



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION IV

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ATLANTA, GA 30303-8927

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April 15, 2015

Mr. Michael L. Thurmond, Esq.  
Superintendent  
DeKalb County School District  
1701 Mountain Industrial Boulevard  
Stone Mountain, Georgia 30083

Re: OCR Complaint #04-14-1508

Dear Mr. Thurmond:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint which was filed on April 9, 2014, against the DeKalb County School District (District), alleging discrimination based on disability.

Specifically, the Complainant alleged that the District discriminated against her son (Student) at Stephenson Middle School (School) as follows:

1. The District failed to timely evaluate the Student for special education services once the Complainant requested an evaluation and expressed disability concerns, in November 2013;
2. The District retaliated against the Student by changing his disciplinary forms to reflect additional and more serious charges and penalties, in January 2014.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. The District is a recipient of FFA from the Department and a public entity. Accordingly, OCR had jurisdiction over this complaint.

OCR investigated the following legal issues:

- 1) Whether the District discriminated against the Student when it failed to timely evaluate him, once the Complainant requested an evaluation and expressed disability concerns, in November 2013, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35(a), and Title II and its implementing regulation at 28 C.F.R. § 35.130(a).

Page 2

- 2) Whether the District retaliated against the Student by changing his disciplinary forms to reflect additional and more serious charges and penalties, in January 2014, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61, and the Title II regulation at 28 C.F.R. § 35.134.

In reaching a determination, OCR reviewed and analyzed documents pertinent to the complaint issues and interviewed the Complainant and School staff and District administration. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. Based on the investigation, OCR found sufficient evidence to support a finding that the District discriminated against the Student, in noncompliance with Section 504 and Title II, as alleged in Allegation 1. OCR found Allegation 2 to be resolved. Set forth below is a summary of OCR's factual findings and conclusions.

### **Legal Standards**

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a) states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 implementing regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as regular or special education and related aids and services that: (i) are designed to meet individual educational needs of individuals with a disability as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards). Implementation of an individualized education program (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this standard. 34 C.F.R. § 104.33(b)(2).

The Section 504 implementing regulation at 34 C.F.R. § 104.35(a) states that a recipient shall 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.

Although the Section 504 regulation does not contain a specific requirement regarding the timeliness of an evaluation, a recipient should conduct an evaluation within a reasonable period of time after it has reason to suspect that a student, because of disability, may need special education or related services.

OCR interprets the regulation implementing Title II to require school districts to provide a FAPE to qualified individuals with a disability to the same extent required by the regulation implementing Section 504.

Retaliation is prohibited under the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et seq. The Title VI regulation at 34 C.F.R. § 100.7(e) prohibits retaliation for engaging in a protected activity. The regulation implementing Title II at 28 C.F.R. § 35.134 contains a similar prohibition against retaliation.

To establish a prima facie case of retaliation, OCR uses a four step analysis and determines: (1) whether the Complainant engaged in a protected activity protected by the laws OCR enforces; (2) whether the District was aware of the protected activity; (3) whether the District took adverse action against the Complainant contemporaneous with or subsequent to participation in a protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the above elements are established, OCR then determines whether the recipient has a legitimate, non-discriminatory explanation for the adverse action. If such an explanation is proffered, OCR examines whether the reason given is merely a pretext for retaliation.

### **Background**

During the 2013-2014 school year, the Student was in the seventh grade at the School. The evidence shows that he has had a series of escalating behavioral incidents since at least October 3, 2012. He had approximately eight disciplinary referrals during sixth grade and four referrals from the beginning of seventh grade through November 2013. According to a November 7, 2013 email summary prepared by the Principal, the Student's behaviors during seventh grade included: causing danger to others (fighting or throwing things), throwing chairs in the cafeteria, indecent exposure, school disturbances (screaming loudly in hallway and classroom), using profanity to adults and students, refusing to follow instructions, etc. During the Student's sixth grade year, the Complainant and School personnel had conversations regarding the District's Student Support Team (SST) and the Complainant was provided documentation to be completed and submitted in order to move forward in the SST process. One District witness told OCR that she also mentioned the District's 504 process to the Complainant.

In November 2013, the Complainant requested that the District initiate the SST process for the Student. The Complainant met with the School Counselor and received medical impairment forms to fill out. They discussed having an SST meeting to discuss the Student's needs. The School Counselor informed School personnel of the Complainant's SST request and the need to gather data. The Complainant consented to vision and hearing tests for the Student on January 27, 2014.

During the February 21, 2014 SST meeting, the Complainant received information regarding special education testing, 504 services, and the need to have the requested medical impairment forms filled out and returned. At the SST meeting, School personnel gave the Complainant the necessary consent forms for initiating an evaluation for eligibility under Section 504, which the Complainant returned on March 7, 2014. However, on April 15, 2014, while the Student was on

out of school suspension, the Complainant withdrew consent for the Student's testing and advised the District that she would obtain private testing of the Student.

**District's Written Procedures.** The District has posted its "Procedures for Implementing Section 504/ADA for Students" on its website. Page 6 of the document is devoted to the SST process. The introduction to that page states that the "SST is the vehicle used in the ... District to identify students in need of additional education support." The last sentence of that page states that the "identification of students who may qualify for services under ... Section 504 ... is often a result of the work done by the SST." Page 7 of the procedures is captioned, "Section 504/ADA Procedures for Students." This page states that the SST "evaluates the student's impairment and determines eligibility" and that any student who has a disability should be referred for evaluation to the SST.

According to the District's webpage concerning Student Support Teams, the District's SST program operates at "Tier 3" of a four tier framework of interventions. SST referrals require "documentation of a student's failure to demonstrate adequate response to interventions." The required documentation covers "a minimum of a twelve week period." The SST procedures include a hearing and vision screening, a referral to the SST chair, a meeting, "generation" of interventions and a follow up meeting to review data. The SST webpage makes no reference to bypassing the twelve week intervention and documentation processes for a student who needs a Section 504 evaluation.

### **Factual Findings**

**Issue 1 - Whether the District discriminated against the Student when it failed to timely evaluate him, once the Complainant requested an evaluation and expressed disability concerns, in November 2013, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35(a), and Title II and its implementing regulation at 28 C.F.R. § 35.130(a).**

Documentation in the Student's records show that the SST process was discussed as early as the 2012-2013 school year, when the Student was in the sixth grade, while the Complainant was concurrently exploring outside interventions, such as mentoring and counseling. The School Counselor who worked with the Student told OCR that she had several discussions with the Complainant about the SST and special education evaluation processes, during both the sixth and seventh grade years. The Counselor described at least two occasions during the 2012-2013 school year that she gave the Complainant blank medical impairment forms for the Student's physician to fill out and return to the School. The Counselor stated that the Complainant never turned in the forms.

One of the forms School personnel gave the Complainant to complete was the District's "Health Care Provider's Certification of Medical Impairment" form. At the top of the form, parental consent is required to permit the release of medical information provided on the form as well as authorize follow-up communication with regards to the provided medical information. This form requires a licensed physician to provide information on a student's medical diagnosis,

medications, medical implications on instruction (alertness, physical function, academic limitations, communication abilities), and medically necessary actions during the school day. The School's Counselor stated that when the Student was in the 6<sup>th</sup> grade, she gave the medical impairment forms to the Complainant twice. The Counselor stated that if the forms had been returned, the District would have started the 504 evaluation process immediately and bypassed the SST process. The Counselor also told OCR that the Complainant said that she did not want the Student to have a "disability label."

In a November 4, 2013 email, the Complainant requested that the SST process begin as soon as possible. The email references previous responses to the Complainant from the addressees; however, the District's data did not include emails predating the Complainant's November 4, 2013 email. The day after the Complainant inquired about the SST process, the School Counselor informed the Student's teachers of the Complainant's SST request and the need to gather data.

On November 5, 2013, the Complainant sent the Principal an email inquiring about a 10-day suspension the Student received that day. On November 6, 2013, Principal responded to the Complainant and stated that the School had been waiting for the Complainant to return the medical impairment form and parent consent to evaluate. She reviewed various interventions that School teachers and staff had implemented to assist the Student, to no avail.

On November 8, 2013, the Complainant sent the Principal and other School administrators an email stating that she was not aware of the consent and medical impairment forms being sent to her the previous school year. She inquired what the next steps could be in determining if the Student might need an IEP since they have "been SSTing for a sufficient amount of time."

With regards to scheduling the SST meeting after the School received the Complainant's email on November 4, 2013, District witnesses stated that SST meetings are held on Fridays and the Complainant's request came just before the District's Thanksgiving (November 25-29, 2013) and Winter (Dec 23-Jan 8, 2013) breaks, which delayed setting up a meeting date. OCR reviewed the calendar and noted that there were nine Fridays available, before the first scheduled date of the Student's SST meeting -- January 31, 2014. Inclement weather required the meeting to be rescheduled to February 14, 2014. Due to inclement weather again, the SST meeting was rescheduled to February 21, 2014.

The Lead Special Education Teacher (Lead Teacher) informed OCR that typically when a student is referred for SST or a parent requests it, data is collected and intervention strategies put into place. There is a meeting with the parents and if the problems persist or the parent requests it, they consider updating strategies, and consider whether an evaluation for special education is necessary. The standard timeframe for SST evaluations to be completed is 60 days.

The minutes of the SST meeting (Part 4, p14) reflect that the Complainant "was asked about special education testing and medical impairment 504 consideration." The minutes further reflect that the Complainant agreed to having medical impairment forms completed and to sign the Parental Consent for Evaluation for Special Education Services (PCE). The Complainant

returned consent forms to the District on March 7, 2014; the forms provided consent for the evaluation process to begin. The Counselor told OCR that the Psychologist met with the Student on March 11, 2014 to begin the SST process. However, on April 15, 2014, the Complainant sent an email to the Principal which read “[the Student] has been scheduled for an evaluation outside of the DeKalb County School district so I will no longer need the services of Ms. Woods or Stephenson Middle at this point.” School personnel interpreted the email as withdrawing consent for the Student’s testing. To confirm the Complainant’s intent, the Lead Teacher called and spoke with the Complainant on April 29, 2014 to ask why she was withdrawing her consent. The Complainant responded that she was getting an outside evaluation.

While the Counselor told OCR that the Complainant’s submission of completed medical impairment forms would have initiated a 504 evaluation and “bypassed” the SST process, other evidence obtained during the investigation does not show that that submission of medical impairment forms initiates a Section 504 evaluation and bypasses the SST process or that the District has a mechanism for immediately initiating a Section 504 evaluation when warranted. Correspondence from the District to the Complainant stated that completion of the medical forms was *a part of* the SST process. A November 8, 2013 email from the Principal to the Complainant states that the Principal, the Counselor and the sixth grade Principal had been talking with the Complainant for two years “about the SST process.” The email further stated:

The Student Support Team (SST) process involves tiered interventions. If you recall, [the Counselor] issued paperwork to you that needed to be completed by the Student’s physician and you. The teachers on ...[the Student’s] ... team, his counselors and administrators collect data and put in place interventions that have shown success for others (research based). The missing pieces are the completed information from your physician that you told us you would bring, but we have not received, and the consent form completed by you.... You agreed at that meeting that you would share our conversation with the therapist that you were going to see the next day and you would have [the Student] seen by his pediatrician so that the process could move forward....

Continuing, the Principal’s email states “... we need you to have ...[the Student]... visit his physician, who will in turn, complete the forms given to you by ...[the Counselor]...and return the forms given to ...[the Counselor]...to include as part of the documentation necessary *in the SST process* and for decisions to be made *in the SST meeting*. (Emphasis added)

Consistent with the Principal’s email linking the medical forms to the process for implementing SST interventions, during her OCR interview, the Counselor acknowledged that in discussions about the Student the Complainant “may have mentioned an IEP but they were *only in the SST process*.” She added that the Complainant might have been confused about terms.

The District provided OCR copies of correspondence between the District and the Complainant. The correspondence directed to the Complainant prior to the February 2014 SST meeting makes no reference to a bypass of the SST process and instead refers to documentation needed to proceed with the SST process.

In addition to the Principal's November 8, 2013 email noted above, a January 23, 2014 notification letter to the Complainant stated that the Student had been referred to the SST and the District needed her consent to conduct a vision and hearing screening. The notice further stated that the referenced testing was not a psycho-educational evaluation and that "if a comprehensive evaluation is deemed warranted, permission for a psychological evaluation" would be requested from the Complainant.

A February 5, 2014 letter to the Complainant likewise referred only to the SST process with no reference to a possibility of bypassing the steps in that process to obtain a 504 evaluation. The letter stated that the Student had been referred to SST/RTI-Tier 3 because of academic and/or behavioral concerns.

Internal District correspondence concerning discussions with the Complainant also focused primarily on the SST process with only one reference to a possible Section 504 evaluation. A November 7, 2013 email from the Principal to other District staff, explaining the efforts made to assist the Complainant and the Student, focuses upon documentation that the Complainant had reportedly failed to provide for the purpose of pursuing the SST process. At one point the email states, "though ... [the Complainant]... has promised since early last year to return the Medical Impairment form and other information necessary in the SST process, she has not returned the information." Similarly, referring to data collection which had started at the beginning of the school year, the email stated:

At that time we again shared with her the RTI process that we use in the SST process. She said she would do her part. Please note that she still has not returned the information necessary to move the process forward though ... [the Student's counselor] ... has asked her to return it three times.

A November 8, 2013 email from the Counselor stated that in September 2012 she had outlined the RTI/SST process "and the 504 process (briefly since there was no medical diagnosis)." The Counselor's email stated that she had provided the Complainant a medical impairment form and referenced the form in conversations with the Complainant during the 2012-2013 school year. She noted that her first contact with the Complainant during the 2013-2014 school year was a November 4, 2013 email from the Complainant inquiring about discipline practices and the code of conduct. The Counselor's email did not state that she had discussed the 504 process with the Complainant subsequent to September 2012 and made no reference to the possibility of an immediate 504 evaluation in lieu of SST interventions.

Finally, during her OCR interview the Principal described a Section 504 evaluation process that begins with SST interventions; a Section 504 eligibility evaluation is initiated if students continue to struggle after SST interventions have been attempted.

On September 25, 2014, OCR spoke with the Complainant to give her an opportunity to respond to the District's position. First, with regards to the delay, OCR presented the District's position that they had attempted to begin the SST previous the previous year; however, they stated that the Complainant had failed to return necessary consent forms. The District had also claimed that

there was confusion on whether it was SST or special education she sought. The Complainant referenced her email inquiring whether the Student might need an Individualized Education Program (IEP). Also the Complainant denied that District staff explained the difference between the SST process and the “special education” evaluation process and said that she was never told what her options were.

When OCR informed her that the District understood her April 15, 2014 email as withdrawing consent, she stated she did not intend to withdraw consent. She stated that she had become “fed up” with the District’s lengthy process. She said further, that she understood she could get an outside evaluation and that she was exercising that prerogative. The Complainant confirmed that she spoke with the Lead Teacher after the email and could understand if the Lead Teacher understood her to be withdrawing consent from the evaluation process. The Complainant stated that she cannot control how the District may have interpreted her, but she did not mean to communicate that she was withdrawing consent from the evaluation process.

The Complainant also pointed to an April 30, 2014 email she sent to the Acting Director of the District’s Department of Safe Schools and Student Relations which stated among other things, that she had submitted the Parent Consent for Evaluation forms. The Complainant also forwarded to OCR an email dated August 9, 2014, sent to the District’s Board of Education, which included a copy of the Student’s ADHD diagnosis, obtained on May 13, 2014.

### **Conclusion**

OCR reviewed the evidence to determine whether the District failed to timely evaluate the Student after District staff had reason to believe that the Student may, because of a disability, need special education or related aids or services. In light of the evidence noted above, OCR finds by a preponderance of the evidence that the District did fail to timely evaluate the Student.

OCR finds that the Student’s pattern of behaviors dating back to the sixth grade as well as those exhibited during the Fall term of the seventh grade should have put the District on notice of a possible need to evaluate the Student, prior to November 2014. Additionally, the Counselor stated that she discussed the 504 process with the Complainant while the Student was in the sixth grade, but did so only briefly “since there was no diagnosis.”

OCR finds also that the District’s written SST and 504 evaluation processes do not specify a clear-cut process for conducting an evaluation of students who may need special education or related services because of a disability without first going through the SST process. Further the evidence shows that District staff do not have a consistent understanding of the process that School officials should undertake to evaluate students suspected of having a disability and did not provide the Complainant clear-cut information about the options for obtaining a Section 504 evaluation. According to one District witness, the SST process can be bypassed and a 504 evaluation begun immediately; however according to other District witnesses, it is only after data has been gathered over several weeks and prior interventions have failed, that an SST team discusses and evaluates whether a Student might have a disability and require FAPE-related services. District personnel stated that they were often waiting for the Complainant to return

consent forms and that it was the Complainant's failure to return the parental consent and medical impairment form, which hindered their ability to move forward. However, the evidence shows that the District's written correspondence with the Complainant prior to the February 2014 meeting focused on the SST process and did not request consent for the purpose of conducting an evaluation for possible Section 504 eligibility. At one point, the Complainant asked if the Student could be considered for an IEP since they had been "SSTing for a sufficient amount of time" and the one District witness who asserts that she mentioned the Section 504 process to the Complainant acknowledges that while the Complainant may have mentioned an IEP, the District was still in the SST stage. While an SST meeting was held on February 21, 2014, the Complainant informed OCR that she had become fed up with the lengthy process and informed the Principal on April 15, 2014 that the Student was scheduled for a private evaluation and would no longer need the services of School staff. The evidence shows that the Complainant withdrew consent for testing by the School and obtained a private evaluation. The evidence shows that after obtaining the evaluation the Complainant provided a copy of the Student's ADHD diagnosis to the District.

Moreover, a requirement that the Complainant take the Student to the doctor and have medical forms completed before the District would begin the 504 evaluation process is not in compliance with Section 504 legal standards. Section 504 requires districts to conduct an evaluation of a student suspected of having a disability at no cost to the student or his or her parents to determine whether the student has a disability and, because of that disability, needs special education and/or related services. Districts may not require submission of a medical diagnosis or impose other costs upon parents as a prerequisite to proceeding with an evaluation if there is reason to believe that the student needs or may need services because of a disability.

Finally, OCR notes that during the 2013-2014 school year, the Student received a series of suspensions that amounted to more than 10 days and also received an alternative school assignment for the remainder of the school year and first semester of the 2014-2015 school year for behaviors which violated the Code of Student Conduct. Because the exclusion of a child with a disability for more than 10 consecutive school days constitutes a "significant change in placement" under Section 504, before implementing the eleventh day of an exclusion in a school year, a school district must conduct a reevaluation of the student to determine if the misconduct in question is caused by the student's disability or if the student's current educational placement was appropriate. As discussed above the District had reason to evaluate the Student; however, it never conducted an eligibility evaluation and also never determined whether behaviors resulting in his suspensions in excess of 10 days and assignment to the alternative school were a manifestation of a disability.

Based on the foregoing, OCR concludes that the District is in noncompliance with Section 504 and Title II with respect to this allegation.

**Issue 2 - Whether the District retaliated against the Student by changing his disciplinary forms to reflect additional and more serious charges and penalties, in January 2014, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61, and the Title II regulation at 28 C.F.R. § 35.134.**

The evidence shows that the Assistant Principal (AP) revised the Student's discipline referral to reflect additional and more serious charges and penalties after the Complainant reported that the AP used profanity during the underlying disciplinary incident. Initially, the Student received an 8-day out of school suspension. A subsequent referral form was completed which reflected a 10-day out of school suspension with a referral for a due process hearing. Due to the Complainant making an internal complaint, the Principal conducted her own investigation and reduced the discipline to a 5-day out of school suspension and withdrew the due process hearing referral. Thus the adverse action was never fully completed and the Principal's response to the internal complaint resolved this concern. Further, the perceived motivation for the AP's action was the Complainant's report of his use of profanity; that report did not constitute protected activity under a statute enforced by OCR.

During the rebuttal interview, the Complainant acknowledged that she considered the issue resolved, however she still felt hurt that the perceived retaliation occurred. Based upon the foregoing OCR deems this issue resolved<sup>1</sup>.

On April 13, 2015, OCR received the enclosed signed Resolution Agreement that, when fully implemented, will address the foregoing compliance concerns. OCR will monitor the implementation of the Agreement until the District is in compliance with the statute(s) and regulations at issue in the case. The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, or discriminate against any individual because he or she has filed a complaint, or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If the event OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information which, if

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<sup>1</sup> Further, the evidence obtained thus far reflected that the apparent motivation for the AP's action was the Complainant's report of his use of profanity; that report did not constitute protected activity under a statute enforced by OCR.

released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you very much for the cooperation your staff provided during the complaint investigation. If you have any questions regarding this letter, please contact Sonia Lee, General Attorney, at (404) 974-9371, or Scott Sausser, Esq., Compliance Team Leader, at (404) 974-9354.

Sincerely,

Deborah Floyd  
Acting Regional Director

Enclosure