

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

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

**DE AC 06-04
(March 9, 2006)**

On November 2, 2005, Parent filed a complaint with the Delaware Department of Education (“DDOE”) on behalf of her child, a student in the Red Clay Consolidated School District (“Student”). The complaint alleges that the District has violated state and federal laws relating to children with disabilities. Specifically, Parent is concerned that the District has failed to implement Student’s individualized education program (“IEP”) as it is written, causing Student to regress.

The complaint has been investigated as required by existing federal regulations at 34 C.F.R. § 300.660 to 300.662 and according to the Department of Education’s regulations and procedures, including Sections 15.12 to 15.14 of the *Administrative Manual for Special Education Services* (“AMSES”). Specifically, the investigation included interviews with Student’s mother (“Parents”); with the principal of the program Student attends (“Principal”); with Student’s current teacher (“Teacher”); and with Dr. Peter J. Doehring, Director of the Delaware Autism Program (“DAP Director”). The investigation also included a site visit to Student’s current program and a review of Student’s educational records, including recent IEPs, evaluation and assessment reports, meeting minutes, and other educational records of Student. Our investigation substantiates most of Student’s concerns and a corrective action plan is entered as part of this Report.

FINDINGS OF FACT

1. Student is fifteen years old, attends high school within the District (“High School”) and is eligible for special education and related services. Student’s education is administered and supervised by an approved special program for children with disabilities within the District (“the Special Program”).
2. Student’s educational needs are extensive. Student has severe cognitive limitations, extremely limited language and social development and adaptive skills in the severely deficient range. Student also has a rare medical condition and associated seizure disorder that cause “drop seizures” and pose a significant risk to Student’s safety in the school environment.
3. Student’s IEP team developed her current IEP in January 2005 (with several minor revisions since). Supports and services on Student’s current IEP include: a Picture Exchange Communication System (“PECS”); an object schedule; one-to-one support throughout the school day (to ensure Student’s personal safety, to implement Student’s behavior support plan and the PECS program and to assist with personal care needs); intensive toilet training. Student’s current IEP also includes educational consultant

services for applied behavior analysis, and to plan positive behavior supports and provide PECS training.

4. Student's IEP also contains detailed goals and objectives directed to language use, hygiene (specifically, toileting), mobility, behaviors, and staying on task.

Behavioral Plan

5. In approximately 2002, District began contracting for additional behavioral services for Student from a private educational consultant ("Consultant"). Consultant worked with the Program and Student until November 2005.
6. Consultant conducted, or assisted the District and Program in conducting and updating, functional behavior assessments and a Positive Behavioral Support Plan ("BSP") for Student. During much of the 2004-2005 school year, Consultant's contract with the Program was for up to six hours of consultation services per month for Student.
7. Student's most recent BSP was first implemented in April 2004 and is quite detailed. It concludes that Student's behaviors serve an escape function and details modifications to Student's environment to "prevent" behaviors before they occur. The Plan outlines the functionally equivalent responses that Student will be taught to replace unwanted behaviors and provides differential reinforcement procedures and "consequence procedures" to be used when Student tantrums, or is aggressive or self-injurious. The Plan also specifies data collection procedures.
8. The BSP was revised in February 2005. The revisions require Student to have a structured, functional daily schedule with "down time" limited to two-minute increments. The revised BSP specified that PECS sessions be conducted at least four times per day and stressed the importance of all staff consistently implementing the BSP.
9. The February 2005 revisions to the BSP also specified that Consultant would use a performance checklist to assess and provide feedback to staff about the fidelity with which the BSP was being implemented.
10. Consultant did a month long assessment of Student's programming in October 2005. It included twelve observations on eleven different school days.
11. Data from Consultant's observations suggested inconsistent application of many components of Student's IEP and behavioral plan. For example, the Consultant's data suggests that Student's individual daily schedule was posted and followed 54.5% of the observations. Reinforcers were delivered at the correct time 18.2% of the time. Preference assessments were not completed before a task was presented during any of the October observations and data collection was not timely during those observations.
12. According to Consultant's observations, compliance with some components of Student's program was higher, including ensuring that Student's schedule incorporated exercise and movement (90.9% of the observations), that tasks were functional (90.0%) and that Student received frequent praise (80.0%).
13. Program staff question whether Consultant's observations are completely accurate and note that observations are simply a snapshot of Student's day. Program staff also believed that Consultant's duties included correcting and training staff when program components were not properly implemented, and that they received insufficient feedback and support from the consultations.

14. Some Special Program staff members have received training in applied behavior analysis and PECS implementation. Consultant has also provided some inservice-type training to staff on the implementation of Student's BSP.
15. Consultant ended his relationship with the District after the October assessment because he did not feel that his continued consultation with District staff was benefiting Student.
16. The District has recently hired a staff person with experience in behavioral programming and plans to use that person's expertise within the Special Program to improve delivery of services to students with IEPs like Student's.

DAP Screening

17. Student was evaluated by the Delaware Autism Program ("DAP") in September 2005. The DAP screening team determined that Student's communication level and social impairments were consistent with her developmental age, such that that autism was not an appropriate educational disability classification for Student.
18. During DAP's screening process in September 2005, Consultant and Parents shared their concerns that Student's BSP was not being consistently implemented as written. DAP staff shared similar concerns from observations. While Principal disagreed with these concerns, the Program agreed to increase Consultant's services to Student based on Parents' concerns. DAP agreed to continue its classroom observations of Student during Consultant's increased hours. These agreements led to Consultant's observations of Student in October 2005.
19. DAP staff continue to believe that Student's profile is more consistent with her cognitive delays than with autism and that she does not qualify for services from their program. DAP acknowledges that it has particular expertise in applied behavior analysis and in PECS and has expressed its willingness to consult with the Special Program, particularly for staff training. DAP and Consultant concur that Special Program needs to develop its capacity to consistently use behavioral interventions and PECS across the school day, across settings, and across staff.

Other IEP Components

20. As noted, Student's IEP provides for support from a one-on-one paraprofessional. A paraprofessional was assigned to Student and received detailed training on the implementation of Student's IEP, particularly her BSP, during the 2004-2005 school year. Paraprofessional did not work in the District during Student's 2005 summer program. In addition, paraprofessional was injured in the classroom early in the 2005-2006 school year and has missed significant amounts of work time since.
21. The Special Program has assured that Student receive one-on-one support even in the absence of her regularly-assigned paraprofessional. The Program acknowledges that several different people have provided Student one-on-one support this year, and that it has been challenging to "bring them up to speed" on the requirements of Student's program.
22. Parent is also concerned about the fidelity and consistency with which other parts of Student's IEP has been implemented, including, for example, toilet training and physical therapy. There do appear to have been some minor implementation issues around these

types of services, primarily caused by communication and staff training and coordination issues. To its credit, Special Program has addressed and corrected these problems as they were identified.

CONCLUSION and CORRECTIVE ACTION PLAN

State and federal regulations governing the education of children with disabilities require that public agencies receiving assistance under the IDEA offer a free, appropriate public education to children with disabilities, including providing special education and related services “in conformity with an individualized education program....” (AMSES Section 1.0; 34 CFR §§ 300.17, 300.300 and 300.350(a)(1)).¹

Parent agrees that the IEP developed for Student is appropriate, but believes that it has not been fully implemented. Our investigation confirms Parent’s concerns. It is clear that the District, Special Program and individual staff members have attempted to provide Student an appropriate education consistent with her needs, that they have partly implemented many of the components of her IEP and that they want to see her succeed. At the same time, Student’s education has been compromised by staffing and personnel difficulties, by confusion over Consultant’s role and by the practical difficulties of establishing an applied behavior analysis program in the context of a Special Program not traditionally aligned with that model.

Consultant and DAP’s observations confirm that important parts of Student’s BSP was not being consistently followed in October. For example, low implementation rates were observed on timing of reinforcers and preference selection, critical components of the applied behavior analysis program called for in Student’s IEP. The parts of Student’s IEP that were more consistently delivered also tended to be the simpler components more aligned to the Special Program’s traditional model (assuring functional activities and providing frequent praise, for example). District correctly notes that Consultant and DAP observers were not present with Student all day, every day, and suggests that rates of implementation were higher than the recorded observations. Unfortunately, if key components of the IEP were not being implemented during observations, and when Consultant was available to assist, there is also the risk that implementation might have been even lower when outside assistance was not available. Staff also acknowledge that there have been challenges in implementing some of the requirements of Student’s IEP within the current structure of their program. These factors support our conclusion that while the District and the Special Program have clearly developed an appropriate IEP for Student, and have attempted to follow the IEP, Student has not consistently received all of the supports and services to which she was entitled.

Having found a violation in the District’s failure to fully implement Student’s IEP, the Department must address “how to remediate the denial of services” and assure the “appropriate

¹ Most of the provisions of the *Individuals with Disabilities Education Improvement Act of 2004* became effective on July 1, 2005 and new federal implementing regulations have been proposed. Those statutory and proposed regulatory changes do not significantly change the provisions pertinent to this investigation. Accordingly, for ease of reference, citations in this Report continue to be to state and federal regulations promulgated as part of the 1997 reauthorization of the IDEA.

future provision of services for all children with disabilities.” (34 CFR § 300.660(b). Parent prefers that Student be able to be educated within the District and an in-District placement is clearly less restrictive than an out of district placement. Parent would prefer that Student be educated within the Delaware Autism Program. To date, DAP has concluded that Student is not eligible for its program, while acknowledging that the behavioral basis of DAP’s model is very similar to the components of Student’s IEP. Our investigation has found no reason to question DAP’s conclusion.

At the same time, it is clear that it will take District and Special Program additional time to organize and put in place the type of structure and system that will permit the District to consistently deliver all of Student’s IEP. Accordingly, the Corrective Action Plan that follows is meant to address Student’s needs immediately, with considerable input from Parent, and to support the District and Special Program as they move towards improving their capacity to serve Student and others similarly situated in the future.

CORRECTIVE ACTION PLAN

The Department directs the District to take the following corrective actions:

- 1. At Parent’s exclusive election, Student shall be placed in a private out-of-district program as soon as possible, but in no event less than (30) days from the date of this Report.**
 - a. The out-of-district program shall be selected by Parent from a list of approved (or approvable) programs provided to Parent by the District.**
 - b. Parent is urged to first consider day programs if they are available and appropriate to Student. However, the list of programs offered by District must also include appropriate residential programs.**
 - c. Within forty (40) days of this Report, District shall send the Department* confirmation that it has provided Parent a list of placement options, and advise the Department of Parent’s selection.**

- 2. The cost of the private program selected for Student shall be shared by the State and the District according to 14 Del.C. §§604(c) and 3124 for the first twelve (12) months of the placement. For the next three months of Student’s placement, the cost of Student’s placement shall be shared 50% to the District and 50% to the State, but otherwise in according to 14 Del.C. §§604(c) and 3124. If Student remains in the private placement for more than fifteen (15) months, the District shall assume full cost of that placement unless the District demonstrates to the satisfaction of the Department that further State contributions are appropriate because the District cannot meet Student’s needs within the Special Program.**

- 3. Within one year of this Report, District shall design and develop a plan for consistently implementing all components of Student’s IEP within the District, including, but not limited to, applied behavior analysis services and the PECS program. At a minimum, the District’s plan shall include program design, identify**

necessary resources and provide for staff training and ongoing support and professional development.

- a. The District is urged to consult with DAP and other public and private programs and organizations in meeting the requirements of this paragraph.
- b. The District shall provide quarterly reports to the Department* on its progress in fulfilling the requirements of this paragraph, beginning three months after the date of this Report.

4. Within fifteen (15) months of this Report, the District shall be prepared to offer Parent the opportunity to return Student to the District consistent with the plan developed under paragraph 3, and shall provide a final report to the Department* on the status of its program development and Student's placement.

** Reports to the Department of Education should be sent to the Director of the Exceptional Children and Early Childhood Education Group.*

By: _____
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Assigned Investigator

