



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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NEW YORK, NEW YORK 10005

RACHEL POMERANTZ
DIRECTOR
NEW YORK OFFICE

May 16, 2023

Sent by email only to RShore@advocatesforchildren.org

Rebecca Shore
Advocates for Children of New York
151 West 30th Street
New York, New York 10001

Re: Case No. 02-22-1043: Zeta Charter Schools

Case No. 02-22-1044: New York City Department of Education

Dear Ms. Shore:

On November 5, 2021, the U.S. Department of Education, Office for Civil Rights (OCR) received the complaint you filed against the Zeta Charter Schools (Zeta) and the New York City Department of Education (NYCDOE).¹ You alleged that Zeta and NYCDOE discriminated against a student (Student A) on the basis of disability by failing to timely evaluate Student A for a suspected disability between February 2020 and March 2021, when one of Zeta Inwood's charter schools (School 1) moved Student A from in-person instruction to remote instruction for "unsafe" behavior, resulting in a potential failure to conduct a manifestation determination review (MDR) to determine if Student A's "unsafe" behavior was related to the suspected disability (Allegation 1). You also alleged that Zeta and NYCDOE discriminated on the basis of disability by failing to conduct an MDR for another student (Student B), who is identified as having a disability, when another one of Zeta Inwood's charter schools (School 2) moved Student B from in-person to remote instruction in September 2020, for "unsafe" behavior related to Student B's disability (Allegation 2). You further alleged that NYCDOE and Zeta had a policy or practice of changing the placements of students with disabilities from an in-person setting to a remote setting because of their "unsafe" conduct related to their disabilities and COVID safety rules during School Year (SY) 2020-2021 (Allegation 3).

Based on the information you provided in your complaint, in supplemental documentation you submitted, and during a telephone call with OCR staff on March 24, 2022, OCR is opening Allegation 1 for investigation and dismissing Allegations 2 and 3 for the reasons set forth below.

¹ OCR assigned two case numbers to the complaint because Zeta and NYCDOE are distinct recipients of federal financial assistance from the Department.

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. 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 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. As public entities that receive financial assistance from the Department, Zeta and NYCDOE are subject to Section 504, Title II, and their implementing regulations.

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 that receives or benefits from Federal financial assistance. The regulation implementing Title II contains a similar provision regarding public entities, at 28 C.F.R. § 35.130(a).

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), requires a recipient that operates a public elementary or secondary education program or activity to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires recipients to provide a free appropriate public education (FAPE) to each qualified individual with a disability in the recipient's jurisdiction. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met; and are based upon adherence to the evaluation and placement procedures set forth in the regulation. The implementation of an individualized education program (IEP) is one means of meeting those educational needs.

With respect to Allegation 1 involving Student A who you identified as a student with a suspected disability during SY 2020-2021, you stated that on March 25, 2021, School 1 moved Student A from in-person to remote instruction for the remainder of the school year because he engaged in "unsafe" behavior, including by not following social distancing protocols. You alleged that Student A's parent requested an evaluation in February 2020, that NYCDOE agreed to evaluate him, and that NYCDOE had not conducted an evaluation of Student A to determine if the Student has a disability by March 25, 2021, when School 1 moved Student A to remote instruction without conducting an MDR to determine if the "unsafe" behavior was related to the suspected disability. You alleged that Student A could not meaningfully participate in remote learning from March 25, 2021, through the last three months of the school year. OCR is opening for investigation under Section 504 whether Zeta and/or NYCDOE failed to timely evaluate Student A for a suspected disability between February 2020 and March 2021, resulting in 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.

With respect to Allegation 2 involving Student B who was a student with an identified disability during SY 2020-2021, you alleged that on September 24, 2020, School 2 moved Student B from

in-person to remote instruction without any written notice or opportunity for a hearing because he did not keep his face mask on during school. You stated that Student B had to attend school remotely for the rest of the school year. You informed OCR that Allegation 2 was addressed in a due process decision dated May 17, 2021. Under Section 110(a)(2) of OCR's *Case Processing Manual (CPM)*,² OCR will dismiss an allegation filed with OCR if it has been resolved by another federal, state, or local civil rights enforcement agency or through a recipient's internal grievance procedures, including due process proceedings, and the allegation(s) was investigated, any remedy obtained is the same as the remedy that would be obtained if OCR were to find a violation regarding the allegation(s), and there was a comparable resolution process in which it applied comparable legal standards. OCR reviewed a copy of the hearing officer's due process decision and determined that the hearing officer used a comparable resolution process under comparable legal standards when the hearing officer considered and rejected your allegation that Zeta and NYCDOE should have conducted an MDR before moving Student B to remote instruction. Though the hearing officer examined this MDR allegation under the Individuals with Disabilities Education Act, OCR determined that the allegation is substantively equivalent to your allegation to OCR under Section 504. Accordingly, OCR is dismissing Allegation 2 under Section 110(a)(2) of OCR's *CPM*.

With respect to Allegation 3, OCR asked if you were aware of examples of students with disabilities other than Students A and B whom Zeta and/or NYCDOE moved from in-person to remote instruction without conducting an MDR for behaviors deemed "COVID unsafe," and you stated that you did not have other examples to support this alleged policy or practice. You also were not aware of any NYCDOE written policy regarding MDRs. You alleged that during meetings with parents, NYCDOE representatives told you that moving a student with a disability to remote learning without conducting an MDR is allowable due to COVID safety concerns and that this information came from higher level decisionmakers at NYCDOE. When OCR asked you for the names of the NYCDOE representatives or decisionmakers and the names of any students at these meeting or when these meetings occurred, you could not provide any specifics.

From a letter from Zeta's counsel to OCR dated November 16, 2021, OCR learned that when SY 2020-21 started, 80% of students enrolled in Zeta's charter schools received remote instruction and only 20% received in-person instruction. The letter further stated that approximately 80% of students at Zeta's Inwood Schools were receiving remote instruction in September 2020, when Student B was moved to remote instruction for "COVID unsafe" behavior, and that 50%-80% of students were still receiving remote instruction at Zeta's Inwood Schools in March 2021, when Student A was moved to remote instruction for such behavior. Neither Section 504 nor Title II precludes school districts from offering educational programs through remote instruction to students with disabilities in response to the COVID-19 outbreak.³

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

³ For more information, see U.S. Department of Education, *Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504*, February 16, 2022, available at <https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html>; U.S. Department of Education, *Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak*, March 12, 2020, available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>; U.S. Department of Education, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, March 21, 2020 (Supplemental COVID Fact Sheet), available at

OCR will dismiss an allegation under Section 108(d) of the *CPM* if OCR determines that the allegation lacks sufficient detail (i.e., who, what, where, when, or how) for OCR to infer that discrimination may have occurred or is occurring. Your allegation that NYCDOE and/or Zeta had a policy or practice of not conducting MDRs before moving students with disabilities from in-person to remote instruction based on their failures to follow COVID safety rules in SY 2020-2021 lacks sufficient detail for OCR to infer that such a discriminatory policy or practice was occurring at the time or is ongoing. You informed OCR that NYCDOE was not citing this practice in SY 2021-2022 and that Students A and B received in-person instruction that school year. Your allegation of a policy or practice in SY 2020-2021 rests on two examples at one of Zeta's seven charter schools and one of NYCDOE's 1,800 schools, and a hearing officer considered one of these examples and rejected your allegation that NYCDOE and Zeta should have conducted an MDR before moving Student B to remote instruction for COVID safety reasons in SY 2020-21. Your allegation of a NYCDOE policy or practice also rests on alleged statements about this practice that you attribute to unidentified NYCDOE decisionmakers and unidentified NYCDOE representatives at meetings you attended for unidentified students on unidentified dates. Based on the information you provided, OCR is dismissing Allegation 3 for insufficient detail to infer a violative NYCDOE or Zeta policy or practice under Section 108(d) of OCR's *CPM*.

As stated above, OCR is opening Allegation 1 for investigation because that the allegation was timely filed, and it is appropriate for investigation under the laws and regulations enforced by OCR. Please note that opening this allegation for investigation in no way implies that OCR has made a determination with regard to its merits. During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence from you, Zeta, NYCDOE, and other sources, as appropriate. OCR will ensure that its investigation is legally sufficient and fully responds to the allegation in accordance with the provisions of Article III of OCR's *CPM*.

You have a right to appeal OCR's determination regarding Allegations 2 and 3 within 60 calendar days of the date indicated on this letter. An appeal can be filed electronically, by mail, or by fax. You must either submit a completed form online at <https://ocrcas.ed.gov/content/ocr-electronic-appeals-form>; or mail, email, or fax a written statement of no more than 10 pages (double-spaced, if typed). If submitted by mail, please send to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202. If submitted via email, send to OCR@ed.gov. If submitted via fax, please send to (202) 453-6012. The filing date on an appeal is the date the appeal is postmarked, submitted electronically or submitted via fax. In the appeal, you must explain why you believe the factual information in this letter was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied; and, how correction of any error(s) would result in the case being opened for investigation. Failure to do so may result in dismissal of the appeal.

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. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that Zeta and 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 Zeta and/or NYCDOE with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that 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 Sandy Araj, Compliance Team Attorney, at (646) 428-3879 or Sandy.Araj@ed.gov; David Krieger, Senior Compliance Team Attorney, at (646) 428-3893 or David.Krieger@ed.gov; or me, at (646) 428-3898 or Ebone.Woods@ed.gov.

Sincerely,

A handwritten signature in black ink that reads "Eboné Woods". The signature is written in a cursive style with a large, stylized "E" and "W".

Eboné Woods
Compliance Team Leader