

New York Office  
Office for Civil Rights  
U.S. Department of Education  
32 Old Slip, 26th Floor  
New York, NY 10005-2500

November 5, 2021

*Sent Via Electronic Mail*

**RE: Complaint Against Zeta Charter Inwood School and New York City Department of Education Relating to Exclusion of Students from In-Person Learning Based on Their Disabilities**

Dear New York Office:

Advocates for Children of New York (“AFC”) is an organization that provides legal assistance and representation to parents of children with disabilities as they navigate the New York City public school system, including parents of students with disabilities at New York City charter schools. Throughout the COVID-19 pandemic, the United States Department of Education (“U.S. DOE”) repeatedly emphasized that students with disabilities retained all their rights and protections under Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and Individuals with Disabilities Education Act (“IDEA”). *See, e.g.*, U.S. DEP’T OF EDUC. OFF. OF CIV. RTS., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 2 (Mar. 2020),

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

Despite this guidance, the New York City Department of Education (“NYCDOE”) and Zeta Charter Inwood School (“Zeta”) used the pandemic as an excuse to exclude students with disabilities from their in-person classes.

AFC brings this complaint against Zeta and the NYCDOE to address the pattern and practice of discriminatory removals and exclusions of students from in-person classes based

upon their disabilities, including two students with disabilities at Zeta during the 2020-2021 school year, R.O. and E.M.

Although the removals were based on behaviors that were manifestations of students' disabilities, the NYCDOE did not conduct manifestation determination reviews ("MDR"), claiming instead that COVID-19 allowed the school to change their placements without due process or any of the protections set forth in the IDEA and Rehabilitation Act. Zeta and the NYCDOE violated Section 504 and the IDEA through their removal and continued exclusion of students from in-person learning due to their disabilities.

The implications of the actions and policies of Zeta and the NYCDOE go beyond the pandemic. Schools cannot circumvent their legal obligations merely by claiming that disability-related behavior is "unsafe." If school districts are permitted to remove students with disabilities from their in-person classes and place them in remote settings without any of the protections mandated by due process, Section 504, or the IDEA, those laws become meaningless.

#### **I. Nature of Complaint & Jurisdiction**

This complaint asserts that by removing students from their in-person classroom settings due to behaviors related to their disabilities, Zeta and the NYCDOE discriminated against students with disabilities in violation of Section 504 and that the NYCDOE and Zeta's failures to conduct MDRs in connection with these removals and changes in placement violate Section 504 and the IDEA. 34 C.F.R. § 300.530(e); 20 U.S.C. § 1415. In addition, Zeta denied these students their due process protections.

The Office for Civil Rights of the U.S. DOE ("OCR") has jurisdiction over this matter for the following reasons:(1) Section 504 prohibits Zeta and the NYCDOE as recipients of federal funding from discriminating against students with disabilities, and (2) Section 504 and the IDEA

require the NYCDOE and Zeta to comply with all protections for students with disabilities, including but not limited to the protection against removal based on disability-related behaviors.

We respectfully request that the United States Department of Education’s Office for Civil Rights accept this case for investigation.

## **II. Factual Background**

Zeta is a charter school in New York City that serves students from pre-K through fourth grade. Because charter schools receive federal funding, Zeta is subject to the obligations of Section 504, including the obligation to provide a Free Appropriate Public Education (“FAPE”) to students with disabilities and the prohibition against discrimination based upon disability. *See* 34 C.F.R. § 104.33 (“A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.”). Included in these obligations is the protection that schools cannot change a student’s placement based upon behaviors that are manifestation of their disability. *See* 34 C.F.R. § 104.33(a) (“A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to . . . any subsequent significant change in placement.”).

Under New York law, the NYCDOE acts as the Local Education Agency (“LEA”) for charter schools and remains responsible for providing and implementing services under the IDEA and Section 504 for New York City students with disabilities in charter schools. Zeta and the NYCDOE violated these obligations by removing students from their in-person classes based

upon behaviors that were manifestations of their disabilities and continuing to exclude them from their in-person classes.

R.O. and E.M. are two students with disabilities who experienced these discriminatory practices while enrolled at Zeta during the 2020-2021 school year. As a result, R.O. missed more than 5 months of in-person learning for a removal from his class directly related to his disabilities, despite documented evaluations showing that he required in-person supports to learn and could engage with the curriculum through remote learning only 10% of the time. E.M. missed approximately 3 months of in-person learning for a removal related to his disability. The exclusion of these students was due to the policies and practices implemented by Zeta and the NYCDOE.

**a. R.O.**

During the 2020-2021 school year, R.O. was enrolled in kindergarten at Zeta. R.O. has a complex array of learning, speech and language, social-emotional, and executive functioning needs, including challenges with receptive and expressive language, regulation of emotions, attention, and focus. *See, e.g.*, Affidavit of M.I. dated November 4, 2021 (“M.I. Aff.”) ¶ 4. As a result of his needs, R.O. requires individualized support both academically and behaviorally. *Id.* ¶ 5. R.O.’s Individualized Education Programs (“IEPs”) and his school progress reports demonstrate his difficulty with receptive and expressive communication, maintaining focus, and social-emotional regulation. *Id.* ¶ 6-9.

On March 27, 2020, the NYCDOE conducted an IEP meeting in preparation for R.O. to start kindergarten in the fall of 2020. *Id.* ¶ 10. R.O.’s IEP detailed his need for 1:1 assistance throughout the day, frequent redirection, focusing prompts from an adult, and small group work or individualized instruction. *Id.* ¶ 10-11, Ex. A. His IEP recommended R.O. be placed in an

Integrated Co-teaching class (“ICT”) and receive group counseling once a week and group speech-language therapy twice a week. *Id.* The IEP had an implementation date of September 10, 2020. *Id.* In August 2020, R.O.’s mother M.I. enrolled R.O. for in-person learning at Zeta. Zeta placed R.O. in an in-person ICT kindergarten classroom. *Id.* ¶ 12.

R.O. began kindergarten in his in-person ICT class at Zeta on September 1, 2020. *Id.* ¶ 12. Shortly after he started attending class, the school began contacting M.I. on a weekly basis about R.O.’s behavior in the classroom. *Id.* ¶ 14. Zeta’s most frequent complaints related to his challenges in receptive and expressive language and focus—documented issues related to his disabilities. *Id.* Zeta expressed concerns about R.O.’s difficulties with following directions and leaving the classroom, behaviors also squarely associated with his disabilities. *Id.* Zeta did not provide additional behavioral supports and services to R.O. to address the school’s concerns about R.O.’s behaviors; nor did the NYCDOE hold an IEP meeting to discuss Zeta’s concerns about R.O.’s behaviors. *Id.* ¶ 15, 16.

On September 24, 2020, Zeta removed R.O. from his in-person classroom without any written notice or opportunity for a hearing. *Id.* ¶ 17, 18. Zeta informed M.I. that R.O. exhibited disruptive classroom behavior and struggled to keep a mask on his face on that particular school day. *Id.* ¶ 17. This was the first and only day about which Zeta expressed concerns to M.I. about R.O. having difficulty wearing his mask. *Id.* In fact, in a January 2021 Functional Behavior Assessment (“FBA”) that Zeta conducted, Zeta reported that the school had removed R.O. from his in-person ICT class for behaviors such as elopement, putting his stomach on the ground, slamming his desk, and not following directions—all behaviors related to his disability. *Id.* ¶ 27, Ex. C. The FBA did not mention an inability to wear a mask as a reason for his removal. *See id.*

Prior to removing R.O. from his in-person placement, Zeta did not provide R.O. appropriate behavioral supports or interventions; nor did Zeta or the NYCDOE conduct an FBA or develop a behavioral intervention plan (“BIP”) until four months later in January 2021. *Id.* ¶ 20. Further, Zeta and the NYCDOE did not provide to M.I. any written information about R.O.’s removal or conduct a hearing before or after the removal. *Id.* ¶ 17, 18. Though M.I. and her attorney reached out to Zeta to discuss supports and services that would allow R.O. to return to his in-person class, Zeta refused to permit R.O. to return to his class for the remainder of the school year. *Id.* ¶ 21, 22.

Once R.O. began remote learning in late September, he had trouble focusing, remaining on task, and participating in the lessons due to the lack of individualized attention and support from a teacher or trained professional. *Id.* ¶ 20. In addition, he struggled accessing the curriculum due to his noted difficulties related to his speech and language impairment. *Id.* ¶ 15. As the year progressed, the difficulty of remote learning for R.O. increased as he understood less and less of the material. *Id.* ¶ 20. Despite multiple requests from M.I. during this time, Zeta did not reinstate R.O. for in-person learning. *Id.* ¶ 21.

In addition, R.O. suffered from the lack of social interaction with his peers. One of R.O.’s counseling goals in his 2020 IEP stated that “R.O. will develop social skills in class and play...[and] share toys and activities with other student[s].” *Id.* ¶ 10, Ex. A. After Zeta changed R.O.’s placement, R.O. had little opportunity to interact with his peers and make meaningful progress towards this goal. *Id.* ¶ 20. M.I. could see the impact the lack of social interaction had on R.O. As he anxiously watched his classmates go to school from his window, he would ask his mother when he would also be able to go to school. He repeatedly expressed how sad this made him and that he felt “left out.” *Id.* ¶ 44.

On November 16, 2020, M.I. requested that the NYCDOE conduct a psychoeducational evaluation and an FBA for R.O. *Id.* ¶ 23. The NYCDOE did not conduct a psychoeducational evaluation until January 6, 2021. *Id.* ¶ 25. The evaluation found that R.O. was easily distracted, frustrated, and impulsive, and would benefit from one-to-one support. *Id.* ¶ 25, Ex. B. The FBA found that R.O. was unable to access the remote learning curriculum due to his disability, highlighting that he was off task about 91 percent of the time during remote learning. *Id.* ¶ 28, Ex. C. Regarding his removal, the FBA stated that R.O. had been removed from in-person learning for behavioral reasons “such as elopement on multiple occasions (leaving the classroom and attempting to go to another floor) and putting his stomach on the ground” and “R.O. also showed difficulty regulating in the classroom when not wanting to participate in an activity or when doing a non-preferred activity, such as slamming his desk, not following directions, stomping feet, banging on his desk, and attempting to walk out of the classroom [and] shows difficulty regulating his emotions and shows non-compliance with adult requests.” *Id.* ¶ 27, Ex. C.

The NYCDOE conducted an IEP meeting on January 13, 2021 to create a new IEP for R.O. *Id.* ¶ 30. At this meeting, M.I. repeated her concerns that R.O. was unable to progress with remote learning. *Id.* The IEP discussed R.O.’s off-task behavior, attributing it to his struggles with attention and focus through the medium of remote instruction and his speech and language impairment. The IEP recommended speech-language therapy, counseling services, and a paraprofessional. *Id.* ¶ 31, Ex. E. All participants at the IEP meeting agreed that the remote setting was not the proper environment for R.O. *Id.* ¶ 30.

After the IEP meeting, R.O. was assigned a remote paraprofessional who was often not present on the computer at all and failed to implement R.O.’s BIP. *Id.* ¶ 32. R.O.’s

paraprofessional was late several times, did not have a working camera, and did not utilize breakout rooms to assist R.O. *Id.* Zeta replaced the first paraprofessional with a paraprofessional who worked with R.O. remotely for only half the school day. *Id.* ¶ 33. Even with the remote paraprofessional, R.O. had difficulty participating in class via remote learning due to his disability. *Id.*

Zeta went fully remote on November 30, 2020 and resumed in-person learning on March 8, 2021. *Id.* ¶ 26. Upon re-opening, Zeta denied R.O. a return to his original placement in an in-person ICT classroom. *Id.* ¶ 35. Zeta informed M.I. that R.O. would remain excluded from his in-person class because of his initial September removal for disciplinary reasons—a removal related to his disability. *Id.* ¶ 35. R.O.’s math and reading comprehension skills regressed as a result of his exclusion from in-person learning and instruction. *Id.* ¶ 42, 43. Additionally, R.O.’s exclusion from the classroom caused him social and emotional harm as he was unable to interact with peers and develop his social skills. *Id.* ¶ 44.

Because R.O. had been excluded from his classroom due to his disability for more than 10 school days, M.I. requested a Manifestation Determination Review (“MDR”) on March 12, 2021. *Id.* ¶ 36, Ex. F. The NYCDOE is responsible for conducting an MDR under the IDEA for students with disabilities in charter schools, and Zeta is responsible for conducting an MDR under Section 504. N.Y. Educ. Law § 2853(4); 34 C.F.R. § 104.33(a). Zeta never conducted an MDR. M.I. Aff. ¶ 22. Although the NYCDOE initially scheduled an MDR for March 26, 2021, the NYCDOE eventually cancelled the meeting, claiming that R.O. was not entitled to this legal protection. *Id.* ¶ 37, 38; Guttu Decl. ¶ 4. As a result of the NYCDOE and Zeta’s refusal to hold an MDR, the NYCDOE denied R.O. his basic due process rights as a student with disabilities.



b. **E.M.**

E.M. is a six-year-old student who attended first grade at Zeta during the 2020-2021 school year. In pre-kindergarten (“pre-k”), prior to attending Zeta, E.M. was classified as a pre-school student with a disability. He received counseling and, through his IEP, he received speech services and was placed in a 12:1 classroom. *See, e.g.*, Affidavit of E.D. dated October 29, 2021 (“E.D. Aff.”) ¶ 3-5. E.M.’s Individualized Education Service Plan from pre-kindergarten indicated that he had moderate delays in his receptive language skills and significant delays in his expressive language skills. *Id.* The IEP stated that E.M. had difficulty following complex directives and understanding certain questions and noted that he may throw objects when upset. *Id.*

On April 2, 2019, the NYCDOE recommended that E.M. be declassified from special education services with a projected declassification date of August 31, 2019. *Id.* ¶ 5. As such, the NYC DOE did not offer E.M. further services. E.M. attended an NYCDOE school for kindergarten. Without the supports that E.M. received during pre-kindergarten, E.M. began exhibiting his prior behaviors, and in February 2020, the NYCDOE agreed to evaluate E.M. *Id.* ¶ 6. When COVID-19 closed the schools in March 2020, the NYCDOE halted its efforts to evaluate E.M. *Id.* ¶ 6.

In September 2020, E.M. began first grade in a general education in-person class at Zeta. *Id.* ¶ 1. On November 12, 2020, Zeta suspended E.M. for two days for what Zeta viewed as disruptive classroom behavior. *Id.* ¶ 8. Throughout the month of November, E.M.’s mother E.D. expressed her concerns to Zeta about E.M.’s behavior and prior challenges he had related to his disability. *Id.* ¶ 7, 9. Although Zeta scheduled a meeting to discuss his behavior for November 17, Zeta cancelled the meeting and never rescheduled. *Id.* ¶ 10.

E.D. repeatedly requested that Zeta evaluate her son or develop a plan to address his behavioral needs. *Id.* ¶ 11, 9, Ex. A. On February 3, 2021, E.D. requested that E.M. receive an evaluation of his disabilities. *Id.* ¶ 12. Zeta staff, however, told E.D. that an evaluation was not necessary at the time. *Id.* ¶ 13. On March 3, and again on March 9, E.D. asked E.M.’s teacher to contact the school psychologist about E.D.’s concerns regarding E.M.’s behavioral challenges at school. *Id.* ¶ 14, Ex. B. On March 12, E.D. once again informed Zeta that she wanted E.M. to be evaluated for special education services. *Id.* ¶ 15. The NYCDOE did not conduct an evaluation at that time.

On March 25, after two more behavioral incidents related to his disability, Zeta removed E.M. from his classroom and informed E.D. that he would not be permitted to attend his in-person class for the remainder of the school year due to his behavior. *Id.* ¶ 16-18, Ex. C. Zeta provided E.D. with written notice of E.M.’s removal, attributing his removal to “unsafe” behaviors purportedly related to COVID-19 that violated social distancing policies. *Id.* ¶ 18, Ex. D. The behaviors were manifestations of E.M.’s disabilities and were not specific to COVID. The written notice stated, “E.M. got up out of his seat at multiple times throughout the day to touch materials in the classroom belonging to other students, such as other students’ desks, bins, backpacks, and papers” and “[E.M.] walked around the room throwing objects, such as chairs, desks, math manipulatives, books, and he came within close contact of several other students in the class. This behavior clearly violates our social distancing and safety guidelines.” *Id.* ¶ 18, Ex. D. Zeta did not conduct a hearing prior to or after removing E.M. from his in-person class. *Id.* ¶ 19.

Prior to E.M.’s removal, neither the NYCDOE nor Zeta conducted an FBA or created a BIP for E.M., despite E.D.’s repeatedly expressed concerns about his behavior and requests for

evaluations and additional support, as well as Zeta and the NYCDOE’s knowledge of his prior behavioral challenges identified in his previous IEPs. *Id.* ¶ 26, 21-24, Ex. E-F. The NYCDOE and Zeta did not conduct an MDR in connection with Zeta’s change in E.M.’s placement based upon behaviors related to his disability. *Id.* ¶ 25.

On April 18, 2021, E.D. had E.M. evaluated by a private provider, after months of requesting that the school evaluate E.M. about his behaviors related to his disability. E.M. was diagnosed with disruptive mood dysregulation disorder, anxiety disorder, and ADHD. *Id.* ¶ 27, Ex. G. Despite repeated communications to the NYCDOE, the NYCDOE never evaluated or held an IEP meeting for E.M. during the 2020-2021 school year. *Id.* ¶ 28. On June 21, 2021, E.D. requested the NYCDOE conduct an MDR. *Id.* ¶ 29. The NYCDOE never responded to her request and neither the NYCDOE nor Zeta has conducted an MDR. *Id.*

### **III. Legal Claims**

#### **a. Applicable Legal Standard**

Section 504 prohibits programs receiving federal funding from discriminating against an individual on the basis of their disability. *See* 34 C.F.R. 104.4(a). In the context of public education, Section 504 and its implementing regulations require the provision of a free appropriate public education to students with disabilities. 34 C.F.R. 104.33(a). Similar to the IDEA’s prohibition against removals for more than 10 days of students for behavior that is a manifestation of their disabilities, *see* 20 U.S.C. § 1415(K)(1)(E), the regulations implementing Section 504 require that prior to imposing “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). The United States Department of

Education Office of Civil Rights has interpreted this requirement to mean that prior to a disciplinary removal of a student with a disability for ten consecutive days or ten cumulative days in a school year “under circumstances constituting a pattern of exclusion”, a school district must conduct an MDR. Letter of Finding re: Case No. 01-14-1238 Worcester Public Schools, U.S. Dep’t of Ed. Office of Civil Rights (Aug. 24, 2016); *see also* Loleta Union Elementary School District, OCR Complaint # 09-14-1111, at 24 (Nov. 22, 2017); Letter of Finding Re: OCR Docket #15-15-1375, U.S. Dep’t of Ed. Office of Civil Rights (Mar. 4, 2016); Letter of Finding re: OCR Docket # 15-14-1071, U.S. Dep’t of Ed. Office of Civil Rights (Aug. 13, 2014); Letter of Finding re: OCR Complaint No. 11-13-1266, U.S. Dep’t of Ed. Office of Civil Rights (Mar. 11, 2014).

Under 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. In New York, the NYCDOE is responsible for conducting an MDR pursuant to the IDEA for New York City students with disabilities in charter schools. 20 U.S.C. § 1415 (k)(1)(E); 34 C.F.R. § 300.530 (e); 8 NYCRR § 201.4. Charter schools hold a separate and independent obligation under Section 504 to ensure that a student’s placement is not changed for disciplinary reasons due to their disability. *See* 34 C.F.R. 104.35(a).

During the COVID-19 pandemic, the U.S. Department of Education made clear that schools' legal obligations to provide a FAPE to students with disabilities were not waived. On March 16, 2020, the Department of Education issued a fact sheet detailing the rights of students in light of the pandemic and remote learning: "if the school is open and serving other students, the school must ensure that the student [receiving services under the IDEA or 504] continues to receive a free appropriate public education (FAPE) consistent with" necessary health and safety measures. U.S. DEP'T. OF EDUC. OFF. CIV. RTS., FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS (Mar. 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>.

The U.S. DOE emphasized the obligations of schools to students with disabilities during remote learning, requiring that "the LEA must make every effort to provide special education and related services . . . for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504." U.S. DEP'T OF EDUC. OFF. OF CIV. RTS., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 2 (Mar. 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>; U.S. DEP'T OF EDUC. OFF. OF CIV. RTS., SUPPLEMENTAL FACT SHEET, ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES (Mar. 21, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>; U.S. DEP'T OF EDUC. OFF. OF CIV. RTS., QUESTIONS AND ANSWERS FOR K-12 PUBLIC SCHOOLS IN THE CURRENT COVID-19 ENVIRONMENT 4 (Sept. 28,

2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf> (affirming its March statement that schools must comply with Section 504).

On May 13, 2021, the U.S. DOE further stated that “if a school had to comply with Section 504 before the pandemic, it still must meet Section 504’s requirements, including for remote learning and during all stages of reopening.” U.S. DEP’T OF EDUC. OFF. OF CIV. RTS., QUESTIONS AND ANSWERS ON CIVIL RIGHTS AND SCHOOL REOPENING IN THE COVID-19 ENVIRONMENT 6 (May 13, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf>. This mandate applied to all public schools, including charter schools. Significantly, the U.S. DOE did not provide any exceptions to school districts’ obligations or allow for justifications for schools to not comply with the legal protections for students with disabilities.

Thus, during the pandemic, students with disabilities maintained their protections under Section 504 and the IDEA. Even more fundamentally, students retained their due process rights and protections.

#### **A. Zeta Denied Students Their Due Process Rights**

In *Goss v. Lopez*, the Supreme Court recognized that students have a property interest in receiving a public education. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Under *Goss*, when a school seeks to deprive a student of that property interest, that student is entitled to at least the minimum due process requirements of notice and a hearing “as soon as practicable.” *Id.* at 583. The Supreme Court explained that for disciplinary removals from instruction of 10 days or less, the student must be given oral or written notice of the charges, an explanation of the evidence against the student and the opportunity to present his or her side of the story. Notice to the student and a hearing should precede any removal from school; if this is not possible, as in the instance of the student’s

attendance causing danger to property or people in school, then the required notice and hearing should occur as soon as possible after removal. *Id.* at 577-84.

Significantly, schools cannot remove students from their class without due process. *Goss*, 419 U.S. at 585. Zeta claimed that the school did not need to provide E.M. or R.O. with any due process because the removals were for behaviors that the school considered “unsafe.” Supreme Court and lower court precedent are clear that schools cannot avoid due process requirements just by re-labeling suspensions as removals for unsafe behavior. *Patrick v. Success Acad. Charter Sch. Inc.*, 354 F. Supp.3d 185, 233 (E.D.N.Y. 2018) (charter school cannot avoid due process procedures simply by insisting that the school claimed the student’s behavior was unsafe); *see also Goss*, 419 U.S. at 574 (“the State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”). What matters is not the word “suspension,” but the removal of the student and denial of that student’s right to an education without process. Here, based on its policies and practices, Zeta removed R.O. from his classroom for more than five months and E.M. for more than 2 months for their behaviors without due process in deprivation of their rights.

**B. Zeta and the NYCDOE Discriminated Against Students with Disabilities by  
Removing Students from their In-Person Placements Due to their Disabilities**

The practices and policies by Zeta and the NYCDOE in removing students from their in-person class placements based on behaviors directly related to their disabilities flies in the face of Section 504, the IDEA, and the guidance published by the USDOE during the pandemic. The removal and exclusion of students with disabilities from in-person classes as a result of their

disability-based behaviors is at the very core of disability discrimination that Section 504 was intended to prevent. *See* 34 C.F.R. 104.4(a) (“No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.”); *see also* 34 C.F.R. § 300.101 (“A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).”).

In addition, prior to “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). Both R.O.’s and E.M.’s removals constituted a change in placement, triggering an MDR for each student under Section 504 and the IDEA. *See, e.g., Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988); *A.W. v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004). Both E.M.’s and R.O.’s removals were the result of behaviors that manifested from their respective disabilities, thus banning the change in placement under Section 504 and the IDEA. Zeta and the NYCDOE cannot justify this change in placement and noncompliance with their legal obligations by unilaterally labeling the behaviors as “unsafe.”

### **1. Zeta Removed Students Based on Behaviors Related to their Disabilities**

As the removals of R.O. and E.M. demonstrate, Zeta’s practice of removing students with disabilities from in-person classes for behaviors that were manifestations of their disabilities discriminated against students with disabilities.



The Office of Civil Rights finds disability discrimination occurs under Section 504 when “there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities.” Arcadia Unified School District, Letter to Dr. Joel Shawn re: OCR Complaint # 09-14-1322 at 2 (Dec. 22, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141322-a.pdf>. OCR then determines:

If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district’s actions were based on the individual’s disability.

*Id.*

In *Arcadia*, OCR investigated whether the school district treated students differently by providing students with disabilities a shorter day via earlier dismissal than their peers without disabilities. *Id.* at 1. OCR’s investigation found that even a 5-minute difference in instructional time due to a shortened day was a 504 violation. *Id.* at 3. The school district’s proffered reason that the students “exhibited behavior issues” during regular dismissal time did not satisfy a legitimate non-discriminatory reason for the different treatment. OCR found that the shortened school day did not comply with Section 504. *Id.* at 3.

In *Jonathan G. ex rel. Charlie Joe G. v. Caddo Parish School Bd.* 92-1531, 875 F. Supp. 352, 364 (W.D. La. 1994), the United States District Court for the Western District of Louisiana found that, as the initial hearing officer had determined, the school district had inappropriately disciplined the student for conduct related to his disability. *Id.* at 357, 369. The student’s evaluations noted “uncontrolled anger, defiance and disrespect of authority and refusal to obey

superiors, were present in every instance of suspension.” *Id.* at 360. The school staff asserted that the conduct for which he was suspended was unrelated to his disability because of its severity. *Id.* at 360-61. The court disagreed, holding that the evaluation made no remarks that the student’s disability-based behaviors were limited only to minor outbursts or displays of aggression. *Id.* at 361. The court then found that “[d]eclaratory and equitable relief of this nature is clearly available under Title VII, and accordingly may be awarded for a violation of Section 504.” *Id.* at 364. The court entered judgement in favor of the family under Section 504, for declaratory relief that the school district improperly suspended Jonathan from his middle school “for reasons related to his exceptionality” and for “conduct related to his behavior disorder.” *Id.* at 369, 362.

R.O. was removed for behaviors including elopement, putting his stomach on the ground, slamming his desk, and not following directions. *See, e.g.*, Affidavit of M.I. dated November 4, 2021 (“M.I. Aff.”) ¶ 39. R.O.’s evaluations and IEPs detail how R.O.’s disability manifests itself in non-compliant behavior and struggles to focus and control his impulses. *Id.* ¶ 25, Ex. B. *Id.* Additionally, his evaluations state that R.O. exhibits characteristics of students who have been diagnosed with ADHD and OCD. *Id.* These behaviors can lead to disruptive classroom behavior and are the behaviors about which Zeta repeatedly called M.I. before removing him on September 24, 2020. *Id.* ¶ 35. Though Zeta claimed on September 24 that the removal was related to a refusal to wear a mask *on one day*, there was no mention of this reason given in the January FBA conducted by Zeta. *Id.* ¶ 17, 27, Ex. C. Instead, Zeta stated that R.O. was removed to remote learning “for showing COVID-19 unsafe behaviors, such as elopement from the classroom (leaving the classroom and attempting to go to another floor) and putting his stomach on the ground.” *Id.* ¶ 27, Ex. C.

Likewise, Zeta removed E.M. from his classroom for behavior related to his disabilities—the same behaviors about which E.D. had previously raised concerns with Zeta staff. *See, e.g.*, Affidavit of E.D. dated October 29, 2021 (“E.D. Aff.”) ¶ 18, Ex. D. E.M.’s evaluations make plain that his non-compliant and disruptive behavior is connected to his disability-related challenges with receptive, expressive, and pragmatic language as well as mood regulation, anxiety, and ADHD. *Id.* ¶ 27, Ex. G. His 2018 IEP stated that he struggled to follow more complex directives and that he would sometimes throw objects when he became upset. *Id.* ¶ 4. In addition, these behaviors in kindergarten are what led the NYCDOE to agreed to evaluate E.M. *Id.* ¶ 6.

R.O.’s and E.M.’s disabilities are what caused Zeta to remove and exclude them from their in-person classes. Under Zeta’s policies, Zeta deemed the behaviors that were manifestations of their disabilities as “unsafe” under COVID. Students without these disability-related behaviors remained in their in-person classes. Because of their disabilities, however, R.O. and E.M. exhibited the behaviors for which they were removed from their in-person classes. Notably, Zeta did not provide a list of the behaviors that it considered “unsafe” to the students’ parents prior to the removals. In both instances described in this complaint, before removing the students, Zeta complained about the students’ behaviors to the parents without reference to the behaviors being unsafe for COVID exposure. It is therefore clear that the justification of the removals as being to prevent COVID “unsafe” behaviors was merely a pretense for removals for disability-related behaviors. Indeed, the behaviors for which Zeta removed R.O. were the behaviors that R.O.’s FBA targeted. While it is possible students without disabilities may have demonstrated these same behaviors, the impact of Zeta’s removal policy was disparately on students with disabilities who were excluded from in-person learning.

Because Zeta’s policy of removing students from in-person classes had a disparate impact on students with disabilities, the policy results in disability-based discrimination.

## **2. COVID-19 Did Not Justify Zeta’s Exclusion of Students with Disabilities from their In-Person Classes**

Behaviors that Zeta unilaterally labeled as “COVID unsafe” provide no justification for Zeta and the NYCDOE to exclude students from their in-person classroom for months without end without due process. If permitted, the justification would defeat the protections afforded by due process, Section 504 and the IDEA, allowing schools to remove students from their in-person learning by the school’s deeming that behavior as “unsafe” without any check on that determination.

Zeta removed R.O. and E.M. for behaviors related to their disabilities. The mere labeling of a student’s removal as due to “Covid-19 safety concerns” does not excuse a school district’s due process, Section 504, or IDEA obligations. As the United States District Court for the Eastern District of New York has held, a school’s unilateral characterization of behavior as “unsafe” cannot sidestep a student’s rights and protections. *See Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 233 (E.D.N.Y. 2018). In *Patrick*, a charter school removed a student with a disability based upon the school’s allegation that the student exhibited “tantruming behavior” and claimed an exception to the MDR requirement based upon the school’s characterization of the behavior as causing “serious bodily injury.” *Id.* at 197-98. The court rejected the school’s characterization of the behavior as exempting the MDR requirement, holding that “Defendants cannot prevent this claim from proceeding simply by insisting that those allegedly corrupt determinations were correct.” *See id.* at 233. The court emphasized “‘Congress’ unquestioned desire to wrest from school officials their former unilateral authority to

determine the placement of emotionally disturbed children.” *Id.* (quoting *Honig v. Doe*, 484 U.S. 305, 321 (1988)).

Similarly, here, Zeta unilaterally and improperly excluded R.O. and E.M. for their behavior from their regular in-person placement, without an MDR and without any due process. Zeta claimed it was permitted to do so because Zeta called the behaviors “unsafe” due to COVID. The COVID-19 pandemic did not provide schools with the ability to label any behavior as a “Covid-19 safety concern” and thus remove students indefinitely without regard to their civil rights. As the court in *Patrick* held, a school’s characterization of the student’s behavior alone is not sufficient to void that student’s rights to an MDR and protection against removal due to disability. *See id.* at 233.

The behaviors underlying R.O.’s removal—elopement, putting his stomach on the ground, slamming his desk, and not following directions—are directly linked to his disabilities. The January 2021 FBA attributed these non-compliant and disruptive behaviors to R.O.’s challenges with emotional regulation. *Id.* ¶ 27, Ex. C. Instead of conducting an MDR for the behaviors for which Zeta removed R.O., Zeta and the NYCDOE impermissibly characterized R.O.’s behaviors as COVID-19 safety concerns and excluded him from his in-person class and the learning environment he needed to make meaningful progress towards his IEP goals. *Id.* ¶ 22. As a result of the policy that Zeta and the NYCDOE articulated that behaviors unilaterally deemed as “unsafe” due to COVID do not require an MDR, Zeta and the NYCDOE did not conduct an MDR under Section 504 or the IDEA. Guttu Decl. ¶¶ 4, 5.

Following this same policy, Zeta excused its removal of E.M. from his in-person learning environment based upon Zeta’s perceived COVID-19 safety concerns. In its written notice to E.D., Zeta stated that it removed E.M. for touching the belongings of other students, getting out

of his seat, and throwing objects in the classroom. E.D. Aff. ¶ 18, Ex. D. These behaviors are the behaviors for which Zeta had suspended E.M. in the fall of 2020 and about which E.D. had previously expressed concern to Zeta staff when requesting E.M. be evaluated for special education services. *Id.* ¶ 7-10. Indeed, throwing objects was a behavior explicitly noted in E.M.’s pre-k IEP. *Id.* ¶ 4.

Zeta removed students, including R.O. and E.M., from their in-person placements for behaviors that manifested from their disabilities under the guise of COVID-19 safety policies. The DOE and Zeta then tried to justify their refusal to comply with legally mandated protections for students with disabilities under Section 504 and the IDEA based upon COVID-19. This approach, which would permit schools to label most, if not all, disruptive behaviors under the blanket designation “COVID unsafe” would effectively leave discretion solely to the school to decide when a student can be removed to a remote placement. This, in turn, would completely deprive the child of their due process rights and protections under the IDEA and Section 504.

**3. Zeta and the NYCDOE Violated Section 504 and the IDEA by Not Conducting MDRs in Connection with the Removals from In-Person Placements**

Section 504 and the IDEA require an MDR to occur if there is a decision to change the placement of a child with a disability for disciplinary reasons. *See* 20 U.S.C. § 1415 (k)(1)(E); 34 C.F.R. § 300.530(e); 34 C.F.R. 104.35. In New York, the NYCDOE is responsible for conducting an MDR pursuant to the IDEA for New York City students with disabilities in charter schools. 20 U.S.C. § 1415 (k)(1)(E). In addition, charter schools hold a separate obligation under Section 504 to ensure that a student’s placement is not changed for disciplinary reasons due to their disability. 34 C.F.R. 104.35.

In *Loleta Union Elementary School District*, OCR Complaint # 09-14-1111, at 30-31 (Nov. 22, 2017), the Office for Civil Rights held that excluding a student with a disability from their educational placement for more than ten consecutive days constituted a significant change in placement. The Office for Civil Rights mandated that if such a change has occurred for disciplinary reasons, the district “must evaluate whether the misconduct was caused by, or was a manifestation of the student’s disability.” *Id.*; see *Broward County (Fl.) School District*, 36 IDELR 159 (OCR Nov. 19, 2001) (explaining that when the exclusion of a child with a disability is for more than 10 consecutive school days, the exclusion constitutes a significant change in placement.)

In *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988), the United States District Court for the Southern District of New York explained that the “[t]he touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience.” *Id.* at 202. When the change in question impacts the student’s learning experience, the change is considered a change in placement under the IDEA. *Id.*; 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” depends upon whether the change is “likely to affect in some significant way the child's learning experience.”). The relevant placement includes the educational program “such as the classes, individualized attention and additional services a child will receive...” *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009).

In a 2015 OCR investigation, OCR found that a school improperly disciplined a student when the school knew about the student’s behavioral challenges and disciplined the student for behaviors resulting from his suspected disabilities. Letter to Edward Brown re: Butte Valley

Unified School District, OCR Complaint # 09-15-1322 (Nov. 4, 2015),

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151322-a.pdf>. OCR

noted that “[t]he circumstances leading to the suspensions involved the same types of disruptive behavior by Student 1 in each instance, indicating that Student 1 was being disciplined through exclusion for behaviors that were part of his suspected disabilities.” *Id.* at 10.

As in E.M.’s and R.O.’s cases, the Butte Valley School District transferred “Student 1” to a “highly segregated setting.” *Id.* at 10. OCR found that the suspensions excluding the student from the school, and his transfer to a different setting “constituted a significant change in placement.” *Id.* The school also violated Section 504 by failing to evaluate the behavior as a manifestation of the student’s disability. “The District did not recognize its responsibility to consider whether Student 1’s misconduct was caused by, or was a manifestation of the student’s disability. OCR therefore also concluded that the District failed to act in compliance with Section 504 with respect to the suspensions and expulsion of Student 1.” *Id.*

Zeta removed students from their in-person placements for much more than ten consecutive days, making their removal from their in-person classes indefinite and lasting for the remainder of the school year. Moreover, the removals were to the most restrictive setting of remote learning. Their learning experiences were drastically impacted, denying them all in-person learning and interaction with teachers, providers, and peers. As such, these removals triggered rights to an MDR. Zeta and the NYCDOE, however, refused to conduct MDRs due to their policy determination that COVID exempted them from their legal obligations.

In R.O.’s case, Zeta’s removal to a remote placement denied him the supports and services that he needed in his in-person ICT classroom, such as one-to-one in-person support, consistent interaction with his teachers, interaction with his classmates, full-time access to his



paraprofessional, frequent check-ins, implementation of his BIP, access to in-person and consistent speech-language services, consistent reinforcement, prompting, movement breaks, and redirection. Effectively, his remote placement made the implementation of his IEP impossible. Without these supports and services, R.O. was unable to focus, remain on task, and effectively engage in instruction. M.I. Aff. ¶ 20. Without individualized support, R.O. was unable to make meaningful progress and regressed in key academic areas such as math and reading comprehension. *Id.* ¶¶ 42-43. Further, removal from his peers prevented him from developing the social skills identified as needs in his IEP. *Id.* ¶ 44.

E.M.'s removal to a remote placement significantly affected his learning experience because it prevented him from accessing the in-person supports and services he required, such as one-to-one support, consistent interaction with teachers, interaction with classmates, redirection, behavioral supports, counseling, and speech and language services. E.D. Aff. ¶ 31. E.M.'s evaluations detail his receptive, expressive, and pragmatic language deficits. *Id.* ¶ 27, Ex. G. His evaluations confirm the concerns that his mother expressed to Zeta as early as November 2020, as he was diagnosed with disruptive mood regulation disorder, anxiety disorder, and attention deficit hyperactivity disorder (“ADHD”). *Id.*

Both the NYCDOE and Zeta were aware of E.M.'s disabilities prior to his removal. The NYCDOE had even agreed to evaluate E.M. in February 2020, but then did not conduct any evaluations. *Id.* ¶ 6. During the 2020-2021 school year, E.D. stated her request to have E.M. evaluated numerous times to E.M.'s teacher. For example, on November 12, 2020 and March 9, 2021, E.D. expressed her concerns in writing about his behavior and his need for supports. *Id.* ¶ 9, 14, Exs. A-B. On March 9, E.D. asked E.M.'s teacher to have the school psychologist reach out to her to “start the process” that would allow E.M. to receive services. *Id.* ¶ 14, Ex. B.

Knowing of these students' disabilities, Zeta still removed R.O. and E.M. from their in-person classes for behaviors that were manifestations of their disabilities. Neither the NYCDOE nor Zeta conducted MDRs, as Section 504 and the IDEA require. Instead, the NYCDOE and Zeta claimed that the law did not require an MDR because of COVID. This interpretation of the law is directly contrary to the guidance the USDOE issued that "if a school had to comply with Section 504 before the pandemic, it still must meet Section 504's requirements, including for remote learning and during all stages of reopening." U.S. DEP'T OF EDUC. OFF. OF CIV. RTS., QUESTIONS AND ANSWERS ON CIVIL RIGHTS AND SCHOOL REOPENING IN THE COVID-19 ENVIRONMENT 6 (May 13, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf>.

Zeta and the NYCDOE's justifications for the students' exclusion from in-person learning without the protections of Section 504 and the IDEA have implications beyond COVID. Zeta and the NYCDOE's justifications for failure to comply with the IDEA and 504 are the same as those the court rejected in *Patrick*: that legal protections purportedly do not apply because the school deemed the students' behaviors as unsafe. While COVID may have been the justification here, schools cannot use their own determination that a behavior is unsafe to ignore students' legal protections – regardless of the reason the school thought the behavior was unsafe.

Notably, the IDEA already has procedures to address those instances in which a school considers behaviors that are manifestations of a student's disability to be unsafe. The IDEA permits a school to maintain a removal of a student with a disability in an interim alternative educational setting ("IAES") for 45 days for (as relevant to this complaint) inflicting serious bodily injury upon another. *See* 20 U.S.C. § 1415(k). Significantly, to assert that removal to an IAES is required for risk of serious bodily injury, the school district still must follow the process

set forth in the IDEA: first, a student is still entitled to an MDR and second, there must have been a factual determination after a hearing that the student poses a current risk of bodily injury requiring the removal to an IAES. *See id.* Moreover, an IAES removal is time-limited, unlike Zeta's removals of students with disabilities from in-person placements.

In contrast to the requirements for an IAES and in violation of the requirements under Section 504 and the IDEA, the NYCDOE and Zeta excluded students with disabilities merely on the school's determination that the behaviors were unsafe without any process. The NYCDOE's and Zeta's unilateral excusal of their legal obligations owed to students with disabilities violates Section 504 and the IDEA.

#### **IV. Conclusion & Relief Sought**

With the passage of Section 504 and the IDEA, Congress sought to prevent the exclusion of individuals with disabilities from participating in or benefiting from basic programs and activities. One of the hallmarks of these protections is a student's right to access education. Section 504 provides that programs that receive federal funding, such as Zeta and its LEA under the IDEA, the NYCDOE, cannot discriminate against students due to their disabilities. As the USDOE made clear, the rights afforded to students under the IDEA and Section 504 were not suspended during the COVID-19 pandemic. The civil rights granted to students with disabilities under Section 504 endured during the 2020-2021 school year and continue now. Section 504 and the IDEA still mandate that the NYCDOE and Zeta cannot exclude students on the basis of their disabilities and must afford due process and conduct MDRs for students with disabilities.

The consequences of Zeta's and the NYCDOE's removal of students with disabilities such as R.O. and E.M. from their in-person classes to a remote placement have been significant.

Both students suffered academically, socially, and emotionally. Both students were not able to attend class with teachers and other students. Both students were removed indefinitely from their educational placements due to their disabilities without due process and in violation of their basic civil rights.

We therefore seek a determination by OCR that the actions of Zeta and the NYCDOE of removing students from in-person learning without any of their legal protections constitute a violation of due process, Section 504 of the Rehabilitation Act of 1973, the IDEA, and their accompanying regulations. Complainants further seek an order from OCR directing that school districts cannot justify removal of students with disabilities from their in-person classes based on behaviors related to their disabilities by unilaterally labeling their behaviors as “unsafe” and that school districts must afford students their due process protections prior to removal from in-person learning, including those to which they are entitled under Section 504 and the IDEA.

Respectfully Submitted,

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