

**59 IDELR 54**

112 LRP 24920

**Virginia Beach (VA) City Public Schools  
Office for Civil Rights, Southern Division,  
D.C. (Virginia)**

11-11-1359

**March 1, 2012**

**Related Index Numbers**

**10.030 Discrimination**

**405.030 Discrimination**

**405.036 Eligibility for Related Services**

**Judge / Administrative Officer**

**Olabisi L. Okubadejo, Team Leader**

**Ruling**

OCR found insufficient evidence that a Virginia district discriminated against students with nut allergies in hosting a schoolwide sale of nuts as a middle school fundraiser. However, it identified concerns that the district may violated Section 504's FAPE requirements when it failed to consider whether any of its 22 students with nut allergies were eligible for Section 504 plans. The district had to review the circumstances involving each student with nut allergies and evaluate them if necessary. It also had to outline a procedure for identifying future students with nut allergies who might require evaluations.

**Meaning**

Peanut and tree nut allergies can be so severe that they have the potential to substantially limit the major life activities of affected students. That's why districts, consistent with their affirmative duties to identify students with potential disabilities, should consider evaluating such students for Section 504 eligibility instead of waiting for parents to request evaluations. Here, the reactive medical plans that the district provided to nine students with severe nut allergies may not have passed muster under Section 504. The district should have evaluated the students to determine their eligibilities for preventative measure

Section 504 plans.

**Case Summary**

Because a newly appointed principal took steps to ensure that a previously planned fundraiser involving the sale of nuts did not result in peanut products entering the main school building, OCR concluded that there was no evidence that the district discriminated against 22 students with nut allergies in hosting the sale. However, OCR noted that the medical plans that the district developed for nine of those 22 students may not have been sufficient to meet the district's FAPE obligations under Section 504. Districts have an affirmative duty under Section 504 to evaluate, and provide services to, any student who has, or is believed to have a disability. Some peanut and tree nut allergies have the potential to substantially limit the major life activities of breathing and respiratory function. Thus, they can be potentially considered disabilities that may entitle affected students to services. Here, instead of evaluating students with nut allergies for 504 eligibility, the district provided the nine students with severe allergies with health care plans related to those allergies. Those plans laid out the specific responses district personnel were to take in response to "minor" and "major" reactions to allergens. The plans failed to set out criteria for preventing the risk of exposure to allergens or creating medically safe environments for the students, OCR determined. Because of the potential severity of nut allergies, the district should not have waited for parents of affected students to request Section 504 evaluations. It should have determined if evaluations were in order, conducted those evaluations, and provided students with more proactive Section 504 plans, if necessary, OCR concluded.

**Full Text**

Dear Dr. Merrill:

This letter is to notify you of the disposition of the complaint that was filed with the District of Columbia Office for Civil Rights (OCR), within the

U.S. Department of Education (the Department), on September 15, 2011 against Virginia Beach City Public Schools (the Division), in particular Great Neck Middle School (the School). The complaint alleged that the Division discriminated against students with peanut and tree nut allergies on the basis of disability. Specifically, the complaint alleges that the School failed to provide a medically safe environment for those students by allowing the sale of roasted peanuts as a school fundraiser.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance (FFA) from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public educational systems, regardless of whether they receive FFA from the Department. The Division is a recipient of FFA from the Department and a public entity and therefore is subject to the provisions of Section 504 and Title II.

### **Legal Standard**

Under the Section 504 regulation, at 34 C.F.R. § 104.33, the Division is required to provide students with disabilities with a free appropriate public education (FAPE), that is, regular or special education and related aids and services that are designed to meet their needs as adequately as the needs of students without disabilities are met. We interpret Title II as imposing similar requirements.

In addition, the Section 504 regulation states, at 34 C.F.R. § 104.4(a), "No qualified [disabled] person 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." The Title II regulation contains a similar prohibition at 28 C.F.R. § 35.130(a). The Title II regulation, at 28 C.F.R. § 35.130(b)(7), also requires school districts to make reasonable modifications in policies, procedures, or practices when necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the service, program, or activity.

OCR interprets the above provisions to require that public school divisions take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. As the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, Section 504 and Title II require that the Division provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility. Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program.

To provide students with PTA-related disabilities with FAPE and meet the standards referred to above, the Division must have a plan to meet those students' needs that is based on individualized consideration of their needs. A plan that meets the students' needs should take into account procedures that limit or prevent the risk of exposure to the allergens in each type of school program or activity in which the students participate, including in classrooms and common areas, the gymnasium, cafeteria, and hallways, and during recess, extracurricular activities, field trips, and school-related activities. The plans should also set out procedures to follow when the students are exposed to allergens.

### **Facts and Analysis**

As it had in past years, the School conducted a fundraiser in fall 2011 to raise money for certain

programs for at-risk students. The fundraiser involved a school-wide sale of nuts and nut products, predominantly roasted peanuts. The sale began in September and ended in mid-October. The products arrived at the School on November 18, and pick up dates (as discussed more below) were November 21 and November 22. According to the School principal (Principal), all peanut products were removed from School premises by the end of the day on November 22, with the exception of one order that was mailed on November 23 to a student who had been unable to pick up the order in person.

This complaint was filed on behalf of all students at the School with PTA-related disabilities. The Division reported to OCR that to its knowledge there are 22 students at the School with allergies to peanuts and/or tree nuts and 9 of those students have health care plans (referred to as Life-Threatening Allergy Management Plans or LAMPs) related to those allergies. The health care plans for those students specify the medication to be provided in response to "minor" reactions (defined as minor itching and/or minor skin hives) and in response to "major" reactions (defined as a large amount of hives, throat swelling, cough, difficulty breathing, wheezing, vomiting, diarrhea or if symptoms progress after treatment for the minor reactions). There is space on the form for parents to provide information regarding their child's typical allergic reaction.

While the plans set out procedures to follow when the students are exposed to allergens, the plans themselves do not delineate procedures to limit or prevent the risk of exposure to allergens in each type of School program or activity in which the students participate, including those in classrooms and common areas, the gymnasium, cafeteria, and hallways, and during recess, extracurricular activities, field trips, and school-related activities. Accordingly, the plans themselves did not specify if or how a medically safe environment could be achieved during the time of the fundraiser.

Nonetheless, the Division reported to OCR that it implemented a number of precautions to avoid or

minimize exposure by students with PTAs to peanuts or peanut by-products in connection with the fundraiser. OCR interviewed the Principal to gather additional details regarding those precautions. The Principal told OCR that he was new to the School at the beginning of the 2011-12 school year and he learned of the planned fundraiser when the parent of a student with a PTA told him in August that she was concerned about her child's safety. At that point, he understood that the School had committed to conduct the fundraiser and he could not stop it; specifically, he understood that the former principal had reached an agreement with the vendor in June 2011 to hold the sale. However, he implemented the following precautions to protect students with PTAs during the fundraiser:<sup>1</sup>

- The products were delivered to an exterior portable building rather than to the main School building.

- Pickup of the products occurred only from that exterior building.

- No one (students or staff) who made orders was allowed to bring any peanut products into the School building.

- General announcements were made over the loud speaker that peanut products were not to enter the School building.

- Announcements were placed on the School's listserv (to which the majority of parents subscribe) and posted in classrooms indicating that peanut products were not allowed in the School building.

- The week prior to the pick-up dates, the Principal sent a reminder email to all School staff stating, "Parents and students will pick up orders from this outside building and no products may enter the building. A few students suffer from peanut and/or tree nut allergies and as such, we must minimize impact of peanut dust on them. That said, know that this fundraiser will not continue after this school year and no peanut fundraising products may be brought into the building. Your assistance in enforcing this is needed."

- Staff members who distributed the products orally told parents and students picking up orders that peanuts may not be brought into the building.

- A colorful strip of paper was taped to each order stating that peanuts could not be brought into the building.

- Notices on bright blue letter-sized paper were taped on all exterior doors stating that peanuts could not be brought into the building.

- An assistant principal met personally with all security assistants to ensure that they knew to enforce the prohibition on peanut orders entering the building.<sup>2</sup>

The Principal reported to OCR that to his knowledge no peanut product entered the building, and no student with a PTA suffered any adverse reactions as a result of the fundraiser.<sup>3</sup> He further reported to OCR, to all School staff, and to the parent who raised concerns that the fundraiser will not be repeated in the future.

The Principal told OCR that only one parent raised concerns prior to the fundraiser. The Principal gave that parent the option of having her child stay home on the days the products were delivered and distributed, with the absences not being included in her child's record. A teacher was available to visit the student's home upon request. That student did stay home on those days; the Division provided OCR records verifying that he was not penalized for the absences. E-mail records reflect that the School provided the student's work to his family prior to the fundraiser, and the child's parent told the Principal that the student was an independent worker.

OCR concluded that the School took steps to ensure that the School environment for students with PTA-related disabilities was a safe environment during the time of the fundraiser. OCR noted in particular that one such step was to commit to not holding a similar peanut sale as a fundraiser in the future.

Although OCR found insufficient evidence to substantiate the complaint allegation, OCR has

concerns related to whether the plans developed for students at the School with peanut and/or tree nut allergies were sufficient to comply with the FAPE requirements of Section 504. The Section 504 regulation requires a school division to conduct an evaluation of any student who needs or is believed to need special education or related services before taking any action toward initial placement of that student. While students with peanut and/or tree nut allergies at the School generally have a LAMP, there is no indication that any of the students with peanut and/or tree nut allergies at the School has been evaluated for possible eligibility under Section 504, despite the nature of their medical condition and potential severity of its consequences. Consistent with current law, in determining whether a student with a peanut and/or tree nut allergy has a disability, a school division must evaluate whether the peanut and/or tree nut allergy would be substantially limiting without regard to consideration of the ameliorating effects of medication or other mitigating measures. Because a peanut and/or tree nut allergy has the potential of substantially limiting the major life activities of breathing and respiratory function, it is likely that many individuals with such allergies would be considered to have a disability. It is not enough for the Division to wait for parents of these students to ask for an evaluation under Section 504; rather, the Division has an affirmative duty to evaluate "any person who, because of [disability], needs or is believed to need special education or related services before taking any action with respect to the ... placement of the person. ..."

Also, while the LAMPs reflect a generalized protocol for responding to a potentially life-threatening situation posed by students' allergies, they do not reflect any individualized consideration of the particular student's needs other than describing the particular dosage of medications to be administered in the event of a reaction. And while the plans set forth procedures to be followed when the students are exposed to allergens, the plans themselves do not delineate procedures to limit or prevent the risk of

exposure to allergens in each type of School program or activity in which the students participate, including those in classrooms and common areas, the gymnasium, cafeteria, and hallways and during recess, extracurricular activities, field trips, and other school-related activities. Finally, there is no indication from the LAMP itself or from information submitted by the Division that parents of students at the School with peanut and/or tree nut allergies have been provided with notice of their due process rights with regard to the evaluation, identification, and placement of their child.

To address OCR's concerns, the Division entered into a resolution agreement, a copy of which is attached. OCR will monitor the Division's implementation of the resolution agreement, full implementation of which will resolve OCR's concerns. Accordingly, OCR has closed its investigation of this complaint, effective the date of this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Division may not harass, coerce, intimidate, or discriminate against an individual because he or she filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment. Also, under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

We appreciate your cooperation during the resolution of this complaint and particularly the assistance of LaRana Owens, Associate City

Attorney. If you have any questions, feel free to contact Martha Russo at (214) 661-9622 or Martha.Russo@ed.gov or Betsy Trice at (202) 453-5931 or Betsy.Trice@ed.gov.

## **Resolution Agreement**

### **Virginia Beach City Public Schools**

Virginia Beach City Public Schools (the Division) agrees to fully implement this resolution agreement (Agreement) to resolve Office for Civil Rights (OCR) Complaint No. 11-11-1359.

Great Neck Middle School (the School) will review the circumstances involving each student with a peanut and/or tree nut allergy who is enrolled in the School as of the date of this agreement to determine whether there is a need to evaluate the student for consideration as a qualified individual with a disability under Section 504, consistent with 34 C.F.R. § 104.35. (The School will follow the same procedure with regard to any student with a peanut and/or tree nut allergy who subsequently enrolls in the School.) To the extent that an evaluation is warranted, it will be conducted consistent with the evaluation, placement, and procedural safeguard requirements of 34 C.F.R. §§ 104.35 and 104.36. Any resulting 504 Plan shall include any necessary procedures to limit or prevent the risk of exposure to allergens in each type of school program or activity in which the student participates.

**Reporting Requirement:** By June 29, 2012, the School will provide verification of its review of the circumstances involving each currently enrolled student with a peanut and/or tree nut allergy and an explanation of whether evaluation for eligibility as a student with a disability is determined warranted and the reasons for that decision.

**Reporting Requirement:** For each student for whom an evaluation was determined to be warranted, by June 29, 2012, the School will submit a copy of minutes of all meetings conducted as part of its evaluation of the student for eligibility as a student with a disability, copies of all information considered, the names and titles of all persons involved, and a

copy of any resulting Section 504 plan. The School will also provide verification that the parents of these students have been provided with notice of procedural safeguards consistent with the requirements of Section 504.

The Division understands that OCR will not close the monitoring of this agreement until OCR determines that the recipient has fulfilled the terms of this agreement and is in compliance with the regulations implementing Section 504 and Title II, at 34 C.F.R. Part 104 and 28 C.F.R. Part 35 respectively, which were at issue in this case.

The Division understands that by signing this agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this agreement. Further, the Division understands that during the monitoring of this agreement, if necessary, OCR may visit the School, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the School has fulfilled the terms of this agreement and is in compliance with the regulation implementing Section 504 and Title II, at 34 C.F.R. Part 104 and 28 C.F.R. Part 35, which were at issue in this case.

<sup>1</sup>These precautions were in addition to the general precautions implemented by the School, such as mandating peanut free classrooms for students with PTAs, restricting student food consumption to the cafeteria, and having peanut free tables in the cafeteria.

<sup>2</sup>One of the four security assistants is always stationed at the only entrance door that is unlocked.

<sup>3</sup>OCR contacted the parent whom the Principal identified as having initially expressed concerns about the sale to ask if her child had experienced any complications; she did not respond.