

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN RESOURCES**

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

DE AC 14-9 (June 12, 2014)

On April 11, 2014, Parent filed a complaint with the Delaware Department of Education (“DOE”). The complaint alleges that Brandywine School District (“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 and the documentation provided by Parent. Interviews with school staff and Parent were also conducted.

COMPLAINT ALLEGATION

The complaint alleges that District: 1) improperly informed Parent that Parent could not refuse to consent to Student’s triennial evaluation, 2) did not acclimate Student to testing prior to conducting Student’s triennial evaluation as written in Student’s Individualized Educational Program (IEP) minutes, and 2) failed to provide Student with related services as outlined in Student’s IEP. During the investigation, Parent clarified that the District did not inform Parent that some Occupational Therapy and Physical Therapy sessions were co-treated.

FINDINGS OF FACT

1. Student is currently five years old and is enrolled in Pre-Kindergarten for the 2013-2014 school year at the School. Student was also enrolled in Pre-Kindergarten at the School during the 2011-2012 and 2012-2013 school years. Student is eligible for special education under a classification of Other Health Impairment. Student has been receiving services since Student was one year old.
2. Student has an extensive medical history, including multiple surgeries. A private duty nurse is assigned to remain with Student at the School at all times. Student has delays in gross and fine motor skills, cognitive limitations, a bilateral hearing loss with use of a sound field system, and interfering behaviors that warrant a behavior intervention plan.

Triennial Evaluation

3. On November 1, 2013, an IEP meeting was held to develop Student’s IEP, review Student’s Communication Action Plan, and discuss permission to conduct Student’s triennial evaluation. Parent inquired as to whether he/she could refuse to consent to Student’s triennial evaluation and was informed that the re-evaluation was mandatory if Student’s

special education and related services were to continue. Parent also requested that School Psychologist spend some one-on-one time with Student in order to acclimate Student to the testing environment prior to conducting Student's triennial evaluation.

4. On November 5, 2013, Parent signed a "Permission to Evaluate and Assess for Special Education Services" Form, which was dated November 4, 2013. The form authorized the District to conduct an Eligibility Review assessing the areas of cognitive functioning, speech/language, occupational and physical therapy, and developmental.
5. On March 10, 2014, Parent received a call from School Psychologist stating that he/she would be starting the evaluation process the following day.
6. On March 11, 2014, School Psychologist began the first session of the assessment.
7. On March 12, 2014, Parent spoke with School Psychologist regarding Student's re-evaluation. Parent asked School Psychologist if he/she had acclimated Student to testing prior to conducting the re-evaluation. School Psychologist replied that he/she did not and that he/she misunderstood Parent's request to acclimate.

Therapy

8. Following the November 1, 2013 meeting, the School issued a Prior Written Notice to Parent. The November 1, 2013 Prior Written Notice stated that Occupational Therapy services would be delivered twice per week, for thirty minutes per session, and an additional thirty minutes per month during the period from November 8, 2013 through June 5, 2014. The Prior Written Notice also stated that Physical Therapy services would be delivered twice per week, for thirty minutes per session, and an additional thirty minutes per month during the period from November 8, 2013 through June 5, 2014.
9. An IEP meeting was held and Student's IEP was developed on November 25, 2013. The November 25, 2013 IEP provides for Occupational Therapy and Physical Therapy services as stated in the November 1, 2013 Prior Written Notice.
10. The Occupational Therapy Service Ticket for Children's Services Cost Recovery Project (CSCR) documents that Student has thus far received individual and consultative occupational therapy sessions for thirty minutes throughout the 2013-2014 school year. Similarly, the Physical Therapy Service Ticket for Children's Services Cost Recovery Project (CSCR) documents that Student has thus far received individual and consultative physical therapy sessions for thirty minutes throughout the 2013-2014 school year. Student's Home-to-School notebook documents that Student was co-treated by the Occupational Therapist and Physical Therapist on several occasions throughout the 2013-2014 school year. According to the CSCR documents, Student's co-treated therapy sessions were thirty minutes in duration.
11. The minutes from neither the November 1, 2013, nor the November 25, 2013, meetings document any discussion regarding co-treated therapy sessions.

CONCLUSIONS

A. Triennial Evaluation

1. Parental Consent

The IDEA requires districts to obtain parental consent prior to conducting an initial evaluation or a re-evaluation of a student for special education eligibility. See 34 C.F.R. § 300.300(c); 14 DE Admin Code § 925.1.0. If a parent refuses to consent to an initial evaluation or re-evaluation, a district may, but is not required to, pursue mediation or file a complaint with the Department. See 34 C.F.R. § 300.300(c); 14 DE Admin Code 925.1.0. “Parental consent” is defined as follows: 1) “the parent has been fully informed of all information relevant to the activity for which consent is sought . . . ,” 2) “the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought . . . ,” 3) “*the parent understands that the granting of consent is voluntary* on the part of the parent and may be revoked at anytime,” and 4) “if [the] parent revokes consent, that revocation is not retroactive” 34 C.F.R. § 300.500 (emphasis added); see also 14 DE Admin Code §922.3.0. If a Parent refuses to consent to a re-evaluation, a district “may, but is not required to, pursue the [re-evaluation] of the child by utilizing the procedural safeguards in 14 DE Admin Code § 926 (including the mediation procedures or the due process procedures, if appropriate).” 14 DE Admin Code §§ 925.1.3.1, 925.1.1.4; see also, 34 C.F.R. § 300.300(c)(3)(i). However, a district “does not violate its obligation . . . if it declines to pursue the evaluation or reevaluation” when a parent refuses consent to a re-evaluation. 14 DE Admin Code § 925.1.3.2; see also 34 C.F.R. § 300.300(c)(3)(ii). Nor is a district in violation if the district fails to make a free and appropriate public education available to a student when a parent refuses to consent to such evaluation. See 34 C.F.R. § 300.300(c)(3)(ii); 14 DE Admin Code § 925.1.2.2.2.

Here, the District correctly informed Parent that Student’s re-evaluation was mandatory *for Student to continue to receive special education and related services*. What is not clear is whether the District informed Parent that he/she could not refuse to consent. However, several days after discussing the matter with the District, Parent executed a “Permission to Evaluate and Assess for Special Education Services” Form by marking “yes” rather than “no.” Under the circumstances, including the delay between the November 1, 2013 meeting and Parent’s execution of the “Permission to Evaluate and Assess for Special Education Services” Form, I cannot conclude that Parent’s consent was involuntary. ***Therefore, I have not identified a violation of the IDEA or corresponding state or federal regulations with respect to Parent’s consent for the District to conduct Student’s triennial evaluation.***

2. Acclimation

While the IDEA addresses parent consent (34 C.F.R. § 300.300(c); 14 DE Admin Code 925.1.0) and the process for re-evaluation (34 C.F.R. § 300.303; 14 DE Admin Code 925.3.0-925.5.0), the IDEA does not require a district to acclimate a student prior to conducting an evaluation or a re-evaluation for special education eligibility. As stated above, Parent executed a “Permission to Evaluate and Assess for Special Education Services” Form granting School Psychologist

permission to re-evaluate Student for special education eligibility and Student was subsequently re-evaluated pursuant to Parent's written consent without issue. ***Therefore, I have not identified a violation of the IDEA or corresponding state or federal regulations with respect to School Psychologist's failure to acclimate Student prior to conducting Student's triennial evaluation.***

B. Therapy

The centerpiece of the IDEA's delivery system for students with disabilities is the IEP. *See Honig v. Doe*, 484 U.S. 305, 311 (1988). As such, in order to satisfy the requirements of the IDEA, the instruction and services offered to a student "*must* comport with the [student]'s IEP." *Board of Education v. Rowley*, 458 U.S. 176, 188-89 (1982). Here, Student's November 25, 2013 IEP provided for frequencies and durations for Occupational and Physical Therapies that were different than therapies documented on CSCRP Service Tickets and in the Home-to-School Student notebook. Having the Occupational Therapist and Physical Therapist co-treat Student for thirty minute sessions – as was done here – is different than providing thirty minutes of Occupational Therapy and thirty additional minutes of Physical Therapy as provided for in Student's IEP. ***Therefore, because the therapy services provided to Student failed to comport with Student's IEP, I find a violation with respect to the implementation of Student's IEP***

CORRECTIVE ACTION

The District shall develop a plan to remedy the denial of appropriate related services to Student during the time period beginning November 8, 2013. In doing so, the District may take into account the provision of services that were provided in the co-treated sessions. The District shall submit the proposed plan to the Director of Exceptional Children Resources for the Department of Education ***on or before August 15, 2014*** for approval.

By: /s/ Janella Newman
Assigned Investigator