

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

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

**DE AC 09-6
(July 30, 2009)**

On or about May 14, 2009, Complainant filed a complaint with the Delaware Department of Education alleging violations of the Individuals With Disabilities Education Act (“IDEA”) and corresponding Delaware law with respect to Student.¹ The complaint alleges Prestige Academy, a Delaware charter school, violated state and federal regulations concerning the provision of a free, appropriate public education to Student.

The complaint has been investigated as required by federal regulations at 34 C.F.R. §§ 300.151 to 300.153 and according to the Department of Education’s regulations at 14 DE Admin Code §§ 923.51.0 to 53.0. The investigation involved interviews with the Executive Director of Prestige Academy, and some of Student’s teachers. The investigation included a review of Student’s educational records, including the April 8th, 2009 IEP, the behavior plan, functional behavior assessment, the March 2009 psychological evaluation, behavior referrals, and other educational records provided by Prestige Academy. The investigation also included an interview with Parent by phone.

FINDINGS OF FACT

1. Student is currently thirteen years of age, and attended Prestige Academy during the 2008-2009 school year as a 5th grade student. Prestige Academy is an all boys school located in Wilmington. Prestige Academy served 5th grade students during the 2008-2009 school year, and had an enrollment of approximately ninety-seven boys. At all relevant times, the School served approximately twenty special education students.
2. Student is a resident of the Red Clay Consolidated School District and his parent elected to enroll him at Prestige Academy. When Student entered Prestige Academy (“the School”), he was not yet identified as a special education student.
3. The School implements an incentive system as a means to address student behavior, academic performance, and school attendance. Students receive “Merits” for exceeding expectations, such as displaying exemplary classroom behavior or volunteering to help a teacher or student. Students receive “Demerits”, for failing to meet expectations, such as engaging in disruptive conduct or failing to attend school. The points result in a “REAL score” calculated each week and given to students in a “REAL Report”. Students start each week with a balance of ninety REAL points. The points are added or deducted

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.

depending on the student's behavior throughout the week. If a student has a REAL score of less than seventy, the student must stay after school on Wednesdays. A student can also "bank" points and receive rewards for positive REAL scores. If a student achieves a high REAL report average, the student may earn such rewards as field trips and school celebrations. All students are required to take their REAL reports home each week, and have them signed by their parents.

4. The School's discipline policy is described in the Code of Conduct as progressive in nature. Relevant provisions include the following:

Demerits. Students receive a Demerit if they engage in certain behavior, such as being out of uniform, failing to follow directions, or talking out of turn.

Detention. Students receive a detention if they commit certain behavior, such as intentionally disrupting class or showing low respect toward a fellow student or staff member. Students will automatically receive a detention if they receive three Demerits within a given week. Students serve the detention period during recess or extracurricular activities, depending on the student's schedule.

In-Class Suspension. Students receive an in-class suspension if they engage in more serious behavior, such as cheating, plagiarism, dishonesty, or skipping school. When serving an in-class suspension, students continue to attend classes and receive instruction. However, they are generally not permitted to attend recess or speak to other students, and they must wear a yellow shirt all day to denote their disciplinary assignment to an in-class suspension. If the student violates any of these rules, additional days of in-school suspension may be required.

Out-of-School Suspension. Students receive an out-of-school suspension for behavior to include using profane language, stealing, or being referred out of class three times in a given week. During an out-of-school suspension, the student does not receive services.

Expulsion. Finally, students may be expelled for conduct considered the most severe, including the use, possession, or distribution of drugs, or assaultive behavior.

5. The School has extended school hours four days a week. On Mondays, Tuesdays, Thursdays, and Fridays, the school hours are 7:50 a.m. until 5:00 p.m. On these days, all students receive two 50-minute periods of instruction in math and English, and one 50-minute period of instruction each in social studies and science. The students remain in the same classroom throughout the school day, and the teachers rotate among the classrooms to provide instruction.
6. On Wednesdays, the school hours are shorter, from 7:50 a.m. until 1:00 p.m. On Wednesdays, all students receive three 75-minute periods of English, math, and either social studies or science. As mentioned, students who receive a REAL score of sixty-

nine or lower must stay until 3:30 p.m. on Wednesdays, also referred to as “the Wednesday Extension”.

7. Student displayed disruptive behaviors early in the school year. Student was disciplined for a number of incidents, and his conduct displayed a behavior pattern typical of disruption, defiance, disrespect, and acting out toward staff and other students. Teachers commonly reported Student’s behaviors as talking back, disruption of the classroom, defiance, disrespect toward peers and staff, refusing to work, falling asleep in class, arguing with staff and students, talking loudly, and wandering the hallway and classrooms. Some of the teachers expressed concern Student was resorting to this pattern of behavior as a means to avoid doing class work.
8. The School documented Student’s behaviors through disciplinary referral forms and notices of suspension provided to the parent.
9. Between August 29th, 2008 and February 12th, 2009, Student received approximately thirty-five disciplinary referrals causing him to be removed from the classroom, usually for the duration of the class period. When removed from class, Student would typically report to a separate “Discipline Room” (also called the “Multi-Purpose Room”) to meet with the School’s disciplinarian. In this setting, Student would sometimes work on class assignments. Other times, he would not.
10. In addition to classroom removals, Student was suspended out of school for approximately sixteen days between August 29th, 2008 and February 12th, 2009. The same pattern of behavior (i.e, defiance, disruption, and disrespect) led to Student being suspended out-of-school.
11. On February 18th, 2009, Student received an out-of-school suspension for ten consecutive days (i.e., from February 19th through March 4th) for conduct described by the School as the repeated and deliberate disregard of school policies and procedures. At this point, the School was considering Student’s expulsion or disciplinary placement in an alternative school. In a March 4th letter to Student’s parent, the School explained it would give Student another chance, but only if certain conditions were met by Student and Parent. The School outlined the conditions of Student’s re-entry, including the completion of his ten day suspension. The School required Parent to consent to Student being evaluated by the School’s psychologist, presumably to determine whether Student should be identified as a student with a disability. As a condition of Student’s re-entry, the School also required Parent to contact a mental health professional and establish ongoing counseling sessions for Student.
12. In accordance with state and federal regulations, schools proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability must obtain informed written consent from the parent of the child before conducting the evaluation. *See*, 34 C.F.R. § 300.9; § 300.300; 14 DE Admin Code § 922.3.0, § 925.1.0. There is no evidence to indicate the School obtained the required written consent from Parent before evaluating Student. However, Parent informed the investigator she was agreeable to the

School's evaluation of her son.

13. Parent had recently obtained an outside tutor to work with Student, and Parent learned about certain IDEA provisions from the tutor. Parent suspected her son could be entitled to special education services.

***The Evaluation of Student
and His Identification as a Special Education Student***

14. On March 5th and 6th, the School's consulting psychologist evaluated Student to assist the School in determining his need for special education. The psychologist reported her belief Student has a learning disability in the areas of reading and written expression. The evaluation showed Student was functioning at the 4th grade level in word identification and decoding, and at the 3rd grade level in reading fluency. Achievement testing shows Student exhibited strengths in math. The evaluation also noted Student was "acutely aware of his learning difficulties", and he "frequently avoids his uncomfortable responsibilities, responding by becoming passive and withdrawn and when challenged, he becomes resistant and defiant." The psychologist felt Student "resorted to this pattern of unproductive behavior to protect his feelings of inadequacy and failure."
15. On or about April 8th, 2009, the IEP team convened and reviewed the results of the psychological evaluation. All required participants attended the meeting. The team determined Student was eligible for special education and related services as a student with a learning disability. Parent agreed with the team's eligibility decision. There is no documentation, however, to show what standard the team applied to the determination as outlined in the State's eligibility criteria for the learning disability category. 14 DE Admin Code § 925.9.0.
16. Federal and state regulations implementing the IDEA require public agencies to specifically document the team's evaluation and eligibility decision. See, 34 C.F.R. § 300.306(a)(2); 14 DE Admin Code § 925.6.1. This requirement exists for the benefit of parents. It assures parents are properly notified of the data sources considered in the evaluation, and the conclusions of the evaluation team. For a child suspected of having a learning disability, such as Student, the documentation of eligibility must be even more specific, to include the particular standard the team applied to determine the existence of a learning disability and assurance it was not the result of prior inappropriate instruction in reading. See, 34 C.F.R. § 300.311; 14 DE Admin Code § 925.11.0. In this case, there is no evidence the School provided the evaluation summary report to parent. The March 2009 report from the School's consulting psychologist does not constitute an evaluation summary for IDEA purposes as defined in 34 C.F.R. § 300.311.

Student's IEP and Behavior Plan

17. On April 8, 2009, the IEP team also developed Student's IEP and a behavior plan. Parent participated in the development of both.

18. The April 8th IEP adequately describes Student's unique strengths and weaknesses, as well as his educational needs. The IEP provisions align with the findings of the psychological evaluation, results of assessments and achievement testing, teacher reports, and parent input. The IEP appropriately identifies Student's needs in the areas of reading fluency, written expression, and behavior, and includes accommodations to address these specific areas of need. Some of the accommodations include:
 - checking for Student's understanding
 - modeling
 - repetition,
 - small group instruction, when needed
 - extended wait time before expecting a verbal or written response
 - oral retelling
 - use of manipulatives
 - use of graphic organizers
 - use of a dictionary or thesaurus
 - access to word banks
 - extended time on tests and assignments
 - repeating of directions
 - reinforcement of attention to task
 - positive encouragement
 - designating a safe place for Student to calm down and de-escalate when frustrated
19. The IEP contains measurable annual goals and short term benchmarks for measuring Student's progress in the areas he was determined to have a learning disability. The IEP contains goals in reading decoding, reading comprehension, written expression, and behavior. Student's present levels of performance are stated in all identified areas of need.
20. The team determined Student would receive instruction in the general education classroom of approximately twenty students, with support from a special education teacher. The School's special education teacher rotated among the classrooms each period to provide support to the School's special education students.
21. Parent signed the IEP in agreement with the proposed program and placement.
22. In addition to the IEP, the team completed a functional behavioral assessment to identify the causes of Student's behavior, and methods to improve his behavior. The team agreed student's learning disability causes him to become frustrated, and Student then withdraws or becomes confrontational.
23. The team further developed a behavior plan, including targeted interventions, such as:
 - seating Student next to a student mentor in the classroom
 - providing positive reinforcement
 - verbal praise and rewards for meeting behavior goals

- use of a behavior monitoring checklist
 - if Student was removed from class for poor behavior, he would report to a specific teacher for support
24. The School began implementing the IEP and behavior plan on April 10, 2009. Despite the behavior interventions and academic supports, Student continued to display defiant and disruptive behavior for which he was disciplined and received Demerits.
 25. Between April 10, 2009 and May 20, 2009, Student received approximately twelve disciplinary referrals causing him to be removed from the classroom for the period.
 26. Student was further suspended out-of-school for three days due to the same pattern of defiant and disruptive conduct. Specifically, Student received out-of-school suspensions with no services on April 21st, 22nd, and May 14, 2009.

CONCLUSIONS

The complaint alleges the following violations, and were investigated by the Department:

1. Student was denied a free, appropriate public education (“FAPE”), and specifically his academic and behavioral needs were not met; and
2. Student was wrongfully suspended out-of-school for three days on April 21st, 22nd, and May 14th. The complaint alleges Student should not be suspended out-of-school due to his special education needs.

Provision of FAPE to Student

Students with disabilities are entitled to receive a free, appropriate public education. “FAPE” is defined as: “special education and related services that are provided at public expense, under public supervision and direction, and without charge; meeting the standards of [state and federal regulations], include an appropriate preschool, elementary school, or secondary school education in Delaware, and are provided in conformity with an individualized education program (IEP) that meets the requirements of [state and federal law]. See, 14 DE Admin Code § 922.3.0; 34 C.F.R. § 300.17.

An “IEP” is defined in state and federal regulations and specifies the provisions that must be included. For example, an IEP must contain: a statement of the child’s present levels of academic achievement and functional performance; a statement of measurable annual goals; a description of how the child’s progress toward meeting the annual goals will be measured; a statement of the special education and related services and supplementary aides and services to be provided to the child; and a statement of any individual accommodations that are necessary to measure the child’s performance on State and school wide assessments. See, 34 C.F.R. § 300.320; 14 DE Admin Code § 925.20.0.

Student’s IEP contains all required provisions. The annual goals, accommodations, and

services are based on Student's needs identified through formal and informal evaluations conducted by the School and parent input. The IEP adequately describes Student's needs in the areas of reading fluency, written expression, and behavior, and includes appropriate accommodations to address each area of need. In addition, Student's behavioral needs are appropriately addressed in the IEP and behavior plan. The IEP includes detailed accommodations to assist with Student's behavior in the classroom environment, as well as a behavior goal to improve Student's off-task and disruptive behavior. The team also completed a functional behavioral assessment to determine the causes of Student's behavior, and methods to improve it. The team properly used the results of the functional behavior assessment and input from the team to develop the behavior plan. The plan includes targeted interventions to improve Student's behavior and access to the general education environment. Further, there is sufficient evidence to indicate the School staff implemented Student's IEP and behavior plan as outlined.

For the reasons stated, I find no violation of state or federal regulations regarding the provision of FAPE to Student through an IEP based on Student's needs.

***Student's Disciplinary Removals
on April 21st, 22nd, and May 14, 2009***

The complainant alleges the School violated the IDEA by suspending Student out-of-school on April 21st, 22nd, and May 14th, 2009. The complainant alleges Student's special education needs, behavioral challenges, and identification as a special education student precluded his removal in April and May from the school environment.

Students with disabilities are entitled to safeguards and protections concerning the imposition of discipline by school officials. *See generally*, 34 C.F.R. §§ 300.530 through 536; 14 DE Admin Code §§ 926.30 through 34.0. These rules exist to protect students with disabilities from disciplinary removals from school resulting in a change of placement for behavior that is a manifestation of their disability. School officials may remove a child with a disability who violates a code of conduct from his or her current placement for not more than 10 consecutive school days in a school year, and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as the removals do not constitute a change of placement as defined in federal regulations). *See*, 34 C.F.R. § 300.530(b)(1); 14 DE Admin Code § 926.30.0.

In addition, children not yet determined eligible for special education must receive the disciplinary protections of the IDEA in certain instances depending on what the school knew about the child, and when. Federal and state regulations indicate a child who has not been determined to be eligible for special education and related services who has engaged in behavior that violated a code of student conduct, may assert any of the disciplinary protections provided in federal regulations ***if the public agency had knowledge*** that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 34 C.F.R. § 300.534; 14 DE Admin Code § 926.34.0. A public agency is deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to 34 C.F.R. §§ 300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the public agency, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. *See*, 34 C.F.R. 300.534; 14 DE Admin Code 926.34.0

In this case, Student displayed a similar pattern of disruptive and defiant behavior throughout the school year. He received multiple disciplinary removals, including out-of-school suspensions and removals from class. Some of Student's teachers felt Student was resorting to such behavior to avoid work and deal with the frustration he felt from his learning difficulties. Student's numerous disciplinary referrals and the teachers' descriptions of Student's behaviors were documented throughout the school year and reviewed by supervisory personnel. There is evidence School personnel expressed specific concerns about Student's pattern of behavior to the School's supervisory personnel well before April 8, 2009 when Student was formally identified as a special education student. Based on the evidence, it is reasonable to assume the School had knowledge even before the February 18th incident of Student's pattern of behavior and the specific concerns raised by Student's teachers. Recognizing the severity of his behavior shown consistently throughout the school year, the School even directed Parent to establish counseling sessions between Student and a mental health professional as a consequence of the February 18th behavioral incident.

Student was entitled to the disciplinary protections of the IDEA as of February 18th, 2009 based on the evidence described above and 34 C.F.R. § 300.536. The School suspended Student out-of-school with no services for ten consecutive days from February 19th through March 4th, 2009. For any subsequent days of Student's removal from his placement, the School was required, at a minimum, to provide Student with educational services during his removal. *See*, 34 C.F.R. § 530(b)(2); 14 DE Admin Code § 926.30.2.1. It is undisputed Student was removed from his placement and suspended out-of-school for three days (i.e., on April 21st, 22nd, and May 14th) with no services.

For the reasons stated, I find a violation of 34 C.F.R. § 300.530(b)(2) and 14 DE Admin Code § 926.30.2.1 regarding the requirement to provide services to students with disabilities who have been removed from their placement for ten days in a school year.²

² Because the School is deemed to have knowledge Student was a child with a disability as of February 18th, Student may be entitled to a manifestation determination before the School suspended him out-of-school on April 21st, 22nd, and May 14th. *See*, 34 C.F.R. § 300.530(e); 14 DE Admin Code § 926.30.5. Since the Department is ordering the School to provide Student with compensatory instruction for these three days of removal, the Department has not made a finding with respect to the manifestation determination.

Other Violations

The Evaluation Summary Report Requirement

When a school conducts an evaluation of a child to determine the existence of a disability and a child's need for special education services, federal and state regulations require the school to specifically document the team's evaluation and eligibility decision. *See*, 34 C.F.R. § 300.306(a)(2); 14 DE Admin Code § 925.6.1. For a child suspected of having a learning disability, the documentation of eligibility provided to the parent must be even more specific. In August 2006, the U.S. Department of Education revised its regulations at 34 C.F.R. § 300.311 requiring the evaluation report to include the following:

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance the team relied upon information from a variety of sources, as defined in 34 C.F.R. § 300.306;
- (3) The relevant behavior, if any, noted during the observation of the child;
- (4) The educationally relevant medical findings, if any;
- (5) Whether:
 - (i) The child does not achieve adequately for the child's age or to meet age or State approved grade level standards; and
 - (ii) (a) The child does not make sufficient progress to meet age or State approved grade level standards; or
(b) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State approved grade level standards or intellectual development;
- (6) The decision of the team concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and
- (7) If the child participated in a process that assesses the child's response to scientific, research based intervention:
 - (i) The instructional strategies used and the student centered data collected; and
 - (ii) the documentation the child's parents were notified about the State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; and strategies for increasing the child's rate of learning; and the parent's right to request an evaluation

In addition, each member of the evaluation team must certify in writing whether the evaluation report reflects the member's conclusion. If it does not, the team member must submit a separate statement presenting the member's conclusions. *See*, 34 C.F.R. § 300.311; 14 DE Admin Code § 925.11.0.

In this case, there is no evidence the School provided the evaluation summary report to Parent. While Parent agreed with the eligibility decision, it does not relieve the School of its responsibility to document the evaluation and eligibility decision in accordance with regulatory requirements. The evaluation summary report protects parents by informing them of the data considered in the evaluation, the specific basis for the decision, and other provisions required by the regulations.

For the reasons stated, I find a violation of 34 C.F.R. § 300.311 and 14 DE Admin Code § 925.11.0 regarding the requirement to provide an evaluation report and documentation of the team’s eligibility decision to Parent. Given Parent’s agreement with the eligibility decision, I find the violation is procedural in nature, and not substantive resulting in a denial of services to Student.

***Written Parental Consent Required
Prior to Evaluation***

Schools proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under the IDEA must obtain informed written consent from the parent of the child before conducting the evaluation. *See*, 34 C.F.R. § 300.9; § 300.300; 14 DE Admin Code § 922.3.0, § 925.1.0. In this case, there is no evidence to indicate the School obtained the required written consent from Parent before evaluating Student. While Parent was agreeable to the School’s evaluation of Student, it does not remove the School’s responsibility to obtain written parental consent.

In addition, a child’s attendance at a public school cannot be conditioned on the parents providing consent to a special education evaluation. If a parent refuses to provide consent to evaluate or fails to respond to the public agency’s request, the public agency can file a due process complaint or request mediation to obtain consent to proceed. *See*, 34 C.F.R. § 300.300(a)(3)(i); 14 DE Admin Code § 925.1.2.2.

For the reasons stated, I find a violation of 34 C.F.R. § 300.300 and 14 DE Admin Code § 925.1.0 regarding the requirement to obtain written parental consent prior to conducting an evaluation to determine if a child qualifies as a child with a disability. Given Parent’s agreement with the School’s decision to evaluate, I find the violation is procedural in nature, and not substantive resulting in a denial of services to Student.

CORRECTIVE ACTION PLAN

As a result of the Department's investigation, the Department directs the School to take the following corrective actions:

Compensatory Instruction

1. The School shall provide six (6) instructional hours of one on one compensatory services to Student for each of the three days Student was suspended out of school with no services on April 21st, 22nd, and May 14th. Thus, the School shall provide a total of eighteen (18) hours of compensatory services to Student.

2. If the School deems it appropriate, the School may satisfy part or all of Student's compensatory service hours by reimbursing Parent for any private tutoring already paid for and subtracting those instructional hours from the total compensatory hours owed.

5. Or, the School may satisfy compensatory service hours through a private tutoring arrangement (if reviewed and approved by the School) or through School personnel providing such services to Student, as long as the schedule and location of services are agreed to by Parent.

6. By **October 1, 2009**, the School shall provide to the Department a schedule which details the manner such compensatory instructional hours will be delivered to Student in a written statement signed by Parent and the School. The instructional hours should be based on Student's areas of academic need as identified in his IEP

7. If the School and Parent cannot agree on how the compensatory services will be delivered, either the School or the Parent shall notify the Department.

Staff Training on IDEA Requirements

8. By **October 15, 2009**, the School shall provide a minimum of a two hour training session to all School administrators, special education staff, and teachers at the School on:

(a) the requirement to provide an evaluation summary report to parents of children who are evaluated for eligibility for special education and related services under the IDEA and Delaware law, including how to complete the evaluation summary report, and the provisions it must contain as defined in 34 C.F.R. § 300.111. (A copy of the Department's evaluation summary report form and the January 2009 technical assistance memo to special education directors is available on the Department's website at www.doe.k12.de.us);

(b) the requirement to obtain informed written consent from the parent of a child before conducting a special education evaluation, including the definition of consent as 34 C.F.R. § 300.300, and that consent to a special education evaluation must be voluntary on the parents' behalf and not conditioned on a child's admission to school;

(c) the requirement to locate, evaluate, and identify children with disabilities

who are in need of special education pursuant to the procedures outlined in 14 DE Admin Code § 923.11.0, and how disciplinary protections of the IDEA and state law³ apply to children with disabilities and children who are not yet determined eligible for special education services.

3. By ***November 1, 2009***, the School shall provide the Department with written confirmation the training described in Paragraph # 8(a) through (c) was provided to staff, including a list of the staff who attended the training, the date(s) and time(s) the training was provided; a written description summarizing the specific topics discussed at the training, and a description of who provided the training. The School shall also provide the Department with copies of any written material the School distributed to staff in connection with the training described in Paragraph #8(a) through (c).

By: _____

Jennifer L. Kline, Esq.
Assigned Investigator
Education Associate

Date Issued: July 30, 2009

³ These protections are outlined in federal regulations at 34 C.F.R. §§ 300.530 through 536, and in state regulations at 14 DE Admin Code §§ 926.30 through 36.0.

