



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

32 OLD SLIP, 25TH FLOOR
NEW YORK, NEW YORK 10005

RACHEL POMERANTZ
DIRECTOR
NEW YORK OFFICE

August 18, 2023

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. 02-23-1109
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 [redacted content] on the basis of his disability by denying his admission to the South Bronx Overall Economic Development Corporation's (SoBro's) afterschool program located in the NYCDOE's [redacted content] (the Program) on [redacted content], 2022 (Allegation 1) and failing to consider the provision of related aids and services for to [redacted content] participate in the Program since [redacted content], 2022 (Allegation 2). For the remainder of this letter, OCR will refer to the Complainant's son as the Student.

On June 28, 2023, OCR contacted the NYCDOE to discuss OCR's Rapid Resolution Process (RRP)¹ pursuant to Section 203 of OCR's *Case Processing Manual (CPM)*,² to address the complaint. On June 29, 2023, the NYCDOE stated that it wished to resolve the complaint pursuant to RRP, prior to OCR's completion of the investigation. OCR determined that a voluntary resolution was appropriate under Section 302 of OCR's *Case Processing Manual (CPM)*. As discussed below, on August 4, 2023, the NYCDOE signed an agreement to voluntarily resolve OCR's concerns that the Program and/or the NYCDOE may have discriminated against the Student on the basis of his disability by denying the Student admission to the Program and failing to consider the provision of related aids and services for the Student to participate in the Program.

¹ RRP is an expedited process that can be used to resolve allegation(s) in any of OCR's statutory areas, either during evaluation or investigation. RRP resolutions must meet OCR's standards for legal sufficiency, be consistent with applicable statutory and regulatory authority, and be aligned with the allegation(s) deemed appropriate for resolution. *See id.*

² *See CPM* (July 18, 2022) at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulations 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 public entity that receives federal financial assistance from the Department, the NYCDOE is subject to Section 504, Title II, and their implementing regulations.

I. Applicable Legal Standards

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. When voluntary noneducational programs are offered on a free or tuition basis, qualified children with disabilities may not be categorically excluded from those noneducational programs on the basis of their disabling condition; and students with disabilities must be offered meaningful and equal access to that program.

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 contains 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;
- 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.

As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. *See* 28 C.F.R. §35.103.

II. Investigative Findings and Analysis

In its investigation, OCR interviewed the Complainant and reviewed documentation that the Complainant submitted. The Complainant alleged that the NYCDOE discriminated against the Student on the basis of his disability by denying his admission to the Program on [redacted content], 2022, and failing to consider the provision of related aids and services for the Student to participate in the Program since [redacted content], 2022.

The Complainant stated that during school year 2022-2023, the Student, who is diagnosed with [redacted content], attended the School and was provided with [redacted content] pursuant to an individual education program (IEP). The Complainant stated that in or around [redacted content] 2022, she applied for the Student to attend the Program for school year 2022-2023. The Program is located in the School. The Complainant asserted that the Program employs several School employees to operate the Program. The Program operated pursuant to an extended use permit from the NYCDOE during school year 2022-2023.

By email dated [redacted content], 2022, the director of the Program (the Program Director) notified the Complainant that SoBro denied the Student's application for admission to the Program. By email dated [redacted content], 2022, the Program Director explained to the Complainant that the Student's application was denied because "[redacted content]."

The Complainant asserted that during a meeting with the Student's father, the School principal (the Principal), and the School [redacted content] on October 20, 2022, the Principal stated that she was unaware of the Program's ever accepting students with [redacted content] and that she was certain the Student would not be successful in the Program because of his IEP. By email to the Complainant later that day, the Principal stated that the Student's IEP required that he be provided with [redacted content] during the school day, reiterated that the Student could not be in the Program because [redacted content] do not work in the Program, and stated that, "the Student would not be well supported in the [Program] as [redacted content] as indicated on his IEP." The

Principal also stated that SoBro operated the Program but suggested that the NYCDOE had a role in supervising and/or managing enrollment in the Program. In the email to the Complainant, she also stated, “We have an inclusive environment and want to serve all students in the best way possible; however, if we do not have [redacted content] we are unable to enroll students who have IEP[s] that should be honored.” The Complainant informed OCR that the Student did not attend the Program during school year 2022-2023.

III. Conclusion

As previously stated, on August 4, 2023, the NYCDOE signed the attached resolution agreement to voluntarily resolve the allegations that the NYCDOE discriminated against the Student on the basis of his disability by denying his admission to the Program on [redacted content], 2022 and failing to consider the provision of related aids and services for the Student to participate in the Program since [redacted content], 2022.

Pursuant to the resolution agreement, the NYCDOE will either itself provide, or ensure that SoBro provides, a written communication to the Complainant about the Program and a reminder that if the Student wishes to register, the Complainant may request aids, benefits, or services for the Student to meet his disability-related needs to participate in the Program during school year 2023-2024. If the Student registers for the Program, the NYCDOE will inquire whether the Complainant’s requests for aids, benefits, and services to meet the Student’s needs in the Program were inappropriately denied, modified, or otherwise not addressed and take any appropriate responsive action.

In addition, the NYCDOE will issue a letter to SoBro regarding SoBro’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 SoBro’s afterschool programs. The NYCDOE will also train all relevant SoBro staff and administrators regarding these obligations. Further, the NYCDOE will provide a written reminder to all NYCDOE schools ensuring that any after-school providers that operate at their schools pursuant to an extended use permit during school year 2023-2024 consider, on an individualized basis, requests for the provision of aids, benefits, and services to meet the needs of qualified NYCDOE student participants with disabilities in after-school programs.

The NYCDOE will also ensure that SoBro sends a letter to all parents of students at NYCDOE schools where SoBro operates an afterschool program pursuant to an extended use permit, reminding them that SoBro 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 SoBro’s afterschool programs.

The NYCDOE will also provide information to OCR regarding any requests that SoBro and/or the NYCDOE receive during school year 2023-2024 for aids, benefits, and services to meet the needs of qualified NYCDOE student participants with disabilities as well as information regarding applicants who were not admitted to any SoBro after-school program that operated in an NYCDOE school pursuant to an extended use permit during school year 2023-2024.

The NYCDOE has also agreed that if SoBro impedes the 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 SoBro'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 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. 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 Geraldo Perez, Compliance Team Investigator, at (646) 428-3765 or Geraldo.Perez@ed.gov.

Sincerely,

/s/

Rachel Pomerantz

Encl.

cc: Julia De Persia, Esq.