

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

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

DE AC 12-13

*(Original Decision Issued: June 29, 2012)
(Revised and Reissued: August 1, 2012)*

On or about April 30, 2012, the Disabilities Law Program ("Complainant") filed a complaint with the Delaware Department of Education ("DOE") alleging violations of the Individuals With Disabilities Education Act ("IDEA") and corresponding Delaware law with respect to Student.¹ The complaint alleges Pencader Business and Finance High Charter School violated state and federal regulations concerning the provision of a free, appropriate public education ("FAPE") 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 included an on-site interview with the School Leader and Educational Diagnostician, as well as a review of Student's educational records.

FINDINGS OF FACT

1. Student is currently 15 years of age and, at all relevant times, attended Pencader as a 10th grade student in the 2011-2012 school year.
2. Student has not been identified as a child with a disability.
3. Student has not attended school since approximately November 16, 2011.
4. School staff described Student as frequently defiant, disruptive, and intimidating to teachers and staff. Student often used inappropriate and offensive language, refused to follow directions, left class or school without permission, and was insubordinate. School staff reported Student's behavior interfered with his learning, and Student was excessively absent or late to school.
5. Student has 5 documented behavioral referrals from September 2011 for various conduct, including leaving or cutting class, lateness to class, defiance, disrespectful toward staff, and inappropriate language and actions.

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.

6. Student's attendance record indicates he was suspended for 5 days from September 30th through October 6th. However, his discipline record is contradictory and reports no out of school suspensions in September 2011.
7. The school provided no additional behavioral referrals documenting Student's behaviors. On or about October 4, 2011, Student was involved in a domestic incident (off of school grounds) and was charged with terroristic threatening and aggravated menacing.
8. Following his arrest, Student was admitted to a children's psychiatric center through a Delaware public agency for 3 days.
9. During his admission, Student was diagnosed with mood disorder, and prescribed medication. Student was discharged on October 7, 2011.
10. On or about October 9, 2011, the school was notified by the Office of the Attorney General that Student had been arrested for out of school conduct on October 4th.
11. The school took no formal disciplinary action against Student as a result of the October 4th incident. According to the complainant, the formal charges were dropped.
12. On October 11, 2011, Student's guardian returned him to school. The School Leader did not, however, permit his attendance on the basis she was concerned about Student's behavior.
13. On October 12, 2011, a meeting was held to discuss Student's return to school. Attendees included the School Leader, Student, his guardian, and a crisis clinician with whom Student was working.
14. During the October 12th meeting, the crisis clinician discussed Student's 3 day admission to the psychiatric center, and the therapy and medication Student was receiving to address his mental health needs. Student's continued attendance at Pencader was discussed. The School Leader commented that Student has strange behaviors, other students are afraid of him, and he never smiles. The School Leader noted Student gets "a look in his eyes" and staff are fearful of him. She commented that Student is a difficult student, Pencader is a "choice school", and there may be a better fit for Student elsewhere. Student's guardian did not agree.
15. Student returned to Pencader on October 13, 2011.
16. Student's disruptive, defiant, and inappropriate behaviors continued upon his return.
17. Pencader has no instructional support team as required by 14 DE Admin Code § 923.11.9 to identify students who require special education services and those who need general education interventions.

18. On or about November 16, 2011, Student was suspended out of school for failing to report to detention on November 9th and 14th.²
19. On November 16, 2011, a meeting was held to again discuss Student's continued attendance at Pencader. Attendees included the School Leader, Student, Student's guardian and her daughter, and a licensed clinical social worker who was providing therapy to Student.
20. During the November 16th meeting, the School Leader repeated that Pencader may not be a "good fit" for Student. She noted the school does not have a full-time guidance counselor for Student to access, Student has a particular "look in his eyes" that causes staff to fear him, and he is not receptive to personal interaction with staff. The School Leader suggested Student attend an alternative school or the Adult High School. Student's guardian declined those options. The School Leader then proposed Student receive homebound instruction provided by the school.
21. Student's guardian agreed, but believed the homebound instruction was temporary until another meeting could be scheduled. However, the school intended the homebound instruction to continue until the end of the school year.³
22. Student did not return to Pencader after the November 16, 2011 meeting.
23. The school provided Student with homebound instruction on a few occasions in December and January. Student's participation was minimal. He participated in some sessions, walked out of other sessions, or was not available when instructors arrived.
24. Student's guardian contends she tried multiple times to contact the School Leader to return Student to school after the November 16th meeting. The School Leader claims she was in contact with the guardian frequently and responded to her.
25. On December 20, 2011, Student's guardian received an E-mail message from the School Leader stating:

Other than an inhouse [sic] program, we believe that [Student] continuing his education through the [Adult] High School would be best. As you know our responsibility for [Student] ended on December 16, 2011 as we are out for the rest of the year on Winter Break. You are free to register [Student] at any time with [the Adult] HS.

*Warmest regards,
[School Leader]*

² School records are contradictory. Student's attendance record reports the disciplinary action as an out of school suspension on November 15th. However, the discipline record identifies the disciplinary action as a detention on November 16th.

³ In a November 16th E-school entry, school staff wrote: "Based on a meeting with [Student, his counselor, guardian and others], all believe homebound would be the best avenue for [Student] throughout the balance of the calendar year."

26. The School Leader re-read her December 20th E-mail during the on-site visit with the complaint investigator. She explained to the investigator she meant to inform the guardian in the December 20th E-mail that Pencader would continue to provide homebound instruction until the end of the school year, and the Adult High School would be a good fit for Student the following year.
27. After receiving the December 20th E-mail, Student's guardian contacted the Adult High School and was informed Student was not eligible for services because he was under the age of 16. The guardian then contacted her school district of residence and was informed that Student could not, at that time, transfer from the charter school to the school district.
28. As a result, Student has not attended school since approximately November 16, 2011.
29. On or about March 13, 2012, Student's guardian, through her attorney, requested the school to conduct a special education evaluation. This complaint was filed with the DOE on April 30, 2012.
30. Since the filing of the complaint, Parent requested the school to conduct a special education evaluation to determine Student's eligibility for special education and related services. Pencader has agreed to provide a psychological evaluation through an independent provider.

CONCLUSIONS

A. *No Instructional Support Team*

Under the IDEA, the State is required to have procedures and policies in effect to ensure all students who may be in need of special education are located, evaluated, and identified. 34 C.F.R. § 300.111. The State adopted regulations in 2007 defining these procedures and policies applicable to all public schools in carrying out the "child find" requirement.

All school districts and charters schools in the State must have instructional support teams or problem solving teams ("IST team") to identify children who require special education services, and to identify students who need general education interventions. 14 DE Admin Code § 923.11.0. This requirement applies to all public school students, not just students who may be in need of special education. The IST team process benefits children educationally and promotes effective instruction and learning for all students. It ensures that children who may be struggling academically or behaviorally receive a level of general education interventions to support them in accessing their program, while taking into account other students may require a more specialized level of support and need special education and related services.

Delaware public schools must have a systematic problem solving process and procedures in place to examine the nature and severity of a student's educationally related problem. The local level procedures must, at a minimum, include: (1) a description of the student's problem or behavioral concern stated in objective, measurable terms; (2) a systematic data-based process for

examining all that is known about the student's problem or behavior of concern; (3) design and implementation of general education interventions to address the student's problem or behavior concern, parent input, and professional judgment concerning the effectiveness of the intervention; (4) regular and frequent progress monitoring to review and analyze the student's performance over time, and modifications of the interventions as frequently as necessary based on progress monitoring data; and (5) evaluation of the effects of the interventions, and a process to ensure decisions are made regarding the effectiveness of the interventions. 14 DE Admin Code § 923.11.9

Referrals to the IST team may or may not lead to an initial evaluation to determine a student's eligibility for special education services. 14 DE Admin Code § 923.11.9.2.5

In this case, Pencader had no IST team and formal procedures in effect as required by 14 DE Admin Code § 923.11.9 to identify students who require special education services and those who need general education interventions. Student clearly had a pattern of behavior that interfered with his learning, including defiance, disruption to the school environment, use of inappropriate language, and disrespect to staff. School staff described Student's behavior as continuous and frequent throughout the year. Yet, the school had only 5 behavioral referrals documenting his behavior in September 2011, and school attendance and discipline records with minimal information. The procedures outlined in 14 DE Admin Code § 923.11.9.2.5 are intended to help children like Student with patterns of substantially similar behavior problems that interfere with learning. In addition, the school was put on notice as early as October 12, 2011 that Student had mental health needs resulting in a psychiatric admission and was receiving medication and therapy. Combined with his record of consistent, frequent, and similar behavior problems and his poor academic performance, Student should have received a special education evaluation much earlier in the year. If Student's guardian refused to provide the school with consent for the special education evaluation, the school had the option to exercise the procedural safeguards outlined in 14 DE Admin Code § 926, including mediation and the due process procedures.

For the reasons stated, I find a violation of State regulation 14 DE Admin Code § 923.11.0 requiring Pencader to have an instructional support team and procedures in place to ensure the identification of students who need special education services, and the identification of students who need general education interventions. Pencader also failed in its "child find" duty with respect to Student. At least by the end of October 2011, Pencader should have proposed to evaluate Student to determine his eligibility for special education and related services and sought written consent from the guardian.

B. Provision of IDEA's Disciplinary Protections to Student

The complaint alleges Pencader failed to provide Student with the IDEA's disciplinary protections. 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. In addition, children not yet determined eligible for special education must receive the disciplinary protections of the IDEA (including a manifestation determination prior to a disciplinary change in placement) if the school had *had*

knowledge the student was a student 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.

According to Student's discipline record, he was suspended out of school fewer than 10 days through mid-November. During the November 16th meeting with Student's guardian, Student's program was changed. The School Leader repeatedly stated that Pencader may not be a "good fit" for Student due to his behavior. The school did not even attempt to apply the school's student code of conduct and disciplinary policies to Student at that point. Nor was Student expelled by the school board. Rather, the School Leader unilaterally altered Student's program on November 16, 2011 resulting in his exclusion from school on the basis that Pencader could not meet his educational and behavioral needs and staff were fearful of him. In this regard, I find Student's educational placement was not changed for **disciplinary** purposes triggering the IDEA's procedural safeguards for student discipline. However, this conclusion does not mean the school's actions were appropriate. Whether the school's exclusion of Student from his public program violates other state and federal law is not within the scope of this complaint decision. The scope of this decision is necessarily limited to allegations arising under Part B of the IDEA and corresponding state regulations.

C. Other Non-IDEA Claims

The state complaint process under Part B of the IDEA allows the State to exercise general supervision to ensure the requirements of the IDEA are carried out. 34 C.F.R. § 300.149. It also provides parents and schools with a forum to address disputes involving the provision of special education services. Complaints filed under 34 C.F.R. § 300.153 must include a statement the local educational agency violated a requirement of Part B of the IDEA.

In this case, the complaint contains non-IDEA allegations. The complaint alleges Pencader violated a Delaware charter school law provision (14 Del C. § 504A(8)) requiring the school to establish and follow reasonable disciplinary standards with respect to Student. The complaint also alleges Pencader failed to place Student in a consortium discipline alternative program as required under a specific state statute (14 Del. C. § 1604(8)) addressing severe discipline problems. The complaint further states Pencader failed to post its policies on student rights and responsibilities on its website, as required by a general DOE regulation, 14 DE Admin Code § 605.2.3. These claims do not allege a violation of Part B of the IDEA, and I decline to make conclusions about non-IDEA claims.

CORRECTIVE ACTION PLAN

The guardian does not intend to enroll Student in Pencader for the 2012-2013 school year, and Student will obtain educational services in another setting, most likely his school district of residence.

In resolving a complaint in which the State has identified noncompliance, the State must address: (a) the failure to provide appropriate services, including corrective action appropriate to address the needs of the child; and (b) the appropriate future provision of services for all children with disabilities. § 34 C.F.R. 300.151

As a result of the DOE's investigation and findings, the DOE directs the school to take the following corrective actions:

A. Special Education Evaluation to Determine Student's Eligibility

On or before August 20, 2012, Pencader shall convene an IEP team and determine whether Student is eligible for special education and related services as a child with a disability. Pencader must document its eligibility decision on an Evaluation Summary Report and provide a copy to Student's guardian, and the DOE. The IEP team must be properly convened and consist of the required participants, including any required Pencader teachers and staff. Pencader must ensure adherence to the evaluation procedures under 14 DE Admin Code §§ 925.2.0; 4.0; 5.0. Pencader must also ensure Student's eligibility for special education and related services is determined in the manner required under 14 DE Admin Code §§ 925.6.0 through 12.0. The psychological evaluation completed by the outside provider shall be reviewed and considered in determining Student's eligibility, with other relevant and required data sources.

Following the eligibility decision, Student's guardian has the right to file a second complaint with the DOE alleging a failure to timely identify Student as a student with a disability, and seek compensatory education and/or other relief. If the guardian disagrees with the eligibility decision or evaluation process, the guardian may file a complaint with the DOE challenging the eligibility decision and/or evaluation process.

B. Additional School Level Corrective Actions

On or before November 30, 2012:


1. Pencader shall ensure all relevant staff, including all teachers, are trained on the requirements of child find, IST teams, and the specific requirements of 14 DE Admin Code § 923.11.9.
2. Pencader shall have an IST team and formal procedures in effect as required by 14 DE Admin Code § 923.11.9 to identify students who require special education services and those who need general education interventions.

C. State Verification Review

During the 2012-2013 school year, the DOE shall conduct a review of Pencader's activities, procedures, and practices to verify the school has corrected all noncompliance identified in this decision, and the audit may include the review of student records, interviews with staff, and/or classroom observations.

Note: the scope of this decision is related to allegations arising under the IDEA and corresponding Delaware law involving special education requirements.

By:


Jennifer J. Kline, Esq.
Assigned Investigator
Education Associate

Original Date Issued: June 29, 2012
Revised and Reissued: August 1, 2012