



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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NEW YORK, NEW YORK 10005

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DIRECTOR
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August 14, 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. 02-23-1190
New York City Department of Education

Dear Chancellor Banks:

By letter dated June 2, 2023, the U.S. Department of Education, Office for Civil Rights (OCR) notified you that it would investigate a complaint filed against the New York City Department of Education (NYCDOE). The Complainant alleged that the NYCDOE retaliated for her disability-related advocacy on behalf of her son (the Student) by reporting her to the Administration for Children's Services (ACS) in October 2022.

As discussed further below, on August 4, 2023, the NYCDOE entered into an agreement under Section 302 of OCR's *Case Processing Manual (CPM)*¹ to voluntarily resolve concerns OCR identified regarding the adequacy of the NYCDOE's efforts to verify the Student's attendance prior to the Student's referral to ACS regarding medical and educational neglect.

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. In addition, OCR enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulations 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.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten,

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

coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The regulation implementing Title II contains a similar provision at 28 C.F.R. § 35.134. 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.

The following three elements must be satisfied to establish a *prima facie* case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a *prima facie* case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation. OCR defines an adverse action as an action that adversely affects a person's work, education, or well-being in an unwarranted, serious, lasting, and usually tangible manner, including acts likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR. Petty slights, minor annoyances, a lack of good manners, or unpleasant but transient incidents are generally not adverse actions.

For school year 2022-2023, the NYCDOE identified the Student as a qualified individual with a disability eligible to receive special education and related aids and services pursuant to an individualized education program (IEP) and enrolled the Student in a 12-month special education program at an out-of-district placement at [redacted content] (the School).

OCR determined that the Complainant engaged in disability-related protected activity between 2016 and the present, including advocating for the Student's special education and related aids and services in several due process hearings with the NYCDOE. The NYCDOE was aware of the Complainant's protected activity.

OCR determined that for school year 2020-2021, an impartial hearing officer (IHO) ordered that the NYCDOE provide to the Student as a related service round-trip transportation to the School with travel time limited to 30 minutes in each direction. The Complainant stated the NYCDOE did not comply with the order for school year 2020-2021.² During school year 2021-2022, the Student attended the School virtually and did not require transportation to the School. For school year 2022-2023, there was no formal virtual program at the School. On September 22, 2022, the Complainant filed a petition for due process, requesting that an IHO require the NYCDOE to adhere to the 30-minute travel time limit in each direction for the Student's transportation between home and the School for school year 2022-2023. On December 5, 2022, the IHO issued a pendency order effective immediately, directing the NYCDOE to provide the Student with round-trip special education bus transportation between his home and the School with travel time not to exceed 30 minutes each way as part of his 12-month special education program.

² The Complainant did not raise an allegation to OCR about the Student's transportation to the School for school year 2020-2021.

The Complainant asserted to OCR that the NYCDOE did not comply with the pendency order dated December 5, 2022, and as a result, she was unable to send the Student to the School during school year 2022-2023. The Complainant stated to OCR that she had documentation establishing that the Student was medically excused from attending the School in person. The Complainant submitted a document to OCR dated October 14, 2022, titled, “Request for Determination of Student Status/Notification of Student Absence Without Legal Excuse (the RDNA).” The RDNA is a form that the NYCDOE requires out-of-district placements to complete under certain circumstances, including when an enrolled student has not been physically present within 20 school days. It includes a section for the NYCDOE to complete to indicate its determination about whether or not a student’s absences would be deemed legally excused or unexcused.³ According to the RDNA for the Student, the School reported to the NYCDOE that for school year 2022-2023, the Student was not physically attending school. The RDNA stated that the Student was experiencing [redacted content] preventing him from returning to the School and that the Student was receiving related services required by his IEP virtually and that classwork was posted on Google Classroom. It also stated that because the School no longer maintained a virtual program, the Student’s attendance could not be established. On the copy of the RDNA that the Complainant provided to OCR the section that would indicate the NYCDOE’s determination about whether or not the Student’s absences would be deemed legally excused was blank.

The Complainant asserted that on October 20, 2022, an NYCDOE employee contacted her by telephone and “behaved unprofessionally and menacingly” during the call. The Complainant stated that fifteen minutes after the telephone call, an agent from ACS called her stating that “the [NYC]DOE had just contacted him regarding the Complainant’s ‘medical and education neglect’ of the Student.” The Complainant asserted that the NYCDOE retaliated for her disagreeing with the NYCDOE employee during the telephone call by referring the Student to ACS. The Complainant asserted that the NYCDOE was already aware that the Student was medically excused from in-person attendance because the RDNA provided the NYCDOE with notice of this on October 14, 2022.

On July 3, 2023, the NYCDOE contacted OCR to communicate its willingness to voluntarily resolve the OCR complaint through OCR’s Rapid Resolution Process (RRP) pursuant to Section 203 of OCR’s *CPM*. As stated above, on August 4, 2023, the NYCDOE voluntarily entered into the attached resolution agreement (the Agreement) to resolve the complaint, in accordance with Section 302 of OCR’s *CPM*. The Agreement addresses concerns OCR identified with respect to whether or not the NYCDOE adequately considered that the transportation dispute pending in due process may have affected the Student’s attendance at the time the Student was referred to ACS.

Under the Agreement, the NYCDOE agreed to ensure that, in addition to any existing applicable policies and procedures that require NYCDOE staff to make attempts to verify a student’s attendance and/or conduct appropriate outreach prior to making a report regarding suspected child neglect to the relevant state agency, the State Central Register (SCR), it will also implement additional policies and procedures pertaining to students who are placed at non-public schools. These policies and procedures will require that prior to making a report of suspected child neglect to the SCR, NYCDOE Committee on Special Education (CSE) staff, who may have attendance-related information as part of the special education process, make attempts to verify a student’s

³ The form refers to excused absences as “legally excused.” It does not use the term “medically excused.”

attendance and/or conduct appropriate outreach. Under the Agreement, the NYCDOE will distribute a written reminder of the policies and procedures to all staff members on the CSE serving District 27 and provide training to all NYCDOE staff members on the CSE serving District 27 regarding the NYCDOE's obligations and the prohibitions against discrimination and retaliation under Section 504 and Title II, and their implementing regulations.

OCR will monitor the NYCDOE's implementation of the 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 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, please contact Natasha Fitzsimmons, Compliance Team Attorney, at (646) 428-3899 or natasha.fitzsimmons@ed.gov; or Eric Bueide, Senior Attorney, at (646) 428-3851 or eric.bueide@ed.gov.

Sincerely,

/s/

Rachel Pomerantz

cc: Nicole Comstock, Esq., *via email only to* ncomstock@schools.nyc.gov

Encl.