



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAR 24 2000

Ms. Michele Williams
Education Consultant and Advocate
8004 S. W. 198 Terrace
Miami, Florida 33189-2116

Dear Ms. Williams:

This is in response to your letter written to Dr. Thomas Hehir, former director of the Office of Special Education Programs (OSEP), in which you ask a number of questions regarding the requirements of Part B of the Individuals with Disabilities Education Act (Part B) that apply to the education of children with Asperger's Syndrome, which you describe as "a form of high functioning autism."

Based on telephone conversations with a member of my staff, it is our understanding that you would like OSEP to respond to the questions that follow, even though many of the questions you are now raising have been addressed in OSEP's prior responses to your inquiries. Due to the large number of questions in your letter, we have not restated each question individually, but instead have summarized the questions and have provided responses in topic areas. An explanation of the requirements of Part B that are relevant to your inquiry follows.

Please note that Part B is the Federal law that OSEP administers. However, some of the questions you have raised relate to the requirements of Federal laws other than Part B. Specifically, the Office for Civil Rights (OCR) enforces two Federal laws, Section 504 of the Rehabilitation Act of 1973 (Section 504), as it applies to programs and activities receiving Federal financial assistance, and Title II of the Americans With Disabilities Act of 1990, (Title II) as it applies to school districts and public libraries, regardless of receipt of Federal funds. Both Section 504 and Title II prohibit discrimination on the basis of disability and require the provision of appropriate educational services to students with disabilities subject to the protections of those laws. You will need to address questions regarding the application of Section 504 and Title II to the areas noted in this response directly to OCR by contacting the OCR official whose name and address appear below:

Gary Walker
Office for Civil Rights, Atlanta Office
U.S. Department of Education
61 Forsyth St. S. W., Suite 19T70
Atlanta, GA 30303-3104
Telephone: (404) 562-6350; TDD (404) 331-7236
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Identification and Evaluation of Students with Asperger's Syndrome

Questions 1 through 4 of your letter seek clarification regarding a school district's responsibility to identify and evaluate children suspected of having Asperger's Syndrome, whether Asperger's Syndrome is considered a disability under Part B, and if so, the disability designation under Part B that would be used for eligible children. Part B contains requirements for State and local educational agencies (SEAs and LEAs) to locate, identify, and evaluate children suspected of having disabilities under Part B who need special education and related services and to make a free appropriate public education (FAPE) available to eligible children. 34 CFR §§300.125 and 300.220. Let me emphasize that whether a child with Asperger's Syndrome or any other identified impairment would be eligible for services under Part B is a determination that must be made on an individual basis in light of the child's unique educational needs. The entitlement under Part B is to FAPE, and not to a particular label. In addition, a school district is not required by Part B to evaluate a child if the school district does not suspect that the child has a disability. In that instance, the school district must notify the parents under 34 CFR §300.503(a) of their refusal to evaluate the child and the parent's right to initiate an impartial due process hearing to challenge the refusal.

The regulations define the term "child with a disability" in relevant part as follows:

(a) General. (1) As used in this part, the term *child with a disability* means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR §300.7(a)(1)

With respect to children aged 3 through 9 experiencing developmental delays, paragraph (b) of §300.7 provides as follows:

The term *child with a disability* for children aged 3 through 9 may, at the discretion of the State and LEA and in accordance with §300.313, include a child-(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, *communication development*, social or emotional development, or adaptive development; and (2) Who, by reason thereof, needs special education and related services. 34 CFR §300.7(b)(1)-(2).

Your letter indicates that Asperger's Syndrome is a form of "autism," and Part B contains a definition of "autism" at 34 CFR §300.7(c)(1). Therefore, if a child with Asperger's Syndrome meets the criteria in the Part B definition of "autism" at 34 CFR §300.7(c)(1), a child with that condition could be found eligible for services under Part B. Because a child with this condition could be found eligible for services under Part B under one of the existing disability categories, we do not believe it necessary to address the question of whether Asperger's Syndrome should be treated in the same manner as attention deficit disorder and attention deficit hyperactivity disorder, the examples of which were added to the "other health impairment" definition at 34 CFR §300.7(c)(9). The conditions listed in the Part B definition of "other health impairment" are examples of conditions that could render a child eligible under that category. Regardless of whether Asperger's Syndrome is identified as a condition that could render a child "other health impaired," we do not believe it would be inconsistent with Part B for a State to permit school districts to evaluate children with Asperger's Syndrome to determine whether they could be considered other health impaired. In addition, children with Asperger's Syndrome aged 3 through 9 can be classified as developmentally delayed if the State and LEA utilize that classification, and if the child's condition meets the criteria in the definition of developmental delay adopted by the State.

The Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97) further clarify that "[n]othing in the Act requires that a child be classified by their disability so long as each child who has a disability listed in §300.7 and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability under Part B of the Act." 34 CFR §300.125(d). However, to satisfy the Part B definition of "child with a disability," a child must be in need of special education and related services. If the only service that a child needs is a related service, such as speech pathology, occupational therapy or physical therapy, that service could be considered special education, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability and "is considered special education rather than a related service under State standards." 34 CFR §300.26(a)(2)(i) (emphasis added).

Before the initial provision of special education and related services under Part B to a child with a disability, a full and individual initial evaluation must be conducted in accordance with the requirements of 34 CFR §§300.532-300.533 of the Part B regulations. Among these requirements is that a variety of assessment tools and strategies must be used to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved and progress in the general curriculum, and for preschool children, to participate in appropriate activities. This information will assist in determining whether the child is a child with a disability under §300.7 and with the content of the child's individualized education program (IEP). 34 CFR §300.532(b). The child must be "assessed in all areas related to the suspected disability, including, if appropriate health vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 CFR §300.532(g). Under Part B, each child's eligibility determination must be made after the completion of the administration of tests and

other evaluation materials by a group of qualified professionals, including the child's parent. 34 CFR §300.534(a).

Provision of Services for Children with Asperger's Syndrome in the Least Restrictive Environment

Questions 5 through 8 of your inquiry seek clarification relevant to issues regarding the provision of specific services and appropriate placements for children with Asperger's Syndrome. IDEA '97 and the Department's regulations also underscore that a child found eligible for services under Part B must receive services to address that child's identified special educational needs. This emphasis is supported by the new requirement at 34 CFR §300.532(b)(1) in the evaluation process, as noted above, that a variety of assessment tools and strategies must be used to gather relevant functional and developmental information about the child. In addition, a child's evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 CFR §300.532(h).

Once a child is determined eligible for services under Part B, an IEP must be developed for the child, which contains the instruction and services that form the basis for the child's placement. 34 CFR §300.535(b). Decisions regarding the provision of services that are appropriate for an individual child must be based on the child's special education and related services needs, and not on the disability category in which the child is classified. 34 CFR §300.300(a)(3).

IDEA '97 focuses each disabled child's IEP on the child's involvement and progress in the general curriculum, that is, the same curriculum as for nondisabled students. This is true regardless of whether a child has the behavioral difficulties described in your inquiry. In particular, each child's IEP must include measurable annual goals, including benchmarks or short-term objectives related to meeting the needs that arise from the child's disability, to enable the child to be involved and progress in the general curriculum, as well as meeting each of the child's other educational needs that result from the child's disability.

The IEP team, which includes the child's parents and other school officials, determines a child's program, including, as appropriate, the special education, related services, supplementary aids and services, and program modifications and supports for school personnel to be provided to the child or on behalf of the child. 34 CFR §300.347(a)(1)-(3).

You ask about specific services for children with Asperger's Syndrome. Part B does not dictate the services to be provided to individual children based solely on the disability category in which the child has been classified. Whether speech pathology or any other related service is required for a particular child with a disability is a determination that must be made on an individual basis by the child's IEP team. The same is true with respect to social skills training, even though Part B does not identify social skills training as a related service. The related services listed in Part B

are examples of related services that could be provided if required to assist a child with a disability to benefit from special education, and this list is not intended to be exhaustive.

There is nothing in Part B that would preclude an IEP team from including in a child's IEP a related service that the team determines is necessary for the child to benefit from special education, even though that service is not specifically mentioned in the statute or the regulations. Conversely, there is nothing in Part B that would require an IEP team to include in a child's IEP any related service, including services listed in Part B, such as speech pathology or occupational therapy, or services not listed in Part B, such as social skills training, based solely on a parent's request for that service, if the IEP team determines that the service is not required to assist the child to benefit from special education.

Once the services determinations are made, the group of persons that makes the placement decision, including the child's parents and other persons knowledgeable about the child and available placement options, must determine the appropriate setting in which required services can be provided. 34 CFR §300.552(a)(1). IDEA '97 also requires that each child's IEP contain an explanation of the extent, if any, to which the child will not be educated and participate with nondisabled children in the regular class and in academic, extracurricular and other nonacademic activities. 34 CFR §300.347(a)(4); Appendix A to 34 CFR Part 300, question 1, published at 64 Fed. Reg. 12470-12471 (Mar. 12, 1999). This means that if a child with a disability is not appropriately included in general curricular and extracurricular activities with his or her nondisabled peers, that lack of participation must be explained in the child's IEP.

The child's placement also is determined in accordance with Part B's least restrictive environment (LRE) requirements at 34 CFR §§300.550-300.554. 34 CFR §300.552(a)(2). LRE means that, to the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.550(b). These requirements express a strong preference for educating disabled children in regular classes with their nondisabled peers with appropriate supplementary aids and services in the school they would attend if not disabled. The Part B regulations also provide that a child with a disability is not to be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. 34 CFR §300.552(e).

Placements must be individually determined based on the unique educational needs and abilities of each disabled child and may not be made based solely on factors such as category of disability, significance of disability, availability of special education and related services, availability of space, configuration of the service delivery system, or administrative convenience. 34 CFR 300.552; Appendix A to 34 CFR Part 300, question 1, published at 64 Fed. Reg. at 12471.

Behavioral and Discipline Issues

Questions 9 through 11 of your letter concern whether the discipline provisions in Part B can be extended to students with Asperger's Syndrome who may not have been found eligible for special education and related services. It is critical for school officials and parents to respond appropriately and promptly to signs of misconduct when they first appear, since doing so could avoid the need for more drastic measures. We are committed to helping schools respond appropriately to a child's behavior, promoting the use of appropriate behavioral interventions, and increasing the likelihood of success in school and school completion for some of our most at-risk students.

The Part B regulation at 34 CFR §300.527 addresses protections for children not yet eligible for special education and related services. A copy of that section is enclosed for your information. Whether the children described in your inquiry could assert any of the protections under Part B is a determination that would have to be made on an individualized basis in light of the particular facts and circumstances.

For further information about the discipline provisions in Part B, see 34 CFR §§300.520-300.529 as well as the discussion of these provisions in Attachment 1 to the final regulations, published at 64 Fed. Reg. 12406 (Mar. 12, 1999). A detailed discussion of the discipline provisions and some commonly-asked questions and answers is found in the preamble to the final regulations at 64 Fed. Reg. at 12413-12416.

Question 11 of your letter concerns the appropriate setting in which to serve a child with Asperger's Syndrome if the child is exceptionally aggressive and mimics the behaviors of others. Part B specifies a number of special factors which must be considered in IEP development. 34 CFR §300.346(a)(2)(i)-(v). Specifically, if a child with a disability has behavior problems and the child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, whether strategies, including positive behavioral interventions, strategies, and supports are needed to address that behavior. 34 CFR §300.346(a)(2)(i). See responses to questions 5 through 8 above.

Responsibilities of Teachers

Questions 12 through 16 of your inquiry concern teacher responsibilities to children with Asperger's Syndrome under Part B. If a teacher determines that he or she will not have a child with Asperger's Syndrome in the classroom or refuses to implement the child's IEP or Section 504 plan, solely by reason of the Asperger's Syndrome, the teacher's refusal to teach the child in his or her classroom could constitute discrimination on the basis of disability in violation of Federal civil rights laws. As noted above, a child with a disability may not be removed from age-appropriate regular classrooms solely because of needed modifications to the general curriculum for that child. 34 CFR §300.552(e). Under IDEA, lack of adequate personnel or resources does not relieve school districts of their obligations to make FAPE available to each

disabled student in the least restrictive educational setting in which his or her IEP can be implemented. Section 504 and Title II of the ADA prohibit exclusion of a student from an appropriate placement based solely on the student's disability. However, placement in a particular regular class based on the qualifications of a particular teacher is permissible under these laws.

With regard to training, IDEA '97 emphasizes the role of the child's regular education teacher as a member of the IEP team, (if the child is, or may be, participating in the regular education environment). 34 CFR §300.344(a)(2). As an IEP team member, the regular education teacher of the child, in particular, must assist in the determination of appropriate positive behavioral interventions and strategies for the child, and supplementary aids and services, program modifications or supports for school personnel that will be provided for the child, consistent with §300.347(a)(3). In order for the teacher to effectively implement this aspect of the child's IEP, the teacher may need support and assistance to facilitate the child's receipt of an appropriate education in a regular classroom. The child's IEP team should determine whether teacher training should be reflected in the child's IEP, as a program modification and support for school personnel to be provided for the child or on behalf of the child. Input from the child's regular education teacher, as a member of the IEP team, is essential in this process. This training could facilitate the participation in the regular classroom and in other nonacademic and extracurricular services and activities.

Questions 15 and 16 of your letter concern whether students with Asperger's syndrome should be required to participate in field trips, and whether it is permissible for school personnel to exclude students with Asperger's syndrome from required field trips. If these students have been found eligible under Part B, the student's IEP team would determine whether a student with Asperger's Syndrome could be excluded from a required field trip, and, if so, under what circumstances. This is because the student's IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, to be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities. See: 34 CFR §300.347(a)(3). If you believe that the exclusion of a student with Asperger's Syndrome from a required field trip would constitute discrimination on the basis of disability in violation of Section 504 or Title II of the ADA, you should contact the OCR enforcement office that serves your State, the name and address of which are provided earlier in this response.

In question 18 of your letter, you request information on options available to the parent if the parent believes that the school district is not offering their child with Asperger's Syndrome an appropriate placement. The Part B regulation at 34 CFR §300.403 concerns children with disabilities enrolled by their parents at private schools when FAPE is at issue. Under that regulation, a public agency is not required to pay for the child's placement at a private school, if the agency made FAPE available and the parents elected to place their child at a private school or facility. However, if a court or hearing officer makes a finding that there has been a denial of FAPE, the court or hearing officer could order tuition reimbursement to the parent for all or part

of the cost of the private school placement. If a parent chooses to home school their disabled child, you would need to consult your State regulations to determine criteria for home schooling and whether any special education and related services would be available to the child.

In question 20 of your letter, you ask whether it is appropriate for either K-12 or postsecondary learning institutions to demand that students with documented language disabilities take/pass foreign language courses even though it represents demanding success in a major area of their disability. With regard to postsecondary institutions, you need to contact the Office for Civil Rights that serves your State to determine whether the requirement to which your inquiry refers violates the Federal civil rights laws. In general, Part B requires that IEPs for students with disabilities focus on their involvement and progress in the general curriculum, that is, the same curriculum as for nondisabled students. 34 CFR §300.347(a)(1)-(2). Therefore, the student's IEP team would need to determine whether the student with a language disability should take a foreign language course and whether any appropriate accommodations or modifications could be provided. The IEP team would also need to consider the applicable State standards. Under IDEA '97, while it is important that students with disabilities be held to high expectations and challenging performance standards, the IEP team would be charged with developing a program for the child that is consistent with the student's goals and disability-specific needs.

Questions 21 through 23 of your letter do not concern Part B, since Part B does not govern requirements of postsecondary institutions. For further information regarding these requirements, you should contact the named official of the OCR office that serves your State at the address provided.

We hope that you find this explanation helpful.

Sincerely,

Kenneth R. Warlick
Director
Office of Special Education
Programs

Enclosure

cc: Shann Goff
Florida Department of Education