Advocates for Children of New York
Protecting every child's right to learn

September 13, 2024

Commissioner of Education
New York State Education Department
89 Washington Avenue
Albany, New York 12234

Re: *Vender, et al. v. New York City Board of Education, et al.*, Appeal No. 22168

Dear Commissioner Rosa:

On behalf of Advocates for Children of New York ("AFC"), I am writing in support of the Commissioner's Appeal against the New York City Board of Education and New York City Department of Education ("NYC DOE") filed by Class Size Matters and five parents and their children regarding the need for an Individualized Education Program ("IEP") meeting before changing a student's placement to a virtual class or school. AFC has significant concerns that students' and parents' rights under the IDEA, Section 504 of the Rehabilitation Act, and New York Education Law will be implicated if the DOE is permitted to place students with disabilities in virtual classes without an IEP meeting.

Under the IDEA, the IEP dictates the services and placement of a student with a disability. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VII); *see also* 34 C.F.R. § 300.327. The IDEA also mandates that any change in placement can be made only at an IEP meeting, by a student's IEP team, with parent participation. *See* 20 U.S.C. § 1415(b)(1), (3); *see also* 34 C.F.R. § 300.327; 20 U.S.C. § 1414(e). New York Education Law has these same requirements. N.Y. EDUC. LAW § 4402(1)(b)(1); 8 NYCRR § 200.5(a), (d).

A student's placement may not be changed without (i) providing the parent with written notice and (ii) the student's IEP team, including the parent, initiating the change on the IEP at an IEP meeting based upon the student's individualized learning

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needs. *See* 20 U.S.C. § 1415(b)(3)(B) & (b)(6)(A); N.Y. EDUC. LAW § 4402(1)(b)(1); 8 NYCRR § 200.5(a), (d). A student's placement may not be unilaterally changed by either the student's school or the school district outside of an IEP meeting. *See* 20 U.S.C. § 1415(b)(3)(B); 20 U.S.C. § 1415(b)(6)(A); 8 NYCRR §§ 200.4(e)(2); 200.5(a), (d). Courts have found that a change in placement occurs when the change in question would impact the student's "learning experience." *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988); *see also George A. v. Wallingford Swarthmore Sch. Dist.*, 655 F. Supp. 2d 546, 551 (E.D. Pa. 2009) ("The Third Circuit has instructed that what constitutes a "change in educational placement" is fact specific and depends upon whether the change is "likely to affect in some significant way the child's learning experience.").

Changes in placement altering a student's educational program can be made only by an IEP team, at an IEP meeting. *See* 34 C.F.R. §§ 300.116(a) & (b); 8 NYCRR § 200.5(a), (d). The IDEA and New York Education Law are clear that the parent is a critical member of the IEP team and must be given an opportunity to participate in all decision-making concerning the placement of a student with a disability. *See* 34 C.F.R. § 300.501(b) & (c). As the implementing regulations of the IDEA state, the school district must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 34 C.F.R. § 300.327; *see also* 34 C.F.R. § 300.501; N.Y. EDUC. LAW § 4402(1)(b)(1); 8 NYCRR § 200.5(d). The IDEA does not contain a provision for placements and programs to be changed through an "opt-in" form.

In *R.E. v. New York City Department of Education*, the United States Court of Appeals for the Second Circuit explained that predetermination of a child's IEP without meaningful parental input constitutes a procedural violation of the IDEA that "can rise to the level of a substantive harm, and therefore deprive a child of a [Free Appropriate Public Education ("FAPE")]." *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012); *see also S.Y. v. New York City Dep't of Educ.*, 210 F. Supp. 3d 556, 576 (S.D.N.Y. 2016) ("[T]he IDEA provides that the fact of the procedural violation, if it significantly impedes the parents' opportunity to participate in the decision making process, is a harm unto itself that results in the denial of a FAPE.") (internal quotations and citations omitted); *Cooper v. D.C.*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014) (finding that the decision to change a child's placement before formulating an IEP violates the IDEA).

The IDEA and New York Education Law also require that a school district provide written notice to the parent "a reasonable time before" any change in *where* the student will receive IEP mandated services. 34 C.F.R. § 300.503(a)(1); 8 N.Y.C.R.R. § 200.1(oo). To allow a parent the opportunity to participate meaningfully in the decision-making process concerning a student's placement, as the IDEA and New York Education Law require, the school district must provide written notice of the proposed classroom teacher and resources available for the student before the change in placement occurs. *S.Y.*, 210 F. Supp. 3d at 574, 577.

In the context of public education, Section 504 of the Rehabilitation Act and its implementing regulations also require the provision of a free appropriate public education to students with disabilities. 34 C.F.R. 104.33(a). The regulations implementing Section 504 require that prior to effecting "any subsequent significant change in placement" of an individual that "needs

or is believed to need special education or related services," a school is required to "conduct an evaluation . . . ." 34 C.F.R. 104.35(a). Section 504 likewise does not contain a provision for changes to be made through an "opt-in" form.

Moving a student from an in-person classroom or school to a virtual class or school impacts the student's learning experience. As the experience of remote learning during COVID showed, replacing a student's in-person class of peers with a computer screen alone impacts the student's social emotional development and ability to engage in learning. *See, e.g.*, "Effects Of Remote Learning During COVID-19 Lockdown On Children's Learning Abilities And School Performance: A Systematic Review," Sept. 2023, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10266495/; "Online Learning in Covid 19 Detrimental to Adolescent Mental Health, School Satisfaction, Performance," Nov. 30, 2022, https://www.ucdavis.edu/news/online-learning-covid-19-detrimental-adolescent-mental-health-school-satisfaction-performance. While some students with disabilities can benefit from a virtual classroom, such a change does impact the student's learning experience and thus requires an IEP meeting.

Moreover, the move from an in-person class to a virtual class changes how restrictive the class placement is for the student. The IDEA requires that a student be placed in the Least Restrictive Environment ("LRE"). 20 U.S.C. § 1412(a)(5)(A). Moving a student from a class of multiple students together in-person to a virtual classroom without any students together, and without engagement in the school's social and extracurricular activities, changes the restrictiveness of the classroom and thus requires an IEP meeting. As the Court of Appeals for the Second Circuit has recognized,

> the IDEA provides that disabled children be educated "[t]o the maximum extent *appropriate* ... with children who are not disabled," and cautions that "special classes, separate schooling, or *other removal* of children with disabilities from the regular educational environment" should only occur "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily**."** 20 U.S.C. § 1412(a)(5)(A) (emphasis added).

M.W. ex rel. S.W. v. New York City Dep't of Educ., 725 F.3d 131, 143 (2d Cir. 2013) (emphasis in original).

Changing a student's class and school from in-person to virtual without an IEP meeting also implicates the protections in the IDEA, Section 504, and New York Education Law against disciplinary removals based upon a student's disability. Under New York Education Law, the IDEA and Section 504, if a school changes the placement of a student with a disability, the school must determine: (1) "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or " (2) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP." 20 U.S.C. § 1415 (k)(1)(E); *see* 34 C.F.R. 104.35. If either of these two provisions applies to the child's conduct, the conduct is found to be a manifestation of the child's disability for which a student cannot be removed. 20 U.S.C. § 1415 (k)(1)(E)(ii); *see* 34 C.F.R. 104.35. We are concerned that schools will be able to circumvent this

requirement if permitted to "place" students with disabilities in a virtual classroom or school without an IEP meeting.

Indeed, Advocates for Children has had clients whose children were moved from their in-person classes to remote learning during the 2020-2021 school year because of the students' behaviors without an IEP meeting or Manifestation Determination Review ("MDR"). Advocates for Children filed a complaint with United States Department of Education Office of Civil Rights, which opened an investigation into a "potential denial of FAPE and a potential failure to conduct an MDR to determine if the COVID-unsafe behavior was related to the suspected disability before moving Student A from in-person to remote instruction." *See* Letter from U.S. Department of Education Office for Civil Rights (May 16, 2023), at 2 (attached as Ex. A).

Replacing the requirement for an IEP meeting with an opt in form without a full discussion about the student's needs violates the explicit requirements of the IDEA, Section 504, and New York Education Law. The purpose of that IEP meeting is for all participants, including the school and parent, to consider whether a virtual learning environment can meet the student's needs, provide the supports that the student requires, and allow the student to progress.

Merely providing the parent a form in which they can "opt in" to virtual learning will not result in the discussion that the law mandates, and can result in the parent opting into virtual learning without a full understanding of the supports and rights of the parent or student. For example, a parent could opt into virtual learning because of transportation challenges, when such transportation challenges could be resolved through the IEP process. Or, as what happened to the students in our OCR complaint, a school may not offer the student the behavioral supports that they need to progress in an in-person learning environment. Without that full discussion at an IEP meeting, a parent may feel pressured to give up these rights and believe they have no other tenable option when a school suggests that the parent submit an opt in form to change the student's program and placement so significantly to remove them from in-person learning. That pressure is even greater when the student's behavior due to their disability is at issue in the school and the suggested alternative is suspension or expulsion.

For these reasons, Advocates for Children strongly encourages the Commissioner to require the NYC DOE to comply with the explicit requirements of the IDEA, Section 504, and New York Education Law by holding IEP meetings before any changes from in-person to virtual classes or schools for students with disabilities.

Respectfully Submitted,

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