



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

February 10, 2017

Via U.S. Mail & Email

Dr. Maria J. Carstarphen
Superintendent
Atlanta Public Schools
130 Trinity Avenue
Atlanta, GA 30303

Re: Complaint No. 04-15-1177

Dear Ms. Johnson:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Atlanta Public Schools (District) on January 28, 2015. The Complainant alleged that staff at the Charles R. Drew Charter School failed to promptly evaluate her son (Student) for Section 504 eligibility and failed to convene a Section 504 meeting to establish his eligibility and complete a Section 504 plan.

As a recipient of Federal financial assistance from the Department, the District is subject to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability. As a public entity, the District is also subject to Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§12131 et seq., and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability. Accordingly, OCR has jurisdiction over this complaint.

Based on the allegations in the complaint, OCR investigated whether the District failed to promptly evaluate the Student's eligibility under Section 504 and convene a Section 504 meeting to decide eligibility and services to be provided, in noncompliance with Section 504 and Title II.

During the course of the investigation, OCR reviewed documents submitted by the Complainant and the District. In addition, OCR interviewed the Complainant and the State Director of Special Education Services and Supports. Prior to the completion of OCR's investigation of this complaint, the District expressed an interest in voluntarily resolving this case and entered into an agreement that commits the District to specific actions to address the issues under review. This letter summarizes the applicable legal standards, the information gathered during the review, and the Resolution Agreement.

Legal Standards

The Section 504 regulation at 34 C.F.R. Section 104.33 provides in relevant part that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education 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. For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons

with disabilities as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

The Section 504 regulation at 34 C.F.R. Section 104.35 provides that school districts must conduct an evaluation any student 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 student in regular or special education and any subsequent significant change in placement. A district must establish evaluation and placement standards and procedures which ensure that: (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure). In interpreting evaluation data and in making placement decisions, a district shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with the regulation at 34 C.F.R. Section 104.34.

The regulation implementing Title II is interpreted consistent with the regulation implementing Section 504.

Summary of Investigation

Student Support Team

A Student Support Team (SST) is “an interdisciplinary group that uses a systematic process to address learning and/or behavior problems of students, K-12, in a school,” according to Georgia Board of Education (State Board) Rule 160-4-2-.32. The Rule provides for parents to be invited to participate in all meetings and in the development of interventions for the child. The Rule states that the SST process includes, identification of the learning and/or behavior problems; assessment, if necessary, education plan, implementation; follow-up and support; and continuous monitoring and evaluation. The Rule states that school personnel and parents may determine that there is a reasonable cause to bypass the SST process. In cases where immediate referral is sought, the Rule provides that the SST shall still determine what interim strategies, interventions, and modifications shall be attempted for the student.

On March 15, 2013, the Student was diagnosed by a private psychiatrist with Attention Deficit Hyperactivity Disorder (ADHD), combined type, depressive disorder unspecified, and oppositional defiance. On April 25, 2013, the Complainant requested a meeting with the School Principal and Social Worker to discuss the next steps. In May 2013, a meeting was convened with the School Counselor and nothing was discussed about starting a Section 504 Plan or the SST process.

For the 2014-2015 school year, the Student was enrolled in grade nine, at Drew Junior and Senior Academy, a District charter school. The Complainant stated that on July 31, 2014 she requested that the School initiate the Section 504 process to address the Student's behaviors during the 2014-2015 school year, including suspensions for behaviors related to his disability. On August 1, 2014, the Dean of Students for the School sent an email to the Complainant describing the services provided under Section 504 and asking if the Student had a diagnosis. He continued, "If so, we start this process very quickly. If not we can begin the Student Support Team(SST) process that will address the same concerns but it [will] take a little longer. He said if she had already gone to a medical doctor [with the Student] to let them know and that he had copied the Principal and Counselor." On August 4, 2014, the Complainant let the Dean know the Student had an upcoming appointment with his private psychiatrist and that she would bring documentation.

On August 14, 2014, the Dean emailed the Complainant stating the Student would be suspended for one day out-of-school (OSS) beginning the next day for cursing at his teacher. The Dean also stated that the Student was sent to him for an issue in gym class by a separate teacher, and that he would like to meet the following week. The Complainant responded by email to the Dean and Counselor that the Student was "entitled to appropriate execution of the 504 process. Suspension is not the first step. Please advise me of the alternative measures in lieu of suspending him." In a follow-up email, the Complainant, among other things, noted that she had previously told the Dean that she had already provided medical documentation to the School." The Dean in response noted that he had suggested a meeting with the Complainant on August 18, 2014 to talk about prevention and the software program that is accessible to parents and used by the School to document minor offenses.

On August 19, 2014, the Complainant emailed the Principal and the Dean, stating she "can make the request to initiate the [Section 504] process independent of a diagnosis. Therefore, my request alone is enough to initiate the process." She noted she had previously provided documentation to the School and stated, "I am formally making another request for immediate initiation of the 504 process."

A District Medical Examination Report form, dated August 21, 2014 and completed by a private psychiatrist, describes the Student's diagnosis as "ADHD, combined type; Oppositional Defiant Disorder." SST Team Minutes reflect that on August 22, 2014, the School convened a meeting to assess whether the SST intervention or a Section 504 plan was appropriate in view of the Student's behaviors and the Complainant's August 21, 2014 diagnosis for the Student. The School reviewed SST procedures with the Complainant at the meeting. The SST team decided to collect data to determine whether behaviors were impacting the Student's functioning at school. The SST identified as target behaviors, following teacher directives and complying with school procedures in class. The Team identified as an objective that the Student would demonstrate specific skills and behaviors at an 80% level or higher within four weeks." The

Education Plan for the Student was described as follows: “He will be shown a graph [measuring his behavior] on a daily basis and chart his progress with a behavior mentor. Teacher will clearly state directions for each given task and check [Student’s] understanding of given directions. He will earn Drew Dollars to purchase a variety of rewards for getting 100% in two or more classes.”

District documentation reflects that during the period between September 9 and 15, 2014 the Student’s behavior was observed by his teachers. On September 18, 2014, the SST met at the Complainant’s request for the purpose of reviewing the behavior plan and reviewing the student’s performance. The discussion summary of the meeting states:

The teachers present believe that although [the Student] has had occasional issues in the beginning of the year that he has adjusted well and is doing much better. His grades are reported as good and he is reported to regularly complete assignments well...The team has decided at this point a 504 plan is not necessary for this student’s overall success at school at this time.

On September 17, 2014, the Complainant emailed the Dean and Principal to be a part of the September 18th meeting. The Dean responded by email, “This would actually just be for the SST team. We could then arrange another meeting with all of his teachers if you would like.”

The SST continued the process. The period between September 17 and October 3, 2014 was the period for observing the student with intervention. On October 29, 2014, the Complainant sent an email to the Counselor, the Dean and two Principals, saying she had not received any additional feedback on the Section 504 process and requested to be contacted to schedule a time to discuss the next step.

On November 5, 2014, the Student received one day in-school-suspension (ISS) for a behavior related issue. On November 7, 2014, the SST met. The discussion summary of that meeting states, “Mom is still concerned that student struggles with behavioral challenges....Despite doing well academically, Mom is concerned that he needs more support.” Additional interventions were to be addressed by a follow-up SST meeting on December 12, 2014, in which the Counselor, the Student’s teachers, and others would participate.

On November 10, 2014, a Behavior Plan was initiated, increasing the supports from the previous behavior goals. The additional supports included increasing praise for good behavior, a non-disciplinary time-out to allow the Student to calm down, and permission to use headphones during independent work to block out outside stimuli. The plan further set up protocols for monitoring data and communicating progress with the parent.

On December 9, 2014, the Student received three days OSS for using profanity toward another student and disrupting the dismissal of school. The incident occurred after school hours while no instruction was occurring. When the behavior was addressed with the Student, he left campus without permission. On December 10, 2014, the Complainant emailed the Dean about the incident, asking to meet with the Dean about the incident because she considered the punishment extreme.

On December 16, 2014, the SST, including the Complainant, convened to review the student's Behavior Plan and data. The team discussed that the data reflected a positive improvement in the Student's behavior in the classroom. The team also noted that disciplinary referrals had reduced since institution of the Plan and that the incident on December 9 had occurred after school hours. It was determined that a meeting with the Student, counselor, intervention specialist and SST chair would be held in January to talk more about the Student's progress. The Complainant suggested that an outside counselor be invited to attend the SST meeting.

On December 18, 2014, the Complainant emailed the Principal, stating she felt the SST process was not the appropriate process, requesting that he initiate a Section 504 plan or indicates in writing he was refusing one. On December 19, 2014, the Complainant met with the Principal concerning both of the Student's suspensions and concerning initiating a Section 504 plan in January 2015.

On January 12, 2015, the Student received two days OSS for a behavior related issue. On January 13, 2015, the Complainant emailed the Principal's supervisor, the Principal, and a Board member expressing her dissatisfaction about the suspensions and also said she had not gotten a response from the Principal about initiating a Section 504 plan.

The School, on the same day, convened an SST meeting with a District Psychologist in attendance. The Complainant expressed a desire to put a Section 504 plan in place in the classroom to supplant discipline and suspension to address behavior. The School indicated that the Student's behaviors emerged mainly outside the classroom. The SST discussed positive behavior supports then in place to enable the Student to express anger through appropriate replacement behaviors. The Psychologist suggested referring the Student for a Functional Behavioral Assessment (FBA) to evaluate whether the Student's behaviors were impacting his access to education. The SST agreed to make the FBA referral. The meeting summary notes state:

[M]om was clear that she is not interested in special ed. [District Psychologist] offered a functional behavior assessment consult to come to our school and look at his behavior and talk to his teachers. [District Psychologist] further explained that therapy is centered on education. Mom asked about what she wants from a 504 and it was decided that we put a 504 on hold and look at the findings from the assessment.

On January 20, 2015, the Behavior Specialist began a FBA of the Student, which included classroom observations on January 20, 22, 26, and 27. The Behavior Specialist Reports states, "I did not witness any outbursts during my observations. Because the student's behavior is not consistent with a particular trigger but is consistent with specific times of the day, such as during transitioning, soft time dismissal, and after school, and the recorded behaviors do not affect his academics, she recommended his being sent to the front office with a designated person daily upon release after school, that for transition he be allowed to leave class before dismissal, and during soft time that he stay with his advisor and not travel freely.

On January 28, 2015, the SST and the Complainant convened. They reviewed the FBA. The District Psychologist recommended that, based on the Student's ADHD, that the Student is Section 504 eligible and that for a Section 504 plan to be put in place to be a monitoring plan as well as a behavior plan. During the 2014-2015 school year, the Student had an out-of-school

suspension on August 15; an in-school suspension on September 9; out-of-school suspensions of three days on December 11-15; and two days out-of-school suspension on January 12-13, 2015 for a total of six days OSS and one day ISS.

Analysis

The Complainant alleged that Student was discriminated against on the basis of disability because the District failed to evaluate the Student for Section 504 eligibility and never convened a Section 504 meeting in order to determine the services to be provided. The District contends that it used the Student Support Team, pursuant to State Board Rule 160-4-2-32, a systematic process to address the Student's problems. Citing the Rule, the District states the SST process may be used prior to, or in lieu of, initiation of a Section 504 plan, unless the team determines there is reasonable cause to avoid the SST process. While conceding that the Complainant on August 1, 2014 asked for a Section 504 plan based on the Student's July 21, 2014 ADHD diagnosis, the District notes that the School followed the SST process for employing interventions prior to referral for a Section 504 plan.

An SST, which included the Complainant, convened on August 22, 2014, the day after the Complainant provided the School the ADHD diagnosis. The District states that the SST initiated interventions for the Student starting that very same day and decided to monitor the Student prior to instituting a Section 504 plan. The District points out that the SST, which the Complainant took part in most of the time, met almost monthly before the January 28, 2015 before the eligibility determination meeting. At the August 2014 SST meeting the School initiated interventions for the Student and, at the November 2014 SST meeting, the School adjusted the interventions. In the fall of 2014, the SST determined that the Student's behaviors were not substantially limiting his ability to access educational benefits and services at that time.

The District further argues that the Student's suspension in December was for conduct that occurred when no instructional or extracurricular activities were in session and that in January 2015, when the Behavior Specialist conducted the multiple observations the Student. The Student targeted behaviors occurred only at unstructured times outside instructional activities. The State Director of Special Education Services, the Georgia Department of Education unit responsible for overseeing implementation of Rule 160-4-2-32, informed OCR that the SST process works in tandem with, not in lieu of, initiation of the Section 504 eligibility process. The Director stated that if a parent cuts in and wants the student evaluated as the SST process is going on, then the District should move forward with the Section 504 eligibility process because the SST process is just to provide supports.

Under Section 504, when OCR reviews whether a district is in compliance when making a determination of Section 504 eligibility, it uses the standard of reasonableness in evaluating how long that evaluation may take. Since compliance with the Individuals with Disabilities Act (IDEA) is one means of meeting the Section 504 requirement of providing a free appropriate public education, the standard of what is a reasonable time for completing a Section 504 evaluation and making a determination is informed by the period of time permitted under IDEA to complete an evaluation for IDEA eligibility.

The use of SST by the School cannot be used to delay or deny the provision of a full and individual evaluation. OCR's investigation to date indicates that the School was operating under the assumption that SST could be used in lieu of making a Section 504 eligibility determination. The information to date shows that the Section 504 eligibility determination for the Student was not completed until five months after the Section 504 request was made. Under the circumstances of this case, the evidence so far indicates that the length of time is not reasonable.

The District additionally argues that prior to the January 2015 Section 504 eligibility determination, the SST appropriately considered the Student's behaviors and their impact on his ability to access educational benefits, services, and activities and that during the fall of 2014. The SST met almost monthly and determined the behaviors were not substantially limiting the Student's ability to access educational benefits, services, and activities. Under 34 C.F.R. Section 104.3 of the regulation implementing Section 504, the standard for evaluating eligibility for Section 504 is not whether the person's disability substantially limits the ability to access educational benefits, services, and activities, but rather whether the disability substantially limits one or more major life activities. Major life activities, for example, may include, but are not limited to, such activities as interacting with others, communicating, concentrating, and thinking. The question of whether a person's impairment is a disability should not demand extensive analysis and the term "substantially limits" is to be construed broadly in favor of expansive coverage. Mitigating measures, such the use of SST interventions with the Student, should not be considered in assessing whether a person has a disability. Therefore, OCR finds that in the fall of 2014 when the SST determined the Student's behaviors were not substantially limiting the Student's ability to access educational benefits, services, and activities, it was applying a standard other than that applicable to Section 504, in noncompliance with Section 504.

Conclusion

OCR determined that, based on its investigation to date, the School's procedure allowed it to use the SST process in lieu of making a Section 504 eligibility determination. Further, the Section 504 determination for the Student was not completed for five months after the request for evaluation. The District submitted the attached Resolution Agreement signed on December 16, 2016, which when fully implemented, will ensure compliance with respect to the issue above. The Agreement requires the District to revise its practice for evaluating students for eligibility for services necessary to receive a free appropriate public education to be consistent with the Section 504 regulation; to provide training of personnel who are responsible for coordinating response-to-intervention, Student Support Teams, and Section 504 eligibility teams; and to determine whether the Student needs compensatory services.

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.

Please be advised that the District may not harass, coerce, intimidate, 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. 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, we will

seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Virgil Hollis, Compliance Team Leader at (404) 974-9366.

Sincerely,

Melanie Velez
Regional Director