

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

**FINAL REPORT  
ADMINISTRATIVE COMPLAINT RESOLUTION**

**DE AC 12-9 (May 11, 2012)**

On February 7, 2012, the Disabilities Law Program filed a complaint with the Delaware Department of Education on behalf of Student.<sup>1</sup> The complaint alleges the Christina School District (“the District”) violated state and federal regulations concerning the provision of a free, appropriate public education to Student (“FAPE”).

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 a review of Student’s educational records, on-site interviews with District staff, and phone conversations with the complainant.

**FINDINGS OF FACT**

1. Student is identified as a student with a disability and eligible to receive special education and related services under the IDEA in the disability category of “Emotional Disturbance”.

2. Student has an educational history of behavioral concerns dating back to elementary school. He was previously evaluated in the 1<sup>st</sup> and 4<sup>th</sup> grades and determined not eligible for special education and related services. Student was eventually diagnosed with Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and Mood Disorder.

3. During the 2010-2011 school year, Student attended the 8<sup>th</sup> grade in the District's middle school and received accommodations under a 504 plan. He also displayed a pattern of behaviors involving defiance, inappropriate behaviors towards peers, and use of abusive and inappropriate language. In the 8<sup>th</sup> grade, Student was suspended 20 days of out of school, and 8 days of in school suspension.

4. In the fall of 2011, Student entered the 9<sup>th</sup> grade in the District's high school and attended regular classes in the general education environment.

5. On or about September 15, 2011, Parent requested the District reevaluate Student to consider his eligibility for special education and related services. Parent felt the 504 plan was not effective in addressing Student’s academic performance and behaviors. Parent was particularly concerned about Student’s defiant and disruptive behaviors, and his transition from

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<sup>1</sup> 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.

the 8<sup>th</sup> to 9<sup>th</sup> grade.

6. The District agreed to evaluate Student. On October 6, 13, and 17, 2011, the school psychologist completed a psycho-educational evaluation, including a review of Student's records, interviews with Student, his teachers, and parent, and completion of standardized assessments. The school psychologist attempted several classroom observations of Student, but they were interrupted due to Student's behavior. During one attempt, Student walked out of class five minutes before the observation began. On another occasion, Student was standing up yelling with the teacher about getting his work done. Another time, Student walked out of class before the observation started, and had to visit the school nurse to calm down.

7. School staff described Student as having a tendency to disrupt class, become defiant, wander around the room or hallway, and easily anger when staff questioned him. As of late September 2011, Student had not completed any work in English class.

8. By mid-October 2011, Student had over 20 behavioral incidents including bullying, inappropriate peer interactions, refusal to work, classroom disruption, verbal altercations, hitting a female student, lateness to class, defiance, off task behavior, and use of profanity.

9. On or about October 18, 2011, and while the special education evaluation was pending, school officials assigned Student to the high school's in-school alternative program due to his behavior.

10. The in-school alternative program is held in a one classroom setting consisting of a small group of general and special education students. The program is separated from the regular high school environment and designed to teach students how to make positive choices, focus on academics and behavior, and build character. Placement in the program is intended to be short term with the goal of returning students to the regular high school setting. Students primarily complete assignments provided by the high school teachers and aligned to the grade level curriculum. Students also receive English instruction from a teacher dually certified in general and special education. The program instructor supports the students in counseling, character building, and work completion. Students in the program have access to an online computerized program for learning resources throughout the day.

11. During the complaint investigation, school staff explained that students are placed in the alternative program usually to address disciplinary issues. At the time of his referral, Student was the only student assigned to the in-school alternative program. Student was frustrated over his removal from the regular setting as he did not want to be separated from his peers.

12. On November 2, 2011, the IEP team met to determine Student's eligibility for special education. Social-emotional data collected by the school psychologist identified very elevated concerns in the areas of externalizing problems, depression, attention problems, relations with parents, and functional communication. Elevated areas of concern also included sense of inadequacy, attitude toward teachers, self-reliance, withdrawal, atypicality, social skills, study skills, and adaptability. Parent reported that Student received inpatient therapeutic services in

2010 and 2011,<sup>2</sup> was under the care of a therapist and psychiatrist, and the supervision of a probation officer. Parent also rated Student's behaviors in the "At-Risk" or "Clinically Significant" range in the areas of depression, hyperactivity, aggression, and conduct problems. Parent's behavior ratings were similar to the ratings of Student's teachers.

Achievement testing showed Student as below average in reading comprehension and fluency, written expression, pseudoword decoding, oral reading fluency, and spelling. Student demonstrated average performance in math problem solving and numerical operations. In the area of reading, the results supported reading comprehension difficulties, as well as significant decoding and reading fluency weaknesses. On the DCAS assessment administered in the fall 2011, Student performed at a level 1 for reading and a level 2 for math.

Based on these and other data sources, the team determined Student was eligible for special education as a child with a disability under the category of "Emotional Disturbance".

13. On November 20, 2011, the team developed Student's IEP. The IEP contains an annual goal for written expression, reading comprehension, and behavior. Services and modifications include: (1) for behavior, small group setting, re-direction, time-out, rewards; and (2) for written expression and reading comprehension, extended time on tests, use of detailed agendas, a dictionary, rubrics, graphic organizers, copies of extensive notes, reading of test questions, directions broken down, and access to reading selections in audio form "whenever possible".

14. Student continued his placement in the alternative program after his IEP was developed. But, the placement was not appropriate for him based on his needs – it did not provide the level of special education support, services, and modifications Student needed. Based on interviews with school staff, it is not clear whether the school members of the IEP team considered and discussed other placement options, taking into account least restrictive environment requirements, or whether they deferred to the alternative program and placement selected by school officials. Student was initially placed in the program by school officials due to his behavioral outbursts and defiance. Once identified as a special education student, the IEP team recognized Student's behaviors were primarily the result of his learning difficulties for which he required special education support. School staff acknowledged Student could not do the regular classwork because he lacked the appropriate services and support, and acted out with negative behavior. But, his placement continued in the alternative program lacking the required special education support for Student in all content areas. The evaluation data showed Student's learning needs crossed all content areas. The school psychologist noted, for example, Student's skills were stronger in math than reading, but he still needed assistance in breaking down math problems. Student did not receive direct instruction in all core content areas while in the alternative program, with the exception English.

15. School staff also completed a functional behavioral assessment ("FBA"). In developing the FBA, the behavior interventionist reviewed Student's educational records, and individually interviewed Student's teachers and parent. However, very few direct observations were completed and the data collection, review, and analysis were limited. The FBA also

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<sup>2</sup> Records indicate Student did not fully complete his treatment program in the summer of 2011.

contains a minimal description of Student's behaviors in relation to the activity, the space, the staff present, the noise in the room, and other factors in the environment which may be preferred or non-preferred to Student in assessing the antecedent, the consequence, and the overall function of Student's behavior. The FBA concludes Student's behavior is due to his academic weaknesses and attempts to "hide his educational issues". The team recognized "if [Student's] academic needs are addressed successfully, he will be happier and cause less trouble since he won't have to cover up poor class performance."

16. School staff developed a behavior intervention plan ("BIP") for Student with the goal of reducing or eliminating his inappropriate behaviors. The BIP does not, however, identify specific short and long term interventions in relation to the unique triggering events that cause Student's behaviors. The plan only generally refers to placing Student in the alternative program, having him work in small groups, and placing him in small classes "when possible". The positive reinforcements described in the BIP are not tailored to Student or his specific needs. The reinforcers are primarily the natural consequences for good behavior that would apply for all students (i.e., higher grades, fewer write ups, fewer suspensions). Some of the reinforcements are also deferred in time (i.e., the receipt of a diploma at the end of the high school career). Overall, the BIP does not provide for teaching Student the interim and long term skills he needs to effectively reduce his behaviors.

17. Student's inappropriate behaviors continued after his identification as a special education student. He often required support from school administrators to minimize the disruption to others. The assistant principal, for example, met with Student each morning, helped him transition to class, and assisted to de-escalate Student following an outburst.

18. Staff eventually noticed that Student's behaviors and language were becoming more sexual in nature and directed toward female students. According to school officials, Student accessed an inappropriate website on a school computer, partially exposed himself to others in the cafeteria, and propositioned females. The conduct violated the District's Student Code of Conduct.

19. On January 23, 2012, the school conducted a manifestation determination and concluded Student's recent behaviors were a manifestation of his emotional disturbance. The team also stated Student's educational needs are not being met effectively "with the resources the High School can provide". The team appeared to change Student's placement to an "alternative placement" that "would appropriately meet Student's emotional needs". But, the proposed change in placement was not described by the team, nor was it identified to the parent. School staff planned to contact the Director of Special Services to obtain information on "appropriate steps to look into placement".

20. Student returned to the alternative program after the January 23, 2012 manifestation determination meeting.

21. On February 6, 2012, this complaint was filed with the Department of Education.

22. A few weeks later, a major behavioral incident occurred in school. Student became

defiant and agitated in class and was charged with offensive touching. The District removed Student from school for an indefinite period. No manifestation determination was conducted. No prior written notice was provided to the parent informing her of the proposed change in Student's placement for disciplinary reasons.

23. Student was also charged by police authorities, and placed in a juvenile detention center from approximately March 8<sup>th</sup> through March 28<sup>th</sup>, 2012.

24. In the interim, the District held an IEP meeting on March 20<sup>th</sup>, developed a new IEP for Student, and planned for his return to school. The District assigned Student to another high school to give him a fresh start and placed him in a self-contained special education classroom for core content classes. Student returned to school on or about April 2, 2012, and has been receiving special education services under his IEP.

25. Finally, on November 4, 2011, the Disabilities Law Program sent a letter to the high school requesting access to Student's educational records on the parent's behalf. According to the complaint, an appropriate parental release of information was provided to the school with the November 4<sup>th</sup> request. School staff acknowledged receipt of the request, but claims the parental release was not enclosed. The Disabilities Law Program then re-sent the request and parental release and continued to contact school and District level staff to obtain the records. The District eventually provided access to Student's records sometime in February 2012. During the complaint investigation, the District did not provide an explanation for the delay in responding to the request.

### **COMPLAINT ALLEGATIONS**

The complaint alleges the District failed to provide Student with a free, appropriate public education as required by the IDEA and corresponding Delaware law. The complaint also alleges the District failed to timely respond to the Disabilities Law Program's request for access to Student's educational records on the parent's behalf.

### **CONCLUSIONS**

#### ***A. Student Entitlement to the IDEA's Disciplinary Protections Prior to His Disciplinary Placement in the Alternative Program***

Students with disabilities who are subject to certain disciplinary actions are entitled to the procedural safeguards outlined in 34 C.F.R §§ 300.530 to 536.0 and 14 DE Admin Code §§ 926.30.0 to 36.0. The safeguards require school districts to conduct a manifestation determination prior to changing the placement of a student with a disability for disciplinary reasons. The school district, the parent, and relevant members of the student's IEP team must determine whether: (a) the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (b) the conduct in question was the direct result of the school's failure to implement the IEP. If the team concludes "yes" to either (a) or (b), the behavior must be considered a manifestation of the student's disability, and the student must be returned to the placement from which the student was removed. 34 C.F.R. § 300.530(f); 14 DE

Admin Code § 926.30.6.

State and federal regulations also provide protections for students who are not yet determined eligible for special education and related services. A student who has not yet been determined eligible for special education and related services may assert any of the disciplinary procedural safeguards if the school district is deemed to have knowledge the student was a student with a disability before the behavioral incident occurred. A school district is deemed to have knowledge that a student is a student with a disability if, before the behavioral incident, the parent of the student requested a special education evaluation or expressed concern in writing to supervisory or administrative staff that the child is need of special education. In this case, Parent requested a special education evaluation on September 15, 2011 and prior to the behavioral incident that resulted in Student's disciplinary change in placement to the alternative program. Under 34 C.F.R. §300.534 and 14 DE Admin Code § 926.34.0, Student was entitled to the disciplinary protections of the IDEA, including a manifestation determination prior to his removal to the alternative program on or about October 18, 2011. ***For the reasons stated, I find a violation of the IDEA's disciplinary procedural safeguards and specifically, the failure to provide a manifestation determination to Student as required by 34 C.F.R. § 300.530(e) and 14 DE Admin Code § 926.30.5.***

***B. Denial of FAPE***

Students with disabilities are entitled to receive a free appropriate public education to assist a child to benefit from an education that is individualized to meet the unique needs of the student, provides significant learning, and confers meaningful educational benefit that is gauged to the child's potential. 14 Del. C. § 3101(5). ***For the reasons described in Paragraphs 14 through 20 above, I find Student did not receive FAPE under his program and placement described in the November 20, 2011 IEP and related behavioral interventions.***

***C. Manifestation Determination Required Prior to Student's Disciplinary Change of Placement For Offensive Touching Incident***

Students with disabilities are entitled to a manifestation determination prior to a change in their educational placement for disciplinary reasons. 34 C.F.R. § 300.530(e); 14 DE Admin Code § 926.30.5. In this case, a major behavioral incident occurred in mid-February when Student became defiant and agitated in class and was charged with offensive touching to staff. At that point, the IEP team had already determined his placement in the alternative program was not appropriate, nor meeting his needs. Student was suspended indefinitely. No manifestation determination was conducted. No prior written notice was provided to the parent informing her of the proposed change in Student's placement (i.e., long term suspension) for disciplinary reasons. ***For the reasons stated, I find a violation of the IDEA's disciplinary procedural safeguards and specifically : (a) the failure to provide a manifestation determination to Student as required by 34 C.F.R. § 300.530(e) and 14 DE Admin Code § 926.30.5; (b) the failure to provide prior written notice to the parent as required by 34 C.F.R. § 300.503 and § 300.530(h) and 14 DE Admin Code § 926.3.1 and § 926.30.8.1.***

***D. Parental Access to Student's Educational Records***

State and federal regulations permit parents and their authorized representatives to inspect and review any education records relating to their children that are collected, maintained, and used by the school district under the special education regulations. The school district must comply with a request without unnecessary delay and before any meeting regarding an IEP, and no later than 45 days after the request has been made. 34 C.F.R. § 300.613; 14 DE Admin Code § 927.13.0 In this case, the District did not provide access to Student's educational records until sometime in February 2012, and more than 45 days from the date the request was made. As mentioned, the reasons for the delay are not clear. The complainant provided records documenting efforts to access Student's records since the request was made in early November 2011. The District did not provide access to the records until late February 2012. ***For the reasons stated herein, I find a violation of the 34 C.F.R. § 300.613 and 14 DE Admin Code § 927.13.0 relating to the rights of parents and their authorized representatives to access their child's educational records no later than 45 days from the date the request was made.***

**CORRECTIVE ACTION**

***A. Proposed Compensatory Service Plan Addressing Denial of FAPE to Student***

Based on Student's current educational, behavioral, and social-emotional needs, the District shall prepare a proposed compensatory service plan to remedy the denial of FAPE to Student occurring between October 19, 2011 and March 30, 2012. *The plan shall not be final until reviewed and approved in writing by the Director of Exceptional Children Resources for the Department of Education.* The plan should include the District's methodology for determining when and how the services will be provided, including how the hours of compensatory instruction were calculated. Prior to submitting the proposed plan to the Department for approval, the District shall be submit the proposal to the complainant and/or parent for review and comment.

The proposed compensatory service plan must be submitted to the Department's Director of Exceptional Children Resources *on or before June 30, 2012* with a copy provided to the complainant and/or parent at the same time. *On or before July 10, 2012*, the parent and/or complaintant may separately provide to the Department any written exceptions or separate comments to the plan proposed by the District.

***B. District Level Compliance Agreement to Ensure the Appropriate Future Provision of Special Education and Related Services to Children with Disabilities***

*On or before June 30, 2012*, District representatives shall meet with the Director of Exceptional Children Resources concerning these findings and the development and implementation of corrective action steps at the local level that will address the findings of noncompliance identified in this decision. The DOE is required to take steps to ensure the appropriate future provision of special education and related services to children with disabilities. As a result of this decision, the District shall also enter into a compliance agreement (to be developed with guidance from the DOE) to ensure services and procedural safeguards are provided in a manner consistent with the IDEA requirements.

By: /s/ Jennifer L. Kline  
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Assigned Investigator  
Education Associate