



U.S. Department of Justice

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District of Massachusetts

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Via U.S. Mail and E-Mail

Frank P. DiPrima
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RE: Young Shakespeare Players East ADA Investigation
USAO# 2016V00093

Dear Attorney DiPrima,

We write concerning the U.S. Attorney's Office's (the "USAO") investigation of Young Shakespeare Players East's ("YSPE") compliance with Title III of the Americans with Disabilities Act of 1990 (ADA) as amended, 42 U.S.C. §§ 12181-12189, and its implementing regulation, 28 C.F.R. Part 36. Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of services provided by any place of public accommodation. The USAO opened this investigation because the question of whether individuals with food allergies are denied access to educational programs, no matter how small, is an issue of general public importance.

The USAO determines that YSPE violated Title III by failing to make reasonable modifications to YSPE's policies, practices, or procedures when such modification was necessary, and by retaliation.

Background:

Young Shakespeare Players East, located in Turners Falls, Massachusetts, is a theater program that invites children ages seven through eighteen to perform unabridged works of Shakespeare. YSPE bases its methods off of Young Shakespeare Players (YSP) located in Madison, Wisconsin. YSPE, staffed by both a Director and a volunteer, charges children a tuition

of up to \$635 per program, but will regularly offer scholarships and tuition payment plans in order to accommodate the families' needs.

Harry Bay¹ is a ten-year-old child diagnosed with allergies to both peanuts and tree nuts. Harry's allergy is severe, and he has experienced life-threatening anaphylaxis after ingesting nuts. With the help of adults, Harry is careful to avoid eating foods that contain peanuts and tree nuts and he has avoided having an allergic reaction since the age of three. Because Harry has effectively managed his allergy with the help of adults, it is unlikely that he will have an allergic reaction on any given day. While an allergic reaction is unlikely, it is necessary that Harry always have access to an epinephrine auto-injector, or EpiPen,² and be in the presence of an adult who can administer the EpiPen if an allergic reaction occurs.

In the spring of 2015, Harry's parents began the process of enrolling him in the upcoming fall program offered by YSPE. Having heard about Harry's allergy needs, the YSPE Director reached out to Harry's mother, Claire Bay, on Facebook. In this Facebook conversation, Claire described the severity of Harry's allergies and asked if it would be possible for YSPE to become "nut-free" in order to help Harry avoid exposure to nuts. In response, the YSPE Director agreed to make efforts to make YSPE nut-free even though participants typically brought many snacks and treats containing nuts.

Conversations about Harry's participation in YSPE continued for six more months. Problems arose when Claire additionally requested that an adult at YSPE be prepared to administer epinephrine should Harry have an allergic reaction. In order for Harry to participate, YSPE required that Claire sign a Waiver that stated it is the family's responsibility to administer any emergency medication during YSPE rehearsals. Claire raised a concern about this provision with the Director, who offered to allow Claire to wait in the lobby during rehearsals in the case that Harry needed his EpiPen administered. The Director also stated that it would be in Claire's best interest and YSPE's best interest to either attend every rehearsal where she could wait in the lobby, or to hire someone to attend every rehearsal. Further, if Claire didn't agree to these terms, that her other option was to send Harry to another program "where professional, trained medical staff are present."

Two days after giving Claire these terms, the YSPE Director consulted an attorney, and revised her stance. She acknowledged that YSPE was required to administer the epinephrine, but she also stated that she would consider ending the YSPE program altogether rather than committing to administer the EpiPen, so she needed time to think about whether she would shut down the program entirely.

¹ We use pseudonyms throughout this letter.

² Epinephrine auto-injectors are devices that administer a pre-measured dosage of epinephrine the event of an allergic reaction. The most commonly known version of epinephrine auto-injector is marketed under the trade name, EpiPen.

A few weeks later, she then agreed to be shown how to administer the epinephrine. She also agreed to have the other YSPE staff member trained, and to adopt a nut-free policy. But she made this accommodation contingent that Claire sign a waiver of liability.

This waiver required that Claire acknowledge that the parent must take full responsibility for any medical concerns of the child. The Director also required that Claire acknowledge a number of “bullet points,” including:

“1. There will be times throughout the program both planned and unplanned when neither [the volunteer], nor [the Director] will be with the ensemble.

2. Dress rehearsals and performances leave children in the ensemble unsupervised in the greenroom and throughout the theater for hours at a time (full days). Neither [the Director] nor [the volunteer] can be with the actors during these long stretches of time.”

Claire asked the Director to clarify whether an adult would be present in the building at all times who would be willing and trained to administer the EpiPen should H.B. need it. Claire also sought clarification on whether YSPE would agree to administer the EpiPen in the case of an emergency, given that the waiver indicated this would be the responsibility of the parents.

The Director responded to these questions by saying: “The bullet points in my letter below along with the nut policy and waiver specify what accommodations YSP East is able to reasonably make, given its resources, in order to accommodate your son or any child with a food allergy. The previous email offers a clear response to your remaining questions. Thank you!” The Director reattached the letter with the bullet points stating that there will be times when no adult is present, and that children will be unsupervised in the greenroom and theater for hours or days at a time.

Claire did not agree to these points or sign this waiver because she felt that, though the Director stated she agreed to learn how to administer the epinephrine, the waiver and “bullet points” meant that the Director would not in fact administer the epinephrine. Claire also felt concerned that no adult would be present with the children regularly and for long periods of time, meaning that no adult would be available to handle any potential emergency. While Claire sought clarification on these points, the Director would not confirm whether she would administer the EpiPen, or whether an adult would be present. Claire notified the Director that, because of these issues, she would not be enrolling Harry in YSPE.

During the six months of discussions about Harry participation in YSPE, Claire emailed fellow parents with children in YSPE asking for advice and assistance in facilitating Harry’s participation in YSPE. In response, two young YSPE participants, Alex and Eric, each wrote emails to the Director advocating on Harry’s behalf.

Alex's email said the following:

“I heard what happened with Harry and I am very surprised and disappointed on how you are handling this situation.

My friend has a nut allergy which is a disability and saying that we are a private organization and you don't have to follow those laws is an excuse and you are defending something that is not worth defending. You are discriminating him [sic]. I personally feel you have more of the issue than YSP does.

I feel that if I share this with YSP people they wouldn't have a problem not bringing nuts. They would be open and cooperative in protecting Harrys. You said yourself there are no rejections and you are rejecting Harrys.

It is important to practice what you preach.”

The YSPE Director responded to Alex by saying:

“I was surprised and disappointed to get your email about Harry. I think you know YSP is an extremely inclusive program. And I'm sure you realize there is no reason on earth I would want to turn down anyone who wants to participate. And so, you must realize that my concerns are based on complex conversations involving matters you may not know about.

YSP takes a great deal of care and positive attention from all of us. But it is also fragile. We need the complete support of everyone involved in it. The presumptuous and accusatory tone in your email was disrespectful to me and works against all of the principals that make YSP work. If you cannot trust our decision or our motivations for making them, it might be best for you to find a different program instead.”

The YSP Director then engaged in email correspondence and meetings with Alex's parents where she made clear that Alex would not be welcome back at YSPE unless she, first, formally apologize to the YSPE Director, and second, distribute this apology to the entire YSPE community. Alex did not apologize, and has not been allowed to enroll in further productions.

Eric, the other participant who emailed the YSPE Director advocating for Harry, did not accuse the YSPE Director of discriminating. The Director did not require an apology from Eric.

Violations:

As a place of public accommodation that engages in commerce within the meaning of the ADA, YSPE is subject to Title III of the ADA.³ Title III defines public accommodation to include places of education and service establishments, and this applies to YSPE in its role of teaching children classical theater.⁴

Some places of public accommodations are exempted from Title III, but YSPE does not qualify for an exemption. Title III exempts private clubs from the prohibition on discrimination by public accommodations. Courts rely on a number of factors when determining if a club is private, giving the most weight to the genuine selectivity of the group, and also considers the club's purpose, and whether the club advertises for members.⁵ YSPE is open to all children between the ages of seven and eighteen, advertises for members, and exists to make the works of Shakespeare accessible to the entire community. The openness and inclusiveness upon which YSPE publicly operates indicate that it is not a private club, and therefore not exempt from the obligations of the ADA.

Reasonable Accommodation

Harry has a disability within the meaning of the ADA. Under the ADA, a disability is a physical or mental impairment that substantially limits one or more of an individual's life functions.⁶ Harry's allergies result in anaphylaxis, which can cause shock, serious drops in blood pressure, and the narrowing of airways. A peanut allergy qualifies as a disability under the ADA if it can potentially impair a major life activity, such as breathing.⁷ Therefore Harry's allergy is a

³ Participation in interstate commerce is required for a private entity to be regulated by Title III, but Congress intended this interstate commerce requirement to be a very low bar. Advertising on a public website with even the potential to draw residents from other states has been found sufficient to meet the requirement. *EEOC v. Serv. Temps Inc.*, 679 F.3d 323 (5th Cir. 2012). Turners Falls, where YSPE is located, sits less than fifteen miles from each New Hampshire and Vermont, and its website could easily draw residents from those states to participate in the program.

⁴ 42 U.S.C. § 12181(7). Additionally, places of public accommodation are not limited to actual physical structures. While YSPE does not operate in one physical place, it is a place of public accommodation within the meaning of the Act. See, *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994).

⁵ *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993).

⁶ 28 CFR § 36.104.

⁷ See *Equal Employment Opportunity Comm'n v. United Parcel Serv., Inc.*, 249 F.3d 557, 562-63 (6th Cir., 2001); *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 961 (7th Cir., 1996). Though an anaphylactic episode is episodic in nature, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D).

disability within the meaning of the ADA because it substantially limits his cardiac and respiratory functions.

As a place of public accommodation, YSPE is required by 28 C.F.R. § 36.302 to make reasonable modifications necessary to afford services to Harry. YSPE failed to make these reasonable modifications. Since unintentional ingestion of an allergen is a possibility, ten year-old Harry must have access to an epinephrine auto-injector and be in the presence of an adult who is willing and able to administer the epinephrine if an allergic reaction occurs. Claire requested that YSPE accommodate Harry's need by agreeing to have an adult administer epinephrine should Harry have an allergic reaction while at YSPE. While YSPE did agree to accommodate Harry by adopting a nut free policy, YSPE did not agree to ensure an adult would be present to administer epinephrine or offer a suitable alternative. YSPE violated Title III of the ADA by refusing to make a reasonable modification.

It would not have been unduly burdensome for YSPE to make this modification. Existing YSPE staff would have only needed to administer the EpiPen in the unlikely event that Harry had a reaction, and administering an EpiPen is a task that can be performed by lay people. YSPE also would not have needed to fundamentally alter the nature of its program in order to provide the accommodation. YSPE needed only to ensure that the program participants—children ages 7 through 18—are supervised by an adult, and that that adult be willing to administer the EpiPen.

The YSPE Director has stated that she cannot always supervise the children due to her other responsibilities, therefore no adult could be present in order to accommodate Harry's needs. The only alternative provided to Claire was that Claire wait in the theater lobby during rehearsals. But YSPE has not demonstrated that providing an adult to supervise children is unduly burdensome. Regulations define an undue burden as a "significant difficulty or expense."⁸ Factors determining whether an action results in an undue burden include the nature of the action and the effect on resources.⁹ In this regard, providing an adult to supervise children ages seven through eighteen for hours at a time, is not inherently burdensome, as most adults would find it surprising that, after paying up to \$650 to participate in a production, their children would not already be supervised. YSPE has also not demonstrated that it would have had a significant expense or effect on its resources. YSPE parents are routinely asked to participate in bake sales or other volunteer activities. Assuming that YSPE could not afford to hire an additional staff member, and assuming that the YSPE Director was not actually available to supervise the children, YSPE did not reach out to its existing base of parents in order to seek parents who might be available to supervise the children during rehearsals, and who would be able to administer the EpiPen.

YSPE asserts that it places a significant focus on the participants running the productions themselves and for this reason prefers to limit parental involvement. But YSPE asks for a parent to supervise the children back-stage during performances, and instructs parents on observing certain boundaries. This parent is provided in case of an emergency and does not interfere with

⁸ 28 CFR § 36.104.

⁹ *Id.*

the children's running of the show. Because YSPE seeks out parents to supervise children during performances, and because these parents readily volunteer and do not interfere with the production, YSPE could have asked for volunteers to supervise during rehearsals without placing an undue burden upon YSPE.

Retaliation

Title III of the ADA prevents private entities from coercion or intimidation with any individual in the exercise of any right granted by the ADA.¹⁰ Requesting an accommodation needed because of a disability is a protected activity.¹¹

After learning that the ADA required her to administer the EpiPen, the YSPE Director emailed Claire saying that, rather than grant Harry's needed accommodation and administer the EpiPen, she was seriously considering whether or not she wanted to continue to operate the program at all and that she would need to "make a big decision of whether to close up shop!" This statement was coercive and intimidating as it asked Claire to choose between forgoing Harry's rights granted under the ADA, or be seen as responsible for shutting down a program her friends' children valued.

YSPE also violated the ADA by retaliating against Alex when she advocated that YSPE grant Harry's accommodation. Title III prohibits private entities from discriminating against any individual because that individual has opposed any act or practice made unlawful by the ADA.¹²

After learning that YSPE was considering not allowing Harry to enroll in a production, Alex wrote the YSPE Director an email that said the following:

"I heard what happened with Harry and I am very surprised and disappointed on how you are handling this situation.

My friend has a nut allergy which is a disability and saying that we are a private organization and you don't have to follow those laws is an excuse and you are defending something that is not worth defending. You are discriminating him [sic]. I personally feel you have more of the issue than YSP does.

I feel that if I share this with YSP people they wouldn't have a problem not bringing nuts. They would be open and cooperative in protecting Harrys. You said yourself there are no rejections and you are rejecting Harrys.

¹⁰ 28 C.F.R. § 36.206(b).

¹¹ *Wright v. CompUSA, Inc.*, 352 F.3d 472 (1st Cir. 2003).

¹² 28 C.F.R. § 36.206(a).

It is important to practice what you preach.”

In this email, Alex advocated for Harry’s rights granted under the ADA, and opposed YSPE potentially denying Harry’s rights. The YSPE Director responded, characterizing Alex’s email as presumptuous and accusatory, concluding that “[i]f you cannot trust our decision or our motivations for making them, it might be best for you to find a different program instead.” YSPE then refused to allow Alex to reenroll at YSPE until Alex issue a public apology.

The ADA makes it unlawful to discriminate against individuals on the basis of their disability. Alex voiced opposition to, what she saw as, YSPE’s decision to discriminate against Harry because of his disability—a violation of the ADA. In response to Alex’s opposition of YSPE potentially violating Harry’s rights, YSPE did not allow Alex to reenroll in future productions without issuing a public apology.

YSPE argues that the issue with Alex’s email was not that she advocated for Harry’s rights, but that the tone of the email itself was disrespectful. YSPE asserts that, for a production to successfully run, all members involved must have a positive cooperative attitude. This argument, however, runs contrary to YSPE’s response to Alex herself. In this response, YSPE takes issue with Alex’s accusatory and presumptuous tone. The accusation and the presumption both essentially being that YSPE is discriminating against Harry based on his disability. But YSPE went on within the email, clarifying that if Alex cannot trust YSPE’s decision—a decision Alex questioned because she found it unlawful discrimination—that Alex could find a different program. This email from YSPE demonstrates that the main issue YSPE took issue with was Alex’s assertion that YSPE discriminated against Harry by deciding not to allow Harry to enroll in the YSPE program because of his disability, thus retaliating against Alex for opposing an action made unlawful by the ADA.

Remedial Measures

Ensuring that programs such as YSPE do not discriminate against individuals because of disability is an issue of general public importance. To remedy the USAO’s concerns that ongoing violations of the ADA do not continue, and to protect the civil rights of other individuals with disabilities who wish to be involved in YSPE, YSPE must take the following steps:

- (1) YSPE will implement a disability non-discrimination policy which will include a non-retaliation provision. This policy will describe the steps YSPE will take to accommodate students with disabilities as required under Title III of the ADA. For example, after admission to YSPE, YSPE will request from parents information about any reasonable accommodations that children may need.
- (2) YSPE will publicize this policy to the families of all current and former students who have enrolled at YSPE in the previous three years.
- (3) YSPE will pay damages to the families of Harry and Alex, which will include reimbursement for reasonable attorney’s fees, in exchange for a written release of all ADA claims, legal or equitable, that they might have against YSPE relating to the claims asserted in this matter.

- (4) All YSPE staff members will undertake appropriate training on YSPE's obligations under the ADA.

Conclusion

We hope to work with you to resolve our concerns regarding provision of reasonable accommodations to individuals with disabilities involved with YSPE and are happy to discuss any questions you may have. Please contact Gregory Dorchak by July 1, 2016 if you are willing to voluntarily resolve this matter.

In the event we are unable to reach a resolution regarding our concerns, the U.S. Attorney may seek authority to initiate a lawsuit pursuant to the ADA in order to address the Office's concerns that YSPE does not violate the ADA in the future. We would prefer, however, to resolve this matter by working cooperatively with you.

Sincerely,

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