



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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March 21, 2023

Sent via 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. 02-23-1005
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 (the Department), Office for Civil Rights (OCR), regarding a complaint filed against the New York City Department of Education (the NYCDOE). The Complainant alleged that the NYCDOE discriminated against her children (Students A, B, and C) on the basis of disability when staff at the XXXXXXXX XXXXXXXX XXXXXX XXXXXXXX XXXXXX at XXXXXXXX XXXXXXXX XXXXXXXX (the Center): on September 8, 2022, immediately following the first day of school year 2022-2023, limited the participation of Students A, B, and C in the Center's XXX-XXXXXXXXXXXXXXXX program to only three hours per day (Allegation 1); on or about September 13, 2022, prematurely referred Students A, B, and C for special education evaluations (Allegation 2); and on September 29, 2022, informed the Complainant that Students A, B, and C could no longer attend the Center's XXX-XXXXXXXXXXXXXXXX program because they required special education services (Allegation 3). OCR also considered whether the Complainant's allegations raised possible systemic concerns.

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

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

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As discussed below, the Complainant and the NYCDOE entered into a mediation agreement (signed copy attached) that resolves Allegations 1, 2, and 3 under Section 201(b) of OCR’s *Case Processing Manual (CPM)*.¹ In addition, before OCR completed its investigation, the NYCDOE expressed a willingness to address possible systemic concerns OCR identified regarding the Center’s treatment of other students by taking the steps in the attached Resolution Agreement (the Agreement). OCR determined that a voluntary resolution is appropriate under Section 302 of OCR’s *CPM* to resolve OCR’s concerns about the Center’s compliance with its obligations under Section 504 and Title II. The NYCDOE signed the attached Agreement to resolve the complaint on March 17, 2023.

I. Applicable Legal Standards

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.² The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that qualified individuals with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity that receives federal financial assistance from the Department. The regulation implementing Title II, at 28 C.F.R. § 35.130, contains a similar provision.

Pursuant to the regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(ii), (iv) and (vii), a recipient may not, on the basis of disability, afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; provide different or separate aid, benefits, or services to qualified individuals with a disability, unless such action is necessary to provide the qualified individual with a disability with aid, benefits, or services that are as effective as those provided to others; or, otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The regulation implementing Title II, at 28 C.F.R. § 35.130(b)(1)(ii), (iv) and (vii), contains similar provisions. Further, the regulation implementing Section 504, at 34 C.F.R. § 104.38, states that a recipient that operates a preschool education program or activity must take into account the needs of qualified individuals with disabilities in determining the aid, benefits, or services to be provided under the program or activity.

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 regulation implementing Title II, at 28 C.F.R. § 35.130, contains a similar provision. 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

¹ See *CPM* (July 18, 2022) at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

² 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.

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 several factors indicating whether a substantial relationship exists between a recipient of federal funding and another entity. The factors evaluated include: (1) direct financial support the recipient provides; (2) indirect financial support the recipient provides; (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.

II. Investigative Findings, Legal Analysis, and Conclusions

The Center is a XXXXX-XXXX provider located in XXXXXXXXXX, New York that is licensed through the New York City Department of Health. It serves up to 60 children between ages X and XXXX and also contracts with the NYCDOE to offer a "XX"/XXX-XXXXXXXXXXXX full-day program serving 45 students (the Program) as part of the NYCDOE's "XXX-X XXX XXX" program.³ The NYCDOE directs parents/guardians to apply to the Program through the NYCDOE's online MySchool application process.⁴ Based on the foregoing, OCR determined that for school year 2022-2023, the NYCDOE had a contractual arrangement with the Center to provide the Program and provided significant assistance to the Program.

A. Students A, B, and C

With respect to Allegation 1, the Complainant alleged that the NYCDOE discriminated against Students A, B, and C on the basis of disability when on September 8, 2022, following the first day of school year 2022-2023, Center staff limited the participation of Students A, B, and C in the Center's XXX-XXXXXXXXXXXX program to only three hours per day. In support of Allegation 1, the Complainant alleged that Center staff stated that Students A, B, and C could not attend the Center's full-day program because of their behavior.

With respect to Allegation 2, the Complainant alleged that the NYCDOE discriminated against Students A, B, and C on the basis of disability when on or about September 13, 2022, Center staff

³ <https://www.schools.nyc.gov/schools/QBNS> (last visited March 20, 2023)

⁴ <https://www.XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.org/XXXXXXXXXX-XXXX-XXX> (last visited March 20, 2023)

prematurely referred Students A, B, and C for special education evaluations. In support of Allegation 2, the Complainant alleged that the Center staff requested her permission to refer Students A, B, and C for special education evaluations prior to implementing any other interventions.

With respect to Allegation 3, the Complainant alleged that the NYCDOE discriminated against Students A, B, and C on the basis of disability when on September 29, 2022, the Center's Director informed her that Students A, B, and C could no longer attend the Center's XXX-XXXXXXXXXXXX program because they required special education services. By email on September 29, 2022, the Complainant notified Center staff that she had decided to withdraw Students A, B, and C from the Center.

On March 16, 2023, the Complainant and the NYCDOE entered into a mediation agreement (signed copy attached) that resolves Allegations 1, 2, and 3. Accordingly, OCR is dismissing Allegations 1, 2, and 3.

Please be advised that OCR is not a party to, nor does it monitor, mediation agreements. Additionally, a breach of the agreement, in and of itself, is not a breach of the regulations OCR enforces. However, should the NYCDOE fail to implement the agreement, the Complainant may file another complaint with OCR. To be considered timely, the new complaint must be filed either within 180 days of the date of the original discrimination, or within 60 days of the date the Complainant obtains information that a breach occurred, whichever date is later.

B. Other Students

OCR requested information from the NYCDOE regarding students other than Students A, B, and C who were discharged from the Center during school year 2022-2023, to determine whether the Center had limited the participation of and/or prematurely referred for special education evaluations students with disabilities in the Center's programs. As stated above, prior to the completion of its investigation, the NYCDOE signed the attached Agreement to voluntarily resolve pursuant to Section 302 of OCR's *CPM*. OCR's concern was that the Center may have excluded or limited the participation of students in the Center's activities on the basis of disability and/or prematurely referred students for special education evaluations. The NYCDOE signed the attached Agreement to resolve the complaint on March 17, 2023.

Obligations under the Agreement

Under the Agreement, the NYCDOE will issue a letter regarding the requirements of Section 504 and Title II to Center personnel, including the administrators, classroom staff, and administrative staff who interact with parents/guardians of students, and to NYCDOE employees who respond to escalations relating to students with disabilities in NYCDOE XX and XXX-XXXXXXXXXXXX programs. The letter will state that the Center (1) may not discriminate against students on the basis of disability; (2) may not exclude or limit the participation of students in the Center's activities on the basis of disability; (3) may recommend to a parent/guardian or to the appropriate Committee on Preschool Special Education (CPSE) that a student be evaluated for services as deemed appropriate based on their demonstrated needs, but must continue to serve that student and not discharge the student from the Center based on the child's perceived or actual disability regardless of whether the parent/guardian consents to the evaluation; and (4) must take into account the needs of students with

disabilities on an individual basis in determining the aid, benefits, or services to be provided. The Agreement further requires the NYCDOE to train all Center administrators, classroom and administrative staff who interact with families, and central NYCDOE employees who respond to escalations relating to students with disabilities in NYCDOE XX and XXX-XXXXXXXXXXXX programs regarding these obligations and Section 504's prohibition against the NYCDOE's providing significant assistance to an agency, organization, or person that discriminates on the basis of disability.

The Agreement also requires the NYCDOE to provide information about the Center's Program to OCR for school years 2022-2023 and 2023-2024 regarding (1) requests the Center received and/or implemented for participants in the Program for aid, benefits, and services to meet the needs of students with disabilities and/or suspected of having disabilities; (2) students in the Program the Center referred for special education evaluations; and (3) Program participants who were discharged from the Center.

OCR will monitor the NYCDOE's implementation of the Agreement. Upon the NYCDOE's compliance with the terms of the Agreement, with Section 504 and its implementing regulations, at 34 C.F.R. Part 104, and Title II and its implementing regulations, at 28 C.F.R. Part 35, 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. An individual may have the 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 regarding OCR's determination, please contact Joy M. Purcell, Senior Compliance Team Attorney, at (646) 428-3766 or joy.purcell@ed.gov; Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or jessica.daye@ed.gov; or Felice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/S/

Rachel Pomerantz

cc: Ellen Kanner, Esq. (by email)