

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN AND EARLY CHILDHOOD EDUCATION
BRANCH**

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

**DE AC 08-11
(May 12, 2008)**

On February 21, 2008, Parent filed a complaint with the Delaware Department of Education (“Parent Complaint”) on behalf of their son (“Student”).¹ The complaint alleges that the First State School (“School”) violated state and federal laws relating to children with disabilities. Parent believes that the School failed to properly implement her son’s IEP.

The complaint has been investigated pursuant to federal regulations at 34 CFR§ 300.151 to 300.153 and the Department of Education’s regulations and procedures. Specifically, the investigation included interviews with the Educational Diagnosticians, Director of the Program, Transportation Director of the District, Student’s Teachers, Recreational Therapist, Nurse, Psychology Fellow; and several interviews with Parent. The investigation also included a review of Student’s educational records, attendance record, excusal notes, evaluation and assessment reports, and other administrative documents provided by the District.

There were numerous complaints that cannot be investigated under the IDEA and are potential ADA or Section 504 violations. Parent has been informed of the procedures for potential ADA or Section 504 violations.

FINDINGS OF FACT

1. Student attends a Specialized School (“School”) and is eligible for special education and related services. Student’s education is administered and supervised by an approved special program for children with medical and severe disabilities overseen by the District.

IEP Meetings

2. An IEP meeting with all required members was held on June 5, 2007. A revision to the IEP changing the placement to the special school program and increasing the amount of special education hours was agreed to by all IEP team members. No changes to

¹ The Final Report identifies some people and places generically, to protect personally identifiable information about the student from unauthorized disclosure. An index of names is attached for the benefit of the individuals and agencies involved in the investigation. The index must be removed before the Final Report is released as a public record.

services or goals and objectives were made to the IEP at this meeting. Parent signed agreement to the IEP.

3. Parent states that the June 5, 2007 meeting was a walk through of the School and not an IEP meeting.

4. An IEP meeting was held on August 27, 2007 and included all required members of the Student's IEP team. Parent and Student signed the IEP in agreement. Student began school on this day.

5. An IEP meeting was scheduled for October 25, 2007. Parent states that the IEP meeting was cancelled by the School twenty four hours before the meeting; therefore her son's IEP meeting was delayed. Parent was told that there is a "written policy that a parent must notify the school in writing 10 days prior to an IEP if a parent will bring an attorney to the meeting." Parent was not aware of this written policy.

6. District states that Parents are asked as a courtesy to inform District if an attorney will be present. District was informed that Parent was bringing an attorney to the meeting and responded by cancelling the meeting so District could bring their attorney.

7. The IEP meeting was rescheduled for November 7, 2007. Parent states that this meeting was held beyond the 60 day requirement for Districts to "Adopt the child's IEP from the previous public agency at an IEP meeting convened for that purpose or develop, adopt, and implement a new IEP that meets applicable requirements." 14 DE Admin Code § 925.23.4.1.

8. Parent states that the School made changes to the IEP without the agreement of the IEP team. Mother stated that when she reviewed the IEP on November 7, 2007 after Father had signed agreement, she noted an accommodation that the Student had previously had not been checked. Mother informed the Educational Diagnostician of this and Educational Diagnostician proceeded to check the accommodation off on the IEP.

9. The School called the Father to see if it was acceptable to him that this accommodation was checked off. Father gave consent for the School to check the accommodation. Father's signature on the IEP states that he agrees with the IEP. Mother and Son did not sign the IEP because the accommodation Mother requested was checked off after the IEP team had met and Father had signed agreement.

10. Mother states that the Occupational Therapy (OT) goals were changed after the IEP was signed by Father. The Occupational Therapist corrected the goals after a discussion with the Mother and after the Father had signed the IEP agreeing with the OT goals on November 7, 2007. Father agreed through a telephone conversation to the OT goals on November 8, 2007.

11. Mother states that the OT goals were not included into the IEP until the January 24, 2008 IEP meeting. A copy of the November 7, 2007 IEP from the School has the OT goals included. Mother and Student did not sign the IEP on November 7, 2007.

12. Parent states an IEP meeting on January 4, 2008 was canceled 30 minutes after the scheduled start time of the meeting.

13. The School stated that it needed to reschedule the meeting due to their attorney being ill. The meeting was rescheduled for January 24, 2008.

14. An IEP meeting was held on January 24, 2008. Parent states that she did not receive a copy of the IEP until February 15, 2008. Prior Written Notice was given to Parent regarding the proposed implementation of the IEP. Parent believes that the proposed changes in the new IEP were not being implemented stating that her Son did not have access to assistive technology, audio books or books with large print for him to read.

15. School states that the staff expanded font size when making copies for the Student and scheduled time for the Assistive Technology staff member to see Student but the Student was often absent, making it difficult to schedule appropriately.

Other Concerns

16. Parent was asked on several occasions by the School and District to fill out the forms in reference to the Student's Seizure Disorder for transportation purposes. These requests were made on August 27, 2008 and January 24, 2008. Parent states that the School was responsible for filling this form out.

17. Parent states that the School had conflicting versions of the Student Activity Supplement which is required for this School. There were two forms and there was a discrepancy between the Parent, physician and Team, therefore, the School included both forms. Parent feels that the information related to the Students fluid intake is misleading because the two forms state different information.

18. The Parent states that the School did not provide a latex free environment for her son when planning field trips. At the January 24, 2008 IEP meeting, the action plan as developed by the team states that, "Luke's nurse and parent will work with Dr. McGeady in determining safety of locations. If during the trip there is a possibility of latex exposure, staff member will take Student to a latex safe area at the same location. Diphenhydramine and zopanex inhaler, Benadryl and EpiPen will be available in case of an emergency. Parent chooses not to meet with Dr. McGeady and School's medical team to address Student's field trip concerns." There were six field trips, one of which was a latex free environment. Student had a doctor's appointment on the day of this field trip.

19. Parent states that the fax machine is located inside the main doors in the library area and that Students and visitors can see the information coming into the fax machine. Parent states that Student's and visitors sitting in the library area can view the incoming faxes. The School states that the incoming faxes that are medically based always come with a cover sheet and the incoming faxes come into the front of the machine which is not facing the entry way for visitors. Faxes are not able to be viewed by incoming visitors. The School also states that there are two staff members that routinely check the fax and quickly put the information into the appropriate staff member's mailbox.

20. Parent states that her son should not attend school when he is sick. School defined “sick” for Parent at the January 24, 2008 IEP meeting by providing a copy of their Parent Agreement and followed it up with a letter dated February 27, 2008 from the School. The School is designed to educate students who are medically fragile or ill. The school is a hospital school and has access to full time nursing and is located on the grounds of a hospital.

21. School states that a letter had been sent to Parent indicating concern regarding the number of absences that had occurred with Student.

22. Parent states that Student was not allowed to participate in group therapy or counseling because it conflicts with when Parent takes Student to pool therapy off-site. Parent has a medical prescription to take Student to pool therapy however, this is not a service written into his IEP. Group therapy is not written into the Student’s IEP but individual therapy is a service that is included in the Student’s Activity Supplement, a specialized service of this school.

Transportation and Wheelchair Concerns

23. Parent states that District refused to transport her son after he got a new wheelchair. Parent states, “Student has received transportation in his previous four wheelchairs since entering the Delaware Public School System in 1997 and a trial securement has never been required.” Further, Parent states that Student did not receive a trial securement prior to starting school in August of 2007.

24. At a January 24, 2008 meeting, the District asked the Parent to fax all the information about the make and model of the chair. District reports that Parent indicated that the wheelchair was not transit approved. An email sent on February 13, 2008 to Parent repeated the request. The District proposed via email to Parent January 31 and February 1, 2008 that trial securement of the wheelchair occur.

25. Parent states that she did not have the wheelchair when these requests were made.

26. Father emailed the District on February 12, 2008 which was the same day the wheelchair was received by the Mother, with the specific name and model of the wheelchair. District offered a substitute wheelchair on February 19, 2008 and February 20, 2008 to transport Student while the new information was being gathered.

27. Parent agrees that she declined to send Student in the wheelchair offered by the District because it was a “stroller.”

28. District states that it was not a stroller but a compact positioning system. District offered reimbursement to Mother to transport Student to school and from School while this issue was being resolved so that the Student would not miss School. Mother states that the District only offered pay for transportation to School but not from School. It is documented in a February 13, 2008 email to Mother that the District would reimburse the Mother to take the Student to and from school until his new wheelchair is inspected.

29. School offered after school and summer school to support Student’s academic progress and documented this offer in a February 13, 2008 email. Mother agreed that School offered

after school but that Student could not take advantage of this due to his medical condition. Parent requested for work to be sent home. School stated that work would be available for Parent to pick up. Parent stated that the work should have been sent home in advance and refused to pick it up at the School. District performed the trial securement on February 19, 2008.

30. Parent states that Student's educational progress has been negatively impacted by District's refusal to transport her son in his wheelchair.

31. Parent states that the transportation forms signed on November 7, 2007, December 4, 2007 and February 4, 2008 are included in the IEP and the form states, "see attached list." Parent states there is no list attached to the IEP. All three transportation forms are included in the IEP.

32. School states that Transportation form dated February 4, 2008 indicates the Students wheelchair requirements, latex-free bus, his medication that he will be transported with and his seizure disorder. The transportation form dated October 25, 2007 states "see revision" because there is information missing on this form. Transportation forms dated February 8, 2008 states "see revision" because Mother was asked to update and return the Student's food allergies and other diagnoses.

CONCLUSION

State and federal regulations governing the education of children with disabilities require that public agencies receiving assistance under the IDEA offer a free, appropriate public education to children with disabilities, including providing special education and related services "in conformity with an individualized education program..." (*IDEA Regulations 34 CFR § 300.17, 300.320*).

IDEA Regulations 34 CFR § 300.323 (e), under IEP's for children who transfer public agencies in the same State requires "If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either--(1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in Sec. 300.320 through 300.324.

Further, 14 DE Admin Code § 925. 23.4.1 states "A child with a disability who transfers from one Delaware public agency to another shall be temporarily placed in an educational setting which appears to be most suited to the child's needs based on a mutual agreement of the parents and the receiving public agency. This agreement shall be documented by the signatures of a parent and the public agency on a temporary placement form or on the cover page of the IEP. Within 60 days of the child's initial attendance in the receiving public agency, the receiving public agency must either: Adopt the child's' IEP from the previous public agency at an IEP meeting convened for that purpose, or develop, and implement a new IEP that meets the applicable requirements in 20.0through 24.0."

In this case, Parent with the IEP team agreed to a change of placement at an IEP meeting on June 5, 2007. Another IEP meeting was held on August 27, 2007 with no other revisions to the IEP and Student began school with this accepted IEP. Another IEP meeting was scheduled for October 25, 2007 and when school understood that Parent would be bringing an attorney, School cancelled the meeting when their own attorney could not attend. A meeting was rescheduled and held on November 7, 2007. There were two IEP meetings prior to Student attending school, one of them on the first day of school and Student was receiving FAPE under the last agreed to IEP. This regulation is to ensure that there is an affirmative agreement that either the IEP the transferred child comes with will be followed or a new IEP developed. In this case, there is no information that the IEP the Student came with was inappropriate or needed revision. The IEP which would have occurred within the 60 day timeline was cancelled because the School was told the day before the IEP that Mother was bringing an attorney. In Appendix A to Part 300 of the 1997 IDEA regulations in answer to question 29, regarding whether attorneys can be brought to IEP meetings is the following answer:

“IDEA Regulations 34 CFR § 300.344 (a) (6) authorizes the addition to the IEP team of other individuals at the discretion of the parent or the public agency only if those other individuals have knowledge or special expertise regarding the child. The determination of whether an attorney possess knowledge or special expertise regarding the child would have to be made on a case-by-case basis by the parent or public agency inviting the attorney to be a member of the team.

The presence of the agency’s attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at an IEP meeting. Even if the attorney possessed knowledge or special expertise regarding the child [34 CFR § 300.344(a)(6)], an attorney’s presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interest of the child. Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged.”

It is not unreasonable that School and District responded to the information that Parent was bringing an attorney to the October 25, 2007 IEP meeting by wanting to include an attorney to the meeting. Districts are required to provide 10 days notice to Parents, unless waived, of the prospective members of the IEP team who will be attending. Although there is no similar requirement for Parents, it is reasonable that some notice would be provided. In this case Parent informed District the day prior to the scheduled meeting. District moved quickly to reschedule the meeting and held the meeting in less than two weeks.

Given that there was an agreed to IEP being implemented by the School since the day Student entered program, I find that Student was provided his free and appropriate public education (FAPE) during this time including the 9 school days that intervened between the cancelled and rescheduled IEP meeting. However, District and School must assure that procedures for timeliness of IEP meetings are adhered to as described in 14 DE Admin Code § 925. 23.4.1 and I do find a violation of this regulation.

Parent alleges a violation because changes that *she requested* to the IEP were made after Father signed the IEP. Parents were in the same room for the IEP meeting and following the meeting as a courtesy, the School staff, Student and Mother met separately to review the IEP due to the Student's anxiety level. Father signed in agreement to the IEP.

School called Father who agreed to the accommodation change and correction of occupational therapy goals one day after he signed the IEP. The IDEA has granted flexibility to IEP teams to make changes to an IEP without convening an IEP team meeting for the purposes of making those changes [34 CFR §300.324 (6)]. School was making an effort to include parental participation by both parents. The change made was minor and one agreed to by both parents. I find no violation regarding the development of the IEP as described in IDEA regulation 34 CFR § 300.324.

Parent complains further about a cancelled and rescheduled IEP in January. Again, attorneys were involved and the meeting was rescheduled because the school attorney could not be present. Additionally, Parent states that she did not receive a copy of the IEP until approximately two and one half weeks later. There is no required timeline for providing a copy of the IEP to Parent and two and one half weeks is a reasonable timeline. There is no evidence that the IEP was not being implemented as agreed to.

District's request for a make and model of the wheel chair in order to ensure safety is a reasonable request. Because District may not have made such requests in the past does not necessarily mean that an increased awareness of safety is evidence that District is preventing Student from attending school. Documentation was provided of offers to reimburse for transportation as well as the repeated requests for the make and model of the wheel chair. It is reasonable that District would seek to ensure every safety precaution necessary and I find there was no denial of FAPE.

Parent lists numerous other concerns regarding transportation forms, latex free field trips and her desire that her son not attend school when he is sick.

District is advised that consolidating transportation information on a single form would be prudent. There was one field trip that was latex free. District should consider more than one such field trip. However, Parent is also encouraged to cooperate by meeting with the District team to identify potential acceptable field trips. The IEP documented that she declined to do.

School is a hospital school. Letters from physicians requesting admittance to this school were among the documents. Given the Student's apparent medical fragility, a school where nursing and medical services are readily available seems ideal, thus school's policy regarding what constitutes a sick day. Although Parent signed the initial agreement regarding sending her son to school, there were many days of absences. Although Parent lists the transportation forms, field trips and sickness policy among her complaints, I do not find that there is any pattern of responses from school that could be construed as a denial of FAPE.

Finally, Parent complains that her Son was denied group therapy because it was scheduled during Student's pool therapy session. Pool therapy sessions were not IEP services and Parent chose to remove Student from the school day to access this therapy. Counseling sessions were IEP services and District asked Parent to change the times for pool therapy. Because counseling is part of the IEP, it is reasonable that it be offered during the school day.

It is unfortunate that a compromise could not be found for Student to access this IEP service. Because Parent chose to remove Student from the school day, I find no denial of FAPE.

The letter of complaint raised concerns that Student's rights were violated under the Americans with Disabilities Act. These complaints were related to the size and functioning of the gurney in the School, the bathroom doors and the accessibility of the front doors to the School building. This investigation is limited to Student's protections under the Individuals with Disabilities Education Act and corresponding state law.

Corrective Action Plan

The Department directs the District take the following corrective action:

1. Within thirty (30) calendar days of the receipt of this Report, the District shall:

a) Send a copy of the written guidance, meetings and/or professional development sessions held that addresses the timely review of IEP's when Students transfer into the District to ensure that a full review of the IEP is done with all appropriate IEP team members within 60 days.

** Reports to the Department of Education should be sent to the Director of the Exceptional Children and Early Childhood Education Group.*

By: _____
Lisa D.V. Cuff, Education Specialist
ECEC Branch, Assigned Investigator