504 Plan is currently written, and complain that there is no provision that all foods brought in must have labels. Other continuing disagreements are that the 504 Plan does not adequately address hand washing after students eat products with nuts or peanuts, that it does not adequately provide the necessary accommodation of training to students in R.P.'s class, calling only for training to occur within the first two weeks of school, and that the frequency of training is left open.[15] Parents also assert that the 504 Plan fails to include necessary accommodations to allow R.P. to safely participate in school-sponsored activities which occur after school hours and thus is discriminatory on its face, and that the 504 Plan fails to include necessary accommodations in the area of the provision of the allergy-free table as without the monitoring of the table, the table can be maintained but still not provide for R.P.'s protection against exposures. Parents' assert that their 504 Plan addresses these alleged inadequacies in a concise three page document.

Vagueness

While the reader is not explicitly referred to the various protocols, more particularly to the Situational Flow Chart and Process Responsibility List, the District's January 4, 2002 504 Plan lists substantially more detailed accommodations than its April 2001 504 Plan, as follows:

-In R.P.'s classrooms (home room, reading, math, music, and PE), teachers (including substitute teachers) and adult assistants will:

-Not use any aerosol in the classroom that has nut products in it;

-Not distribute any food item to any child in the classroom that lists nut products in its label or says "may be processed with nut products";

-Either (a) wash hands before starting class, or (b) not touch R.P., unless staff member has chosen to use nut-free hand care products;

-Not use curriculum materials in classroom that contain nut products;

-R.P.'s homeroom, reading and math teachers will have a sign or written cue reminding students to wash their hands if they have handled nut products. Students will be provided a verbal cue at the beginning of the school year.

Parents assert that with the CLASSROOM accommodations proposed on page 2 of their January 14, 2002 504 Plan, R.P. would have adequate protection in the classroom. Items that differ from the District's proposal, and which Parents would have included in the 504 Plan, are:

-The inclusion of "or may have been processed with peanuts" or nuts.

-Verbal cueing for hand-washing throughout the year.

-A specific provision requiring label reading prior to distribution.

-Refusing to accept food brought into the classroom if it does not have a label.

-R.P.'s homeroom teacher will send home a note to classmates' parents twice a year informing them of R.P.'s life threatening allergy and of the policy of no peanut or tree nut products allowed for parties, activities, etc.

-Notifying R.P.'s parents when R.P.'s classroom will have a substitute.

Inclusion of "or may have been processed with peanuts" or nuts

Direct or indirect exposure by touch to peanuts, peanut oils, tree nuts or products which may have been processed with peanuts or tree nuts causes R.P. to have an allergic reaction. Having an allergic reaction means that R.P. must leave the classroom, and possibly the school proper, as well as having medication administered. Absence from the classroom results in a loss of access, for whatever period of time, to the educational program to which R.P. is entitled. Consequently, inclusion of the phrase "or may have been processed with peanuts" or nuts is appropriate for inclusion in the 504 Plan accommodations. However, the District has not failed to offer R.P. a 504 Plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met by not including that phrase.

Verbal cueing for hand-washing throughout the year

A child is no better at remembering to wash his or her hands than an adult. A classroom full of 4th grade students compounds this tendency to forget. For the reasons set out in the preceding paragraph, verbal cueing for hand-washing throughout the year is appropriate for inclusion in the 504 Plan accommodations. However, Parents seek to have the 504 Plan include an accommodation under which "all students are expected to and are provided an opportunity to wash their hands after eating breakfast and lunch." The District's 504 Plan requires requiring verbal cueing once per year, as R.P.'s home room, reading and math teachers will have a sign or written cue reminding students to wash their hands if they have handled nut products. The evidence does not demonstrate that the District's accommodation, particularly when read together with the other accommodations of the 504 Plan and the Health Management Plan, fails to offer R.P. a 504 Plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met.

Requiring label reading prior to distribution, no food accepted without a label

The requirement to not distribute any food item to any child in the classroom that lists nut products in its label or says "may be processed with peanuts or nut products" presupposes that there will be a label, that the label must be read to know if there is any risk of exposure, and if there is no label, one will not know if there is a risk of exposure and thus common sense dictates that the item will not be distributed. Moreover, sending a note home to classmates' parents twice a year informing them of "the policy of no peanut or tree nut products allowed for parties, activities, etc.," and that "No food will be accepted without a label" creates a de facto policy prohibiting entrance into the classroom, and by extension the entire school, of any product of any type, food or otherwise. Such a blanket prohibition on other parents sending any homemade treats is unacceptable interference in the individual rights of parents to raise their children as is appropriate for their culture, beliefs, languages and finances, even if a list of ingredients (label) for homemade treats is included with the treats, and goes beyond the standard applicable here.

Further, the provisions for reminders for hand washing after eating or handling anything containing or processed with nuts and the requirement that R.P. not be touched by teachers who have not washed their hands before starting class, unless the staff member has chosen to use nut-free hand care products,

accomplishes the protections Parents seek through inclusion of the specific accommodation regarding labels. I do not find inclusion of these two accommodations necessary to allow R.P. to safely access her education as adequately as the District allows for safe access to students without disabilities.

Notify Parents when a substitute will be present

Finally, the requested accommodation requiring the school to notify R.P.'s parents when R.P.'s classroom will have a substitute offers nothing by way of protection for R.P. Parents understandably are disturbed by the exposure that occurred when R.P. had a substitute teacher in her 2nd grade year. Notifying them of the substitute would not have prevented that exposure, and I found nothing in the evidence to demonstrate how parents would respond in future if notified other than to call R.P. at school and remind her that she does not need to cooperate with any directions by a substitute that would put her at risk. Nor is there any reason to believe that another exposure would be sure to occur at any time a substitute is needed. I do not find inclusion of this accommodation necessary to allow R.P. to safely access school as adequately as the District allows for safe access to students without disabilities.

Training

Parents object to the District's proposed accommodation regarding training and assert that it is both vague and insufficient in terms of frequency. The District's proposed accommodation provides that "students are trained regarding R.P.'s allergy, prevention, response (i.e., washing hands after eating nut products, recognizing R.P.'s allergy symptoms and telling an adult). Training will occur within two weeks of the start of school and be school wide, and either an interpreter or interpreted materials will be used with ELL students who cannot understand the information if it is presented in an English format." In addition, R.P.'s home room, reading and math teachers will have a sign or written cue reminding students to wash their hands if they have handled nut products, as well as providing students a verbal cue at the beginning of the school year. Moreover, R.P.'s 504 Plan requires that staff are training in R.P.'s allergy and in prevention and treatment. Again, common sense must dictate that staff will be trained and will instruct R.P.'s classmates accordingly so that R.P. will be able to access her educational program as adequately as the District allows for safe access to students without disabilities, beginning with the first day of school.

Accommodation for after-hours school-sponsored activities

Parents are particularly concerned about R.P.'s ability to safely access mandatory school-sponsored events and object to the District's proposed accommodation in this regard. However, Parents also ask that their own proposed 504 Plan accommodation on this topic be modified to cover any school sponsored events, noting that R.P. has the right to participate in all of the school sponsored events, not just those for which her attendance is mandated.

The District's January 4, 2002 proposal provides the following accommodation/modification for R.P.: "Sponsored events that occur after school that R.P. is required to attend and where food is prepared and provided by school staff, the District will provide the same protections to R.P. that she receives under the 504 Plan during the school day. However, for any events at the school that are run or sponsored by another organization, or where another organization provides or prepares the food, the District understands that R.P. and her parents will take appropriate steps to ensure R.P.'s safety."

R.P.'s attendance at school during the day is not an elective activity. She is required to attend classes, and the school is likewise required to provide accommodations which enable R.P. to safely access her education in the same manner as non-disabled children. Were R.P. in physical attendance at the school, it could be assured that she would, in fact, be in class. Eating a cafeteria-provided lunch and field trips are not mandatory activities; the school must nevertheless accommodate R.P.'s access to those activities to the extent that the accommodations do not result in a fundamental alteration in the nature of the program, or cause undue financial or administrative burdens to the District. It is an undue administrative burden on the District to require that, for non-mandatory activities at which any student's attendance or

participation is voluntary, the District police the behavior of other possible participants, parents and community members alike, and prohibit the provision and distribution of food which may contain or have been processed with peanuts or tree nuts, require all participants to wash their hands or refrain from using any nut-based products prior to attending these events, and so forth.

Maintenance of Allergy-free table

Parents object to the provision for "maintenance" of an allergy-free table, arguing that the term "maintain" is vague and provides inadequate protection. The District's January 4, 2002 504 Plan provides that "[T]he school will maintain an allergy-free table in the cafeteria throughout the day, including at breakfast and lunch time. No students with cold lunches are to sit at this table. R.P. is responsible for ensuring that she sits at this table for breakfast and lunch."

The entirety of the January 4, 2002 proposed 504 Plan makes it abundantly clear that any tactile exposure to peanut, tree nuts and oils can result in an allergic reaction requiring administration of Benadryl or Epinephrine. The entire cafeteria is kept peanut and tree nut-free and labels are read. Simple common sense dictates that "maintenance" requires whatever actions are appropriate to prevent contamination of the table, including putting it up after use and covering it with a plastic cover, cleaning it to remove any traces of accidental contamination, and otherwise "maintaining" it in a contaminant-free state. In determining not to elaborate on all that is encompassed by the term "maintain" the District has not failed to offer R.P. a 504 Plan which is designed to meet her individual needs as adequately as the needs of students without disabilities are met.

Summary

Parents assert that R.P. has met the elements of a *prima facie* case of discrimination, by showing that she is a person with a disability, that she is qualified to receive the benefits of the District's educational program, that the District receives federal funding, and that she was denied the benefits of that educational program solely by reason of her disability. I find that R.P. failed to meet her burden on this last element, and thus do not find the District in violation of Section 504.

Order

During the 2001-2002 school year, Cascade School District offered R.P. a 504 Plan designed to meet her individual needs as adequately as the needs of students without disabilities are met.

In the January 4, 2002 504 Plan, Cascade School District offered R.P. a 504 Plan designed to meet her individual needs as adequately as the needs of students without disabilities are met.

R.P.'s parents are not entitled to reimbursement for costs related to the tutoring they paid for for R.P. following removal of R.P. from Turner Elementary School on or about October 31, 2001.

R.P. is not entitled to compensatory education for the period of time following her removal from Turner Elementary School on or about October 31, 2001.

The District has prevailed on the issues for which this hearing was requested.

[1]Prior to the hearing, Parents submitted a Motion for Ruling on Evidentiary Issue. I ruled that the question of implementation of R.P.'s 504 plan(s) is not at issue, and the manner of implementation, or lack thereof, will not serve as a basis for remedy separate and apart from the issues previously identified in this case. Any evidence presented at the hearing regarding implementation of R.P.'s 504 plans prior to her withdrawal from school on or about November 1, 2001, would be considered relevant only insofar as it might bear directly on the question of whether the plans were inadequate because they did not contain the specific plan contents requested by R.P.

[2]Peanuts are legumes, not true nuts.

[3]R.P. was referred to Dr. Wagner by Dr. Baskin, R.P.'s pediatrician.

[4]The EpiPen Auto injector is a disposable drug delivery system with a spring activated, concealed needle. It is designed for emergency administration to provide rapid, convenient first-aid for individuals sensitive to potentially fatal allergic reactions.

[5]The only documents actually identified as "protocols" were the Transportation Protocol and the Orientation Protocol.

[6]For example, the January 4, 2002 plan requires that "In R.P.'s classrooms (home room, reading, math, music, and PE), teachers (including substitute teachers) and adult assistants not distribute any food item to any child in the classroom that lists nut products in its label or says "may be processed with nut products." The results are the same as those which would be reached using the language in Parents' plan: "All food labels will be read by staff before distributing food to R.P. and her classmates." In order to avoid distributing any food that lists nut products in its label or says "may be processed with nut products," staff must read a label, and the food item must have a label to read.

[7]Provisions which are essentially identical in both proposals have not been included here.

[8]This provision in effect establishes a policy that extends the "nut-free" cafeteria to parents of classmates and prohibits parents from preparing and sending home-made treats for their child's class.

[9]It is unclear how this is any more likely to ensure R.P.'s safety than the phrase "steps will be taken."

[10]Written in response to an inquiry from Professor Perry Zirkel of the College of Education at Lehigh University. In the 504 FAQS (frequently asked questions) found on the OCR website, at *http://www.ed.gov/offices/OCR/,* the OCR reiterates its position that the reasonable accommodation standard does not apply in the elementary and secondary education setting.

[11]The District also asserts that R.P. has the burden to show that her allergy is, in fact, as severe as claimed, i.e. that skin contact with nut oil or trace residue puts R.P. at risk of anaphylactic shock or death in the same way that ingestion does, thus necessitating the additional measures requested. To the extent the District is correct in this allocation of burden, I must concur. The evidence does not support such a determination of equivalent risk.

[12]34 CFR 104.3(l)(1-4) defines "Qualified Handicapped Person" with respect to employment (1), public preschool, elementary, secondary, or adult educational services (2), postsecondary and vocational education (3), and "other services" (4). Only the definition of qualified handicapped person as it applies to employment uses the term "reasonable accommodation." Reasonable accommodation is defined in 34 CFR 104.12, relating to employment practices.

[13]*Pawlett* also refers to *Rothschild v. Grottenthaler,* 907 F.2d, 286 (1990) in which this same court held that in evaluating an accommodation offered, courts should be "mindful of the need to strike a balance between the rights of [the student and student's parents] and the legitimate financial and administrative concerns of the School District." In *Rothschild,* the Second Circuit held that the requirement that school district provide a sign-language interpreter for deaf parents of a student at school-initiated conferences incident to student's education, but not at voluntary extracurricular activities, was "reasonable accommodation."

[14]As noted above, the standard provided for in the regulations is the same for academic and extra-curricular setting.

[15]The frequency is not, in fact, left open, as it provides that training will occur within two weeks of the start of school and that students will receive a verbal cue regarding hand washing at the beginning of he school year. Frequency of training is in dispute, however, with Parents requesting twice-yearly training.

Regulations Cited

34 CFR 104.3(k)(1)
34 CFR 104.31-104.39
34 CFR 104.34(a)
34 CFR 104.3(l)(1)-(4)

Cases Cited

114 F.3d 976
26 IDELR 6
224 F.3d 60
907 F.2d 286
29 IDELR 896
26 IDELR 432
35 IDELR 39
33 IDELR 167