

**DELAWARE DEPARTMENT OF EDUCATION  
EXCEPTIONAL CHILDREN RESOURCES**

**FINAL REPORT  
ADMINISTRATIVE COMPLAINT RESOLUTION**

**DE AC 19-01 (September 11, 2018)**

On July 13, 2018, Parent filed a complaint with the Delaware Department of Education (“the Department”). The complaint alleges the Charter School (“the Charter School”) 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’s regulations at 14 DE Admin Code §§923.51.0 to 53.0. The investigation included a review of Student’s educational records, correspondence with Parent and Charter School staff, and documents provided by Parent and the Charter School. Interviews were conducted with Parent and Charter School staff.

**COMPLAINT ALLEGATIONS**

Parent alleges the Charter School violated Part B of the Individuals with Disabilities Education Act (IDEA) and corresponding state and federal regulations by: (1) finding Student not eligible for special education and related services; and (2) unilaterally changing Student’s educational placement to homebound instruction and denying Student the procedural safeguards.

**FINDINGS OF FACT**

Based upon the information provided by the Charter School and Parent, the Department makes the following relevant findings of fact:

**Provision of Speech Services**

1. Student previously received early childhood intervention services through the School District while attending a private community preschool, and was identified as a student with a disability under the category of preschool speech delay pursuant to 14 DE Admin Code §925.6.18. While in preschool, Student received special education and related services in accordance with Part B of the IDEA and 14 Del. C. §3101 *et seq.*
2. Student’s first individualized education program (“IEP”) was developed at an IEP Team meeting on April 12, 2017, and focused on the provision of speech therapy services and goals addressing articulation of sounds and blends. While in preschool, Student received speech therapy services three (3) times a month for a total of ninety (90) minutes a month.
3. Student subsequently began kindergarten for the 2017 – 2018 school year, and transferred to the Charter School beginning August 24, 2017.

4. The Charter School scheduled an IEP Team meeting for October 18, 2017 for the purpose of reviewing Student's IEP within sixty (60) days of Student's initial attendance pursuant to 34 C.F.R. §300.323(e) and 14 DE Admin Code §925.23.4.1.
5. The Charter School sent timely written notice of the meeting to Parent on September 15, 2017. Parent also signed a waiver of the right to receive ten (10) school days written notice of the meeting under 34 C.F.R. §300.322 and 14 DE Admin Code §925.22.
6. Parent attended and participated in the October 18, 2017 IEP Team meeting, and the members required by 34 C.F.R. § 300.321 and 14 DE Admin Code § 925.21.1 were in attendance.
7. An October 18, 2017 progress report from the speech language pathologist demonstrates Student mastered two (2) IEP goals for articulation. The speech language pathologist recommended Student's goals be revised to focus on /sh/ and /ch/ blends in words and sentences. The IEP Team made the requested revisions to Student's IEP and Parent was in agreement.
8. In addition, the IEP Team reviewed Student's eligibility for special education and related services and found Student met the eligibility criteria for a speech and/or language impairment as defined in 14 DE Admin Code §925.6.15. Accordingly, the IEP Team documented Student's eligibility on the Evaluation Summary Report, and Parent was in agreement.
9. The October 18, 2017 prior written notice states, in relevant part:
  - (a) The speech goals in Student's IEP would be revised based on the mastery of goals from Student's previous IEP;
  - (b) Student's disability classification would be changed from preschool speech delay to speech and/or language impairment;
  - (c) Student's placement would change from the preschool setting to a general education classroom setting;
  - (d) Speech therapy services would be provided in a group, one (1) time per week, for thirty (30) minutes.
10. Student's IEP was implemented following the October 18, 2017 IEP Team meeting, and speech therapy services were provided.
11. While Student made significant progress with speech skills, Student struggled to maintain appropriate behaviors throughout the school year. As discussed below, the Charter School developed and implemented behavior interventions for Student, but did not revise the IEP to address the specific behavior supports Student required based on the unique needs.

12. The Charter School scheduled an IEP Team meeting for April 11, 2018 for the purpose of conducting an annual review to develop, review and/or revise Student's IEP. The Charter School sent timely written notice of the meeting to Parent on March 13, 2018.
13. Parent attended and participated in the April 11, 2018 IEP Team meeting, and the members required by 34 C.F.R. § 300.321 and 14 DE Admin Code § 925.21.1 were in attendance.
14. An April 11, 2018 progress report from the speech language pathologist demonstrates Student was able to produce /sh/ and /ch/ blends in conversation, Student's articulation was age appropriate, and the only sound production errors were /l/ blends and /th/, both later developing sounds.
15. Thus, Student made meaningful progress on the IEP speech goals. The IEP Team revised Student's IEP to include a goal targeting /l/ blends in conversation, and for providing therapy services in a group, three (3) times per month, for ninety (90) minute sessions.
16. The April 11, 2018 prior written notice describes the revisions to Student's IEP focusing primarily on Student's speech skills and therapy services.
17. Because Student mastered IEP speech goals, the Charter School sought to reevaluate Student's continued eligibility for special education services as a student with a speech and/or language impairment, and Parent provided written consent to evaluate. Charter School staff were simultaneously addressing Student's inappropriate behaviors through interventions and supports, but without revision to Student's IEP.
18. The speech and language evaluation was completed on April 15, 2018 and noted Student's progress with speech sounds and age appropriate articulation skills.
19. The Charter School scheduled an IEP Team meeting for April 30, 2018 for the purpose of considering Student's eligibility for special education and related services. The Charter School sent timely written notice of the meeting to Parent on March 12, 2018.
20. In the area of speech skills, the IEP Team found Student was presenting with age appropriate receptive and expressive language skills, and no longer met eligibility criteria for special education and related services under the disability category of speech and/or language impairment.
21. The April 30, 2018 prior written notice describes the eligibility decision finding Student does not qualify for special education and related services.
22. For the reasons described below, Parent withdrew Student from the Charter School on May 16, 2018 and enrolled Student in kindergarten in the School District for the remainder of the 2017–2018 school year.

### **Student's Behaviors and Interventions**

23. At the start of the 2017 – 2018 school year, Student was placed in the general education setting in classroom one (1).
24. Early in the school year, Student developed disruptive and inappropriate behaviors. Student received Student's first demerit on 8/31/17.
25. Charter School staff implemented behavior interventions for Student in classroom one (1), including Student spending some instructional time in classroom two (2) in the afternoons across the hall.
26. In September 2017, Student also began to receive small group counseling once a week from the school counselor focusing on social skills, friendship, positive character traits, self-esteem, and making good choices.
27. Parent reported, and the E-mails document, Parent suggested specific behavior interventions for Student, and some were incorporated into Student's program by Charter School staff, such as the use of a velcro strip and lap blanket.
28. Charter School staff also developed a daily behavior chart to document behaviors and interventions. The chart was sent home daily for Parent's signature.
29. The Charter School's Code of Conduct outlines a graduated demerit system and is disseminated to parents when students are enrolled. The Code of Conduct describes behaviors that may result in a demerit, as determined by Charter School staff. An accumulation of demerits results in detentions and disciplinary actions. After three (3) demerits, the student will serve a detention, and after six (6) demerits, the student will serve two (2) detentions. After nine (9) demerits, a parent conference is scheduled with the Charter School Director, and two (2) detentions must be served. After twelve (12) demerits, the student will be suspended. After fifteen (15) demerits, the student will appear before the Charter School's Review Board to determine and recommend specific actions to the Charter School Director.
30. Student's discipline records reflect numerous classroom and playground behavior infractions for safety violations, defiance, offensive touching, and inflammatory actions.
31. By October 26, 2017, Student had received Student's seventh (7<sup>th</sup>) demerit. For each demerit issued, the school staff called Parent and sent home a demerit slip describing the behavior infractions.

32. Rather than issue further demerits to Student as a disciplinary measure, Charter School staff focused on the need to determine the antecedents and triggers to Student's specific behaviors, and the appropriate Tier II and Tier III behavioral interventions needed to support Student.
33. In addition, Parent provided the Charter School with consent on November 7, 2017 to permit the occupational therapist to screen Student for any fine and/or visual motor deficits that could be triggers to Student's behaviors.
34. Charter School staff also moved Student from kindergarten classroom one (1) to classroom two (2) in the general education setting on November 27, 2017.
35. On December 16, 2017, the occupational therapist completed the screening of Student and found no deficits in Student's fine motor and visual motor skills. Student's skills were age appropriate based on classroom observations, and Student's writing and cutting samples. On December 19, 2017, the results of the screening were reviewed with Parent, and a full occupational therapy evaluation was not recommended.
36. Student's referral action profile data reflected continued inflammatory actions, abusive language, and inappropriate behaviors in classroom two (2) and on the bus. From December 1, 2017 through February 2, 2018, Student exhibited eleven (11) behavior infractions resulting in referrals to the office and school counselor, and telephone calls to Parent.
37. By February 9, 2018, Student had received Student's ninth (9<sup>th</sup>) demerit for offensive touching towards a staff member and requiring a parent conference be scheduled.
38. On February 13, 2018, a parent conference was held with Parent, the Charter School Director of Learning, and the school psychologist to discuss Student's accumulated demerits and continuing behavior concerns. The Charter School proposed to formally complete a functional behavior assessment ("FBA") to address Student's behaviors, and explained the special education evaluation and Child Find process to Parent.
39. On February 15, 2018, Parent provided the Charter School with signed written consent for completion of the FBA. The school psychologist also called Parent and explained the FBA process.
40. Student's FBA was completed and a behavior intervention plan ("BIP") were developed by the school psychologist based on classroom observations of Student and consultation with the classroom teacher and Parent.
41. The FBA identifies Student's interfering behaviors as hands-on, non-compliance, and inappropriate comments and sounds. The antecedents to Student's behaviors are described as writing tasks and motor skills. Antecedent modifications, reinforcement, alternative responses, and strategies for responding to Student's interfering behaviors were recommended.

42. Student was also provided a specific behavior contract identifying appropriate behaviors, such as following directions, using nice words, and keeping hands to self. Student's point card tracks the occurrence of the behaviors, giving Student the opportunity to earn a cash-out for displaying the appropriate targeted behaviors.
43. Student's IEP was not revised to incorporate the specific behavior interventions to support Student's needs.
44. On February 13, 2018, the Principal sent an E-mail to Parent noting that Student would receive demerits for any significant behaviors.
45. Behavior concerns continued and the school psychologist and Charter School Director of Learning met with Parent on February 27, 2018, and proposed a comprehensive evaluation to determine Student's eligibility for special education and related services under other disability categories.
46. On March 6, 2018, Parent provided the Charter School with written consent to conduct an evaluation and determine Student's eligibility for special education and related services.
47. On March 12, 2018, the teacher from classroom two (2) sent an E-mail to Parent providing the point card and an explanation of its use. Student's point card was completed and sent home daily.
48. The Charter School scheduled an IEP Team meeting for April 30, 2018 for the purpose of determining Student's eligibility for special education and related services.
49. Charter School staff initially scheduled meetings with Parent to review Student's FBA and BIP on March 28, 2018 and April 16, 2018, but both meetings had to be rescheduled. Charter School staff then made the decision to incorporate the review of Student's FBA and BIP with Student's IEP Team meeting scheduled for April 30, 2018.
50. On April 12, 2018, Student received his fifteenth (15<sup>th</sup>) demerit for physical contact with a staff member. For the fifteenth (15<sup>th</sup>) demerit, the Charter School's Code of Conduct required Student and Parent to appear before the Charter School's Review Board.
51. On April 16, 2018, Parent and Student appeared before the Charter School's Review Board serving as an advisory group to the Charter School Director.

52. On April 16, 2018, the Charter School Director sent Parent a letter noting Charter School Director's support of the Charter School Review Board's recommendations to place Student on probation for the remainder of the school year and noting if Student received one (1) more demerit for offensive touching or verbal threats to do physical harm or violence to another person or the school, Student would be placed on homebound instruction and not permitted to return to the Charter School for the 2018 – 2019 school year. "Offensive touching" is defined by the Charter School's Code of Conduct and was cited by the Charter School Director in the footnote of the letter.
53. Student returned to school on April 17, 2018, and earned a demerit for offensive touching in violation of the terms of probation.
54. On April 17, 2018, the Charter School Director telephoned Parent to advise Student had violated probation, and was placed on homebound instruction for the remainder of the school year.
55. In response, Parent sent an E-mail to the Charter School Director on April 19, 2018 requesting to terminate Student's one year contract with the Charter School to allow Student's enrollment in the District as soon as possible. Parent also stated homebound services are unacceptable.
56. On April 18, 2018, the homebound teacher E-mailed Parent and they reached an agreement as to the schedule and location for services.
57. Student's homebound instruction began on April 24, 2018 for three (3) times a week for one (1) hour, and was later changed to two (2) times a week for one and one half hours (1.5).
58. The occupational therapist completed an occupational therapy evaluation on April 20<sup>th</sup>, and the school psychologist completed a psychoeducational evaluation on April 25<sup>th</sup>. Parent requested, and received, copies of the psychoeducational, speech, and occupational therapy evaluations in large print on April 27, 2018.

## **Eligibility Decision**

59. On April 30, 2018, the IEP Team convened to determine Student's eligibility for special education and related services, and the meeting included the team members required by 34 C.F.R. § 300.321 and 14 DE Admin Code § 925.21.1. Parent attended and participated in the meeting.
60. The eligibility decision was documented in the April 30, 2018 Evaluation Summary Report, and described, in relevant part:
- (a) The classroom teacher described Student's difficulties as waiting Student's turn, following directions, cooperating with peers, respecting the rules, and maintaining attention during instruction. In addition, Student becomes easily distracted during large and small group activities, and makes sounds that interrupt the learning of others.
  - (b) Student has supports that include teaching, modeling, practicing social skills, offering choices throughout the school day, reinforcement of positive behavior, use of if-then statements, and offering special jobs and incentives for engaging in appropriate behavior.
  - (c) Student also receives supports to assist with social skills in the classroom and with the school guidance counselor.
  - (d) Student receives support for academic skills, to include differentiated instruction, extra reading support with the reading specialist (Tier 2 reading interventions), individualized attention and instruction with writing tasks, and preferential seating.
  - (e) Student's occupational therapy evaluation revealed average fine motor and visual motor skills.
  - (f) Speech and language assessment results indicate developmentally age appropriate receptive and expressive language skills, and Student no longer qualifies for speech therapy services.
  - (g) Student has high average cognitive functioning, as well as average to high average academic skills, based on assessment data.
  - (h) While significant behaviors are reported within the school setting, almost no concerns are noted within the home setting.
  - (i) Kindergarten competencies and progress monitoring data show Student is making academic progress and gains across both math and reading.
  - (j) There is no indication Student has a chronic or acute health problem.



- (k) The IEP Team reviewed multiple sources of information, and determined Student did not meet the criteria for a student with a disability pursuant to any of the thirteen (13) disability categories under the Department's regulations.
  - (l) The IEP Team considered teacher reports and observations, classroom assessments, current standardized evaluation results, related service evaluation results, including for speech and language and occupational therapy, as well as information provided by Parent.
  - (m) Parent wanted to specifically discuss the emotional disability category, and the team reviewed the definition with Parent finding Student does not meet the disability criteria.
61. Charter School staff reported, and the documentation supports, Parent stated at the April 30<sup>th</sup> IEP Team meeting, Student has an upcoming appointment with an independent psychologist, and Parent expected the psychologist would provide a diagnosis for the IEP Team to consider Student's eligibility under the other health impairment category. The IEP Team agreed to reconvene with the school nurse when the documentation was provided by Parent.
62. The Evaluation Summary Report and prior written notice were provided to Parent on or about May 8, 2018, and dated April 30, 2018.
63. On May 16, 2018, Parent withdrew student from the Charter School. Student's last day of receiving homebound instruction was May 15, 2018.
64. A June 2018 homebound report documents Student received instruction seven (7) times for a total of ten and one half hours (10 ½) of instruction focusing on English language arts and math skills.
65. On July 11, 2018, Parent filed this complaint with the Department alleging the Charter School violated Part B of the IDEA, and corresponding state and federal regulations finding Student not eligible for special education and related services, and unilaterally changing Student's educational placement to homebound instruction without affording the procedural safeguards.

## CONCLUSIONS

### **A. Student's Eligibility Determination Is Compliant with the IDEA**

Parent claims the Charter School violated Part B of the IDEA by finding Student not eligible for special education and related services at the April 30, 2018 eligibility meeting. The eligibility decision was properly documented in the April 30, 2018 Evaluation Summary Report, and described in detail the behavioral and academic supports provided to Student. The IEP Team reviewed multiple sources of information as required by state and federal regulations, and determined Student did not meet the criteria for a student with a disability pursuant to any of the thirteen (13) disability categories under the Department's regulations. Student's occupational therapy evaluation revealed average fine motor and visual motor skills. The speech and language evaluation demonstrated developmentally age appropriate receptive and expressive language skills. There was no indication Student had a chronic or acute health problem. Student has high average cognitive functioning, as well as average to high average academic skills, based on assessment data, and progress monitoring data showed Student was making academic gains in math and reading. In compliance with state and federal regulations, the IEP Team considered teacher reports and observations, classroom assessments, current standardized evaluation results, related service evaluation results, including for speech and language and occupational therapy, as well as information provided by Parent. **As a result, I find no violation of the IDEA or corresponding state and federal regulations regarding the eligibility determination finding Student not eligible for special education and related services.**

### **B. Student Was Entitled to the Procedural Safeguards as a Student with a Disability**

Students with disabilities determined eligible for special education and related services under the IDEA are entitled to the IDEA's procedural safeguards. The procedural safeguards apply to eligible students under all disability categories, including students who meet eligibility criteria solely on the basis of a speech and language impairment. Speech services are considered special education services, as opposed to related services, and Student is considered a student with a disability and entitled to the disciplinary protections of the IDEA. *See*, 14 DE Admin Code 922.3.0; 34 C.F.R. § 300.39(a)(2)(i).

In this case, the Charter School violated the procedural requirements of Part B of the IDEA when it unilaterally changed Student's educational placement to homebound instruction, and prevented Student from returning to the educational placement due to disciplinary behaviors.

A student's educational placement must be based on the student's IEP and determined by a group of persons, including the parent, and other persons knowledgeable about the student and the IEP. *See*, 34 C.F.R. §§ 300.116(a)-(b); 14 DE Admin Code §§ 923.16.1-2.

School officials may remove a student with a disability from the current educational placement to another educational setting, or suspension, for not more than ten (10) consecutive school days, or for not more than ten (10) cumulative days in the same school year for separate behavioral incidents, as long as it does not constitute a pattern resulting in a change of placement. *See*, 34 C.F.R. § 300.530(b); 14 DE Admin Code § 926.30.2.

If a change in educational placement is sought based on the student's violation of the code of conduct, the school must conduct a manifestation determination to decide if the behavioral incident was a manifestation of the student's disability. If the behavior was a manifestation of the student's disability, the school may not proceed with the change in educational placement to the disciplinary setting. If the behavior was not a manifestation of the student's disability, the school may proceed with the change in educational placement to the disciplinary setting with the continued provision of special education and related services consistent with the student's IEP. *See*, 34 C.F.R. § 300.530; 14 DE Admin Code § 926.30.5.

In this case, Student's educational placement was changed by the Charter School for disciplinary purposes on or about April 18, 2018 for the remainder of the school year without a manifestation determination through a properly convened team meeting to include parental participation, and prior written notice provided to Parent.

School officials also may unilaterally place a student in an interim alternative educational setting for up to forty-five (45) school days, without regard to whether the behavior is a manifestation of a student's disability, when the student engages in a weapons or drugs offense, or inflicts serious bodily injury. *See*, 34 C.F.R. § 300.530(g); 14 DE Admin Code § 926.30.7. However, these circumstances did not apply in this case.

Because the Charter School proceeded with a disciplinary change in Student's educational placement without providing Student the procedural safeguards of the IDEA, **I find a violation of the IDEA and corresponding state and federal regulations and denial of FAPE from April 18, 2018 to the end of the school year. I recognize Parent withdrew Student from the Charter School on May 16, 2018 and enrolled Student in the School District, however, Student did not promptly receive the required services and supports following the unilateral disciplinary change of placement given the Charter School's failure to document the necessary behavioral supports and services in Student's IEP.**

### **C. Student's IEP Must Address the Unique Educational Needs**

The IDEA and corresponding Delaware law require public agencies to provide a free appropriate public education (FAPE) to students with disabilities. *See*, 20 U.S.C. §1401(9); 34 C.F.R. § 300.101(a); 14 Del. C. § 3101(5); 14 DE Admin Code § 923.1.2. FAPE is provided through a student's IEP as developed collaboratively by the student's IEP Team. Importantly, a student's IEP must address all of the student's unique educational needs, whether or not related to the student's disability category. A student's services must meet the student's needs and not be determined solely by the student's eligibility category. *See*, 71 Fed. Reg. 46,655 (2006). In addition, state and federal regulations require an IEP to be reviewed periodically, but not less than annually, for any of the following reasons: (a) any lack of expected progress toward the annual goals and in the general education curriculum; (b) information from any new evaluation or reevaluation; (c) information or concerns shared by the parent or teacher; (d) the child's anticipated needs; or (e) other matters, issues, or concern.

In this case, Student's IEP addressed the identified communication needs, but failed to incorporate Student's unique needs for behavioral interventions, supports, and services. Student struggled with appropriate behaviors throughout the school year as evidenced by the increase in demerits and disciplinary referrals. Charter School staff developed and implemented behavior interventions for Student, including the development of an FBA, but did not revise the IEP, or involve the IEP Team, to address the specific behavior supports Student required based on the unique needs. Student's IEP Team should have been responsive to Student's needs for behavioral supports and interventions to ensure FAPE. As a result, Student's IEP failed to include the behavioral provisions based on Student's unique needs to provide meaningful educational benefit. **For these reasons, I find a procedural violation of the IDEA and corresponding state and federal regulations regarding the required content of the IEP. However, I do not find a substantive denial of FAPE. While the behavioral provisions were not properly documented in the IEP, the services and supports were being provided to Student, and Student was making progress in the educational program.**

### **CORRECTIVE ACTION**

To address the regulatory violations noted in this Decision, the Department directs the School to take the following corrective actions:

#### **Student Level Corrective Actions**

1. To address the denial of FAPE from April 18, 2018 through the end of the school year, when the unilateral disciplinary change of placement occurred, compensatory education must be provided by the Charter School for the counseling services, social skills, and behavior supports that were delivered prior to the unilateral disciplinary change of placement but not documented in the IEP during this period. The Charter School will calculate the number of hours/sessions owed to the Student and come to an agreement with the Parent regarding the number of hours/sessions owed. The Charter School will submit the agreed upon number of hours/sessions owed to the Director of Exceptional Children Resources, as well as a plan for delivering the compensatory education, including a timeline for service delivery and how the services will be provided (e.g. reimbursing Parent for outside counseling, coordinating with Student's current School of attendance and reimbursing that School for providing additional compensatory services etc.). This plan must be submitted to Director of the Exceptional Children Resources on or before **September 28, 2018**.
2. The Charter School shall provide to the Director of Exceptional Children Resources and the Parent, on or before **June 17, 2019**, records that confirm Student's receipt of compensatory services, which shall include, but need not be limited to, a list of dates and times that services were provided, a description of the service, and any related records. Any records provided to the Director of Exceptional Children Resources and Parent to evidence the provision of services to Student must be verified in writing by the Charter School's administration as an accurate representation and account of services provided.

**School Level Corrective Actions**

1. On or before **September 28, 2018**, the Charter School shall review school policies, procedures and practices and revise as necessary to ensure IDEA procedural safeguards are afforded to students with disabilities. As necessary, the Charter School shall develop a detailed corrective action plan to address the regulatory violations identified in this decision. Documentation evidencing completion of these actions shall be submitted to the Director of Exceptional Children Resources on or before **December 31, 2018**.
  
2. On or before **November 30, 2018**, the Charter School shall ensure professional development is provided to all special education staff and administrators in the School, regarding FAPE, focusing on IEP revisions and discipline proceedings. The professional development shall be completed and the associated documentation (sign in sheets, copy of handouts, copy of PowerPoint, etc.) shall be provided to the Director of Exceptional Children Resources on or before **December 31, 2018**.

By: \_\_\_\_\_  
Assigned Investigator