



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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July 15, 2022

Sent by email only to LBerman7@schools.nyc.gov

David C. Banks
Chancellor
New York City Department of Education
Tweed Courthouse
52 Chambers Street
New York, New York 10007

Re: Case No. 02-22-1076
New York City Department of Education

Dear Chancellor Banks:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the complaint filed against the New York City Department of Education (the NYCDOE). The Complainant alleged that the NYCDOE discriminated against her son on the basis of his disability by failing to consider the provision of related aids and services for her son to participate in the Manhattan Youth afterschool program at XXXXXX XXXXXX XX (the Program), since September 2021 (Allegation 1). The Complainant also alleged that the NYCDOE discriminated against her son on the basis of his race by dismissing him from the Program, on or about October XX, 2021 (Allegation 2). For the remainder of this letter, OCR will refer to the Complainant's son as "the Student."

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 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 receiving Federal financial assistance 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. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. Additionally, OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. § 2000d, *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color or national origin in programs and activities receiving financial assistance from the Department.

As a recipient of Federal financial assistance from the Department, the NYCDOE is subject to Section 504 and Title VI. As a public elementary and secondary education system the NYCDOE is subject to Title II.

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In its investigation, OCR interviewed the Complainant. OCR also reviewed documentation that the Complainant and the NYCDOE submitted, as well as information that Manhattan Youth, the Program’s umbrella organization (the Organization), submitted. As discussed below, before OCR completed its investigation of Allegations 1 and 2, the NYCDOE expressed a willingness to resolve both allegations. OCR determined that a voluntary resolution is appropriate under Section 302 of OCR’s *Case Processing Manual (CPM)* to resolve OCR’s concerns about Allegations 1 and 2. Subsequent discussions between OCR and the NYCDOE resulted in the NYCDOE’s agreeing to take the steps in the enclosed resolution agreement to address OCR’s concerns about Allegations 1 and 2 to date.

Allegations

Allegation 1

With respect to Allegation 1, the Complainant alleged that the NYCDOE discriminated against the Student on the basis of his disability by failing to consider the provision of related aids and services for the Student to participate in the Program, since September 2021.

The Complainant stated that when she registered the Student in the Program, she noted in her registration documentation that the Student has an individualized education program (IEP). The Complainant alleged that during a telephone conversation in October 2021, the Program’s site director (the Site Director) informed her that the Student was not behaving in the Program. The Complainant stated to OCR that she told the Site Director that her son has disabilities and needed to be accommodated, but she did not specify the accommodations he needed. The Complainant stated that the Site Director responded by stating that the Program did not offer supports for the Student. The Complainant stated that one week later, on or about October XX, 2021, the Program’s director (the Director) orally informed her that the Student had been dismissed from the Program for XXX XXXXXXXXXXXX, XXXXXX XX XXX XXX XXXX XX XX XX XXX XXXXXXXXXXXX XXX XXX XX XXXXXXXXXXXX XXXXXXX XXXXXX XX XXXXXX XXXXXX XX XXXXXX XXXXXXXXXXXX in the Program. The Complainant stated that she told the Director that the Student was being dismissed for behavior related to his disabilities and that he should have been and should be “accommodated.” The Complainant asserted that the Director responded that the Program did not accept federal money and therefore did not have to implement the Student’s IEP or provide him with closer supervision.

The Complainant informed OCR that by email on October XX, 2021, she notified the NYCDOE’s special education department about the Student’s dismissal from the Program, and the NYCDOE told her that it could not assist her because the NYCDOE did not fund the Program. The Complainant stated that in an email on October XX, 2021, she also informed the School’s Principal about the Program’s refusing to accommodate the Student and dismissing him from the Program. The Complainant stated that the Principal told her she would work on the issue, but nothing was done.

The Complainant asserted that the Program’s failure to take into account the Student’s disability-related needs to allow him to participate in the Program and the NYCDOE’s failure to ensure that the Program accommodated the Student’s needs in the Program was discriminatory based on the Student’s disability. The Complainant informed OCR that the Student did not return to the

Program or enroll in another afterschool program for the remainder of school year 2021-2022. The Complainant informed OCR that the Organization reimbursed her for the tuition she had already paid for afterschool programming that took place after the Student was dismissed from the Program.

Allegation 2

With respect to Allegation 2, the Complainant alleged that the NYCDOE discriminated against the Student on the basis of his race by dismissing him from the Program, on or about October XX, 2021. The Complainant stated that the Site Director told her that the Student was being dismissed because parents complained that the Student and other students were XXXXXXXX XXXXX XX XXXXXX XXXXXXXX. The Complainant, who identified the Student as XXXXX, stated that the Student told her that a XXXXX student (Student A) was also XXXXXXXX XXXXX, but was not dismissed or otherwise disciplined. The Complainant stated that she spoke with Student A's father, who told her that he was not aware of the incident and that the Program had not brought this issue to his attention. The Complainant stated to OCR that she believed the Student was dismissed from the Program because of his race, but she stated that she did not communicate this to the NYCDOE.

Applicable Legal Standards

Section 504/Title II

The regulation implementing Section 504, at 34 C.F.R. § 104.3(k)(4), states that a qualified individual with a disability, with respect to services other than employment or educational services, is defined as one who meets the essential eligibility requirements for the receipt of such services. The regulation implementing Title II, at 28 C.F.R. § 35.104, contains a similar provision.¹

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified individual 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 financial assistance from the Department. The regulation implementing Title II, at 28 C.F.R. § 35.130(a), contains a similar provision.

The regulation implementing Section 504, at 34 C.F.R. § 104.38, provides that a recipient that operates a day care program or activity may not, on the basis of disability, exclude qualified persons with disabilities and shall take into account the needs of such persons in determining the aid, benefits or services to be provided.² When voluntary noneducational programs are offered

¹ The regulation implementing Title II, at 28 C.F.R. § 35.104, defines a qualified individual with a disability as one who, with or without reasonable modifications to rules, policies or practices, or with the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of such services or the participation in programs or activities provided by a public entity.

² The NYCDOE's Chancellor's Regulation D-180, Extended Use of School Buildings (Regulation A), similarly prohibits discrimination on the basis of disability and sets forth the requirements for allowing permitted users, such as the Program, to use a NYCDOE school building outside normal school hours and days. Regulation A provides, "No group or organization that invites members of the public to a meeting or program in a school facility may exclude persons on the basis of any impermissible discriminatory reason as set forth in Chancellor's Regulation A-830....Accordingly, such groups or organizations must provide, at no cost to the [NYC]DOE, disability-related

or Title VI. The Program also was not a public entity over which OCR has jurisdiction under Title II.⁶

The NYCDOE asserted that it did not operate the Program. In support of this assertion, the NYCDOE stated that the Program was independently operated by the Organization, a private entity that provides childcare, afterschool programs and recreational activities, and is funded through parental tuition.⁷ The NYCDOE also asserted that it provided no funding, staffing, materials or supplies to the Program. The NYCDOE stated that it allowed the Program to operate at the School after school hours pursuant to an extended use permit. The NYCDOE asserted that it does not receive payment in return for allowing the Program to operate at the School or receive any portion of the tuition the Program collects from students who attend the Program. The NYCDOE informed OCR that it has elected not to grant the Organization an extended use permit to operate the Program at the School for school year 2022-2023. The NYCDOE informed OCR that it is currently working to secure a new afterschool operator at the School for the upcoming school year 2022-2023.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(i) and (vi), provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service, or otherwise limit qualified individuals with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. The regulations implementing Title II, at 28 C.F.R. § 35.130, and Title VI, at 34 C.F.R. § 100.3(b)(2) contain similar provisions.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(v), provides that a recipient may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefits, or services to beneficiaries of the recipient's program. The regulation implementing Title II, at 28 C.F.R. § 35.130(b)(1)(v), contains a similar provision. If OCR finds that a recipient is providing significant assistance to an agency or organization that discriminates on the basis of disability, the recipient must either obtain compliance by the other entity or terminate the assistance. Appendix A to the regulation implementing Section 504 explains that among the criteria to be considered when determining whether a recipient is providing significant assistance to another entity is the substantiality of the relationship between the recipient and the other entity, including financial support the recipient provides, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

Significant assistance is tested by a number of factors indicating whether a substantial relationship exists between a recipient of federal funding and another entity. The factors evaluated in determining this issue include:

- 1) direct financial support provided by the recipient;
- 2) indirect financial support provided by the recipient;

⁶ The Program, as a place of public accommodation, may be subject to Title III of the ADA, but is not subject to the Department's jurisdiction under Title II.

⁷ The Organization operates afterschool programs in multiple NYCDOE elementary and middle schools.

- 3) provision of tangible resources such as staff, facilities, and/or materials at no cost or reduced cost;
- 4) intangible benefits such as the lending of recognition and approval;
- 5) selectively providing privileges and resources to the private entity; and
- 6) whether the relationship is occasional and temporary or permanent and long-term.

Not all factors must be present to support a finding of significant assistance.

OCR determined that pursuant to an extended use permit, the NYCDOE had an arrangement with the Program to provide afterschool services to its beneficiaries at the School for school year 2021-2022, and provided indirect financial and other support to the Program, as follows:

- The Program operated on the School's premises throughout the school year at no cost to the Program.
- The Program was available only to students enrolled in the School.
- The School provided parents of students at the School with information about the Program by email before each registration session in August and September 2021, as well as in January 2022.
- The Program followed the School's calendar, although the Program did not operate for the first week of school year 2021-2022.

Based on the foregoing, OCR determined that the NYCDOE provided significant assistance to the Program to provide afterschool services to the School's beneficiaries.

Enrollment in the Program was open to all students enrolled at the School. OCR determined that the Student met the essential eligibility requirements for the Program; i.e., he was enrolled in the XXXXXX XXXXX at the School. Accordingly, OCR determined that the Student was a qualified individual with a disability with respect to the Program. The Student registered for and was admitted to the Program for school year 2021-2022, and began attending the Program on or about September 20, 2021.

The NYCDOE informed OCR that by email on October XX, 2021, the Director informed the Principal that the Program administrators had dismissed the Student from the Program but did not say why. The NYCDOE stated that sometime on or after October XX, 2021, the NYCDOE's Director of Family Support in the Office of Special Education spoke with the Executive Director (the Executive Director) of the Organization regarding the dismissal; however, the Executive Director did not share details with her about why the Program dismissed the Student. The NYCDOE stated that on October XX, 2021, the Principal contacted the Executive Director, who referred the Principal to the Organization's Associate Executive Director (the Associate Executive Director).

The NYCDOE stated that on October XX, 2021, the Principal spoke with the Associate Executive Director by telephone and informed him of the Program's obligations to promptly readmit and accommodate the Student. The NYCDOE stated that the Associate Executive Director agreed to contact the NYCDOE's Section 504 Program Manager (the 504 Manager) to further discuss the Program's plan for readmitting and accommodating the Student. The NYCDOE stated that on November X, 2021, the Principal again spoke to the Associate Executive Director to request that

he contact the 504 Manager, but the Associate Executive Director never did so. The NYCDOE took no further action regarding the Student's dismissal from the Program. The NYCDOE continued to host the Program at the School during school year 2021-2022, and continues to host other Organization programs at multiple NYCDOE elementary and middle schools pursuant to extended use permits.

The Organization and the Program declined to provide any documentation to OCR related to the complaint or allow OCR to interview its employees knowledgeable about the complaint. Instead, counsel for the Organization submitted written responses to OCR's questions, asserting that while the Student was in the Program, Program staff had recommended that the Complainant speak with the School or the NYCDOE about obtaining a one-to-one aide for the Student while he attended the Program. The Organization's counsel stated that staff similarly advised the Principal that the Program could enroll the Student with a one-on-one aide that the NYCDOE provided. The Organization's counsel asserted that the Program administrators dismissed the Student from the Program on October XX, 2021, because the Student XXX X XXXXXXXX XX XXXXXXX XXX XXXXXXX but did not explain what led to this conclusion. The NYCDOE informed OCR that no other student enrolled in the Program, which included at least 33 other students with disabilities and at least XXX other XXXXX students, was dismissed during fall 2021. The NYCDOE also stated that it was not aware of any race-related concerns regarding the Student's dismissal from the Program prior to the instant complaint.

The NYCDOE did not provide the Program's code of conduct and/or discipline procedures to OCR. The NYCDOE asserted that it could not do so because it does not control or operate the Program and does not have access to its materials. As stated above, the Program declined to provide to OCR any documentation relating to the complaint or allow OCR to interview its employees regarding the complaint and, specifically, Allegation 2. OCR also was unable to locate the Program's code of conduct and/or discipline procedures on its public-facing website. The Organization's counsel denied that Student A or any other Program students had engaged in conduct similar to the Student's.

Prior to the completion of OCR's investigation, on July 11, 2022, the NYCDOE signed the attached resolution agreement to voluntarily resolve Allegations 1 and 2 that the NYCDOE discriminated against the Student, on the basis of his disability, by failing to consider the provision of related aids and services for the Student to participate in the Program, since September 2021; and discriminated against the Student, on the basis of his race, by dismissing him from the Program on or about October XX, 2021.

Obligations Under the Resolution Agreement

Pursuant to the resolution agreement, the NYCDOE will either itself provide, or ensure that any new entity offering an afterschool program at the School (the New Program) provides, a written communication to the Complainant about the New Program and a reminder that if the Student wishes to register, the Complainant may request aids, benefits, or services for the Student to meet the Student's disability-related needs, if any, to participate in the New Program for school year 2022-2023. If the Student registers for the New Program, the NYCDOE will inquire whether the Complainant's requests for aids, benefits, and services to meet the Student's needs in the New Program were inappropriately denied, modified or otherwise not addressed and take any appropriate responsive action.

In addition, the NYCDOE will issue a letter to the Organization and a written reminder to relevant NYCDOE administrators regarding: (1) the Organization's obligation to consider and make individualized determinations regarding requests for the provision of aids, benefits and services to meet the needs of qualified NYCDOE students with disabilities in the Organization's afterschool programs; and (2) the Organization's obligation to not discriminate on the basis of race, color, and/or national origin in its discipline or dismissal of NYCDOE students in the Organization's afterschool programs. The NYCDOE will also provide training for all relevant Organization staff and administrators regarding these obligations.

The NYCDOE will also send a letter to all parents of students at NYCDOE schools where the Organization runs an afterschool program pursuant to an extended use permit that is not jointly sponsored by the NYCDOE, as well as to parents at the School (if the NYCDOE grants an extended use permit to another entity to operate an afterschool program at the School during school year 2022-2023), reminding them that the Organization: is obligated to consider and make individualized determinations regarding requests for the provision of aids, benefits, and services to meet the needs of qualified NYCDOE students with disabilities participating in the Organization's afterschool programs; and must not discriminate against participating students on the bases of their race, color, and/or national origin. The NYCDOE will send a similar letter to parents at the School, if the NYCDOE grants an extended use permit to another entity to operate an afterschool program at the School during school year 2022-2023.

The NYCDOE will also provide to OCR information from the Organization regarding any requests received for aids, benefits, and services to meet the needs of qualified NYCDOE student participants with disabilities as well as information regarding student participants who were dismissed from the Organization's afterschool program (including the student participant's race and disability status) at each of the Organization's afterschool programs that are not jointly sponsored by the NYCDOE and that operated in a NYCDOE school pursuant to an extended use permit for school year 2022-2023.

The NYCDOE has also agreed that if the Organization or any new entity that operates an afterschool program at the School for school year 2022-2023, impedes NYCDOE's efforts to comply with the Action Items and Reporting Requirements contained in the resolution agreement, the NYCDOE will take appropriate responsive action, which may include revoking the Organization's and/or the new afterschool entity's existing extended use permit(s) and/or denying their future permit(s).

OCR will monitor the NYCDOE's implementation of the resolution agreement. Upon the NYCDOE's compliance with the terms of the Agreement, Section 504 and its implementing regulations at 34 C.F.R. Part 104, Title II and its implementing regulations at 28 C.F.R. Part 35, and Title VI and its implementing regulations at 34 C.F.R Part 100, which were at issue in this case, OCR will close the case.

This letter should not be interpreted to address the NYCDOE's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy

statements are approved by a duly authorized OCR official and made available to the public. 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 NYCDOE must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint against the NYCDOE with OCR.

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, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact David Krieger, Senior Compliance Team Attorney, at (646) 428-3893 or David.Krieger@ed.gov; or Sandy Araj, Compliance Team Attorney, at (646) 428-3879 or Sandy.Araj@ed.gov.

Sincerely,

/s/
Rachel Pomerantz

Encl.

cc: Julia De Persia, Esq.