

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN RESOURCES**

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

DE AC-16-02 (November 2, 2015)

On August 6, 2015, the Disabilities Law Program filed a complaint on behalf of Parent and Student with the Delaware Department of Education (“DOE”).¹ The complaint alleges the Department for Services, Youth, and Their Families (“DSCYF”) violated Student’s rights in the day treatment program at the Terry Children’s Psychiatric Center (“the Terry Center”) administered by DSCYF. The complaint has been investigated as required by federal regulations at 34 C.F.R. §§ 300.151 to 300.153, and according to the DOE’s regulations at 14 DE Admin Code §§ 923.51.0 to 53.0. The investigation included a review of Student’s educational records, policies and forms from the Terry Center and DSCYF, as well as position statements submitted by legal counsel for the Disabilities Law Program and DSCYF. The investigation also included interviews with Terry Center staff, DSCYF, and legal counsel for the Disabilities Law Program.

COMPLAINT ALLEGATIONS

The complaint alleges DSCYF violated Student’s rights while Student was participating in the day treatment program at the Terry Center by:

1. Repeatedly informing Parent a one-to-one aide or paraprofessional could not be provided due to standard internal policy, and not based upon a determination of individualized Student’s needs;
2. Failing to provide physical therapy services to Student as required by Student’s last Individualized Education Program (“IEP”), and before evaluating Student’s needs to determine whether Student could be discharged from PT;
3. Discharging Student from occupational therapy before evaluating Student’s needs;
4. Failing to document and report the restraints and seclusion used on Student in violation of DOE regulations at 14 DE Admin Code § 610.5.0 and 6.0, and DSCYF policy; and
5. Failing to comply with 14 Del. C. § 4112F(b)(2)(c)’s prohibition against applying pressure to a student’s head and neck during a restraint.

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.

Subsequent to the filing of the complaint, the parties agreed to participate in voluntary mediation conducted by the Special Education Partnership for the Amicable Resolution Conflict (“SPARC”) and in accordance with DOE regulations. On September 21, 2015, the parties entered into a mediation agreement resolving complaint allegations one (1) through three (3) relating to the provision of an aide to Student, and physical and occupational therapy. However, the parties did not resolve complaint allegations four (4) and (5) related to the alleged duty of DSCYF to document and report restraints and seclusion used on Student under 14 DE Admin Code § 610, and to refrain from applying pressure to Student’s head and neck under 14 Del. C. § 4112F(b)(2)(c). This report addresses issues four (4) and five (5).

FACTS:

1. On August 18, 2014, Student was enrolled at the Terry Center by the Division of Prevention and Behavioral Health Services (“DPBHS”). DPBHS is a division of DSCYF. The Terry Center is a mental health treatment program administered by DSCYF.

2. The Terry Center’s primary function is to provide mental health, behavioral health, and related services to children. 29 Del. C. § 9003(8). Children with disabilities attending the Terry Center are also entitled to receive special education and related services through an IEP in accordance with the Individuals with Disabilities Education Act (“IDEA”) and corresponding state and federal regulations.

3. Student is 12 years of age, and identified as eligible for special education and related services under the category of “Emotional Disturbance”. Student’s needs are complex. Student has a history of day and residential mental health treatment services. Student’s emotional and behavioral needs impact Student’s involvement in the general education curriculum. Student has difficulty learning and mastering skills outlined in the general education curriculum, maintaining appropriate peer and teacher relationships, drastic mood changes, uncontrollable outbursts, and physical and verbal aggressions often requiring therapeutic holds.

4. Student received a comprehensive neuropsychological evaluation from DPBHS on September 13, 2013. Student was assessed using the *Woodcock Johnson, Third Edition, Test of Cognitive Abilities (WJ-III)*. Student received a standard score of 58, falling within the extremely low range of intellectual functioning. Student’s diagnoses include pervasive developmental disorder NOS, disruptive behavior disorder NOS, attention-deficit hyperactivity disorder (combined type), and moderate intellectual disability. The psychologist described Student as having significant cognitive challenges, along with significant psychiatric history of aggression, impulsivity, oppositionality, mood lability, and social skill challenges causing significant functional impairment.

5. Student’s current IEP is dated November 14, 2014. Student requires supports and services to address Student’s impulsive behavior, organizational and skill development, fine and gross motor development, over stimulation, and communication deficits. Student’s IEP goals focus on behavior, reading fluency, math computation, written expression, reading comprehension, and speech and language.

6. At the Terry Center, Student received instruction in a self-contained specialized educational setting with a pupil to teacher ratio of 8:1. The interventions and supports outlined in the IEP include small class setting with counselor, verbal praise, behavior checklist, chunking of assignments, use of time outs, prompting, frequent breaks, positive reinforcements, use of Read Aloud, manipulatives, drill and practice, and clear and concise expectations.

7. Student's IEP further outlines Student's participation in the Terry Center's "SAFETY model" to support safe, respectful, and responsible behavior across settings. Students follow a hierarchy of interventions which include redirection, reminders, refocusing, specific verbal feedback, self-directed time outs, adult directed time outs, increased adult supervision, individual, group and family counseling, use of incentives, use of the "buck" system, and teaching of self-control strategies with opportunities to practice self-control and social skills.

8. Due to various aggressions and behavioral and emotional outbursts, Student was physically restrained on several occasions by the Terry Center staff.

DSCYF Policy and Restraints Used on Student

9. DSCYF has a written program policy titled #D-19 "Behavior Management Techniques". The policy outlines a progression of steps to be taken when behaviors occur that threaten a student's safety beginning with a non-verbal least restrictive intervention, followed by a verbal intervention, then body positioning, physical touch, separation, and ending with a physical restraint. According to DSCYF policy, physical restraint, (or a therapeutic hold), is used: "*When a child presents with one of the following behaviors that has been unsuccessfully dealt with by less restrictive alternatives: destruction of property, self-abusive behavior and/or physical aggression toward others...*"

10. DSCYF requires the Terry Center staff to report the use of restraints to Central Operations for DPBHS on a "Reportable Event Summary". The summary must be submitted within 72 hours of the time of the event.

11. In addition, DSCYF policy requires the Terry Center to notify the parent or guardian of every therapeutic hold or physical restraint the child receives, including escorts.

12. In this case, the complaint alleges specific dates when physical restraints were used on Student.

13. It appears the Terry Center completed Reportable Event Summaries pursuant to DSCYF policy for some of the restraints used on Student, but not all restraints. Documents indicate the following:

- (a). A September 12, 2014 Reportable Event Summary describes a physical peer-to-peer aggression by Student at 11:45 a.m. Student was leaving the multipurpose room and transitioning to class when Student charged at another student who was verbally instigating and provoking. Staff separated and moved

them to different areas. No physical restraint was used. Parent was contacted at 2:30 p.m.

(b). A September 15, 2014 bus conduct referral indicates the bus driver was repeatedly punched because bus driver would not allow Student to punch another student. The bus driver restrained Student who refused to be seated and continued screaming. No Reportable Event Summary was completed and there is no record Parent was contacted.

(c). A September 22, 2014 Reportable Event Summary describes Student was brought to the POD for medication, but became non-compliant resulting in Student punching staff, kicking, scratching, and pulling hair. After several attempts to de-escalate the behaviors, staff placed Student in an upper torso assist for one minute. The restraint occurred at approximately 12:55 p.m., and Parent was contacted at 1:07 p.m.

(d). A September 26, 2014 Reportable Event Summary documents Student kicked the teacher, ran out of the classroom, and hit another student in the chest. After staff removed Student to the Residential Treatment Center (RTC) POD, Student knocked over a bucket used for cleaning, threw a DVD player, radio, fan, and chair at staff. In an attempt to calm Student down, staff removed Student to another hallway and Student attempted to bite staff and tear items from the wall. Student's finger was fractured. Police were called to assist in transporting Student to the Rockford Center as staff could not calm Student and Student's extreme aggressions. The incident occurred at approximately 9:45 a.m., and Parent was contacted at 10:20 a.m.

(e). A December 22, 2014 Reportable Event Summary describes staff used physical restraint to address Student's physical aggressions toward staff. The incident occurred at 9:44 a.m. to 9:46 a.m., and Parent was contacted at 10:25 a.m.

(f). On December 22, 2014, a Reportable Event Summary documents Student was running up and down the hallway and into classrooms between 10:00 a.m. and 10:30 a.m. approximately. Student was briefly placed into an upper torso assist in order to move Student away from the hallway. Parent was contacted at 10:25 a.m.

(g) On February 2, 2015, Student's progress notes describe an incident during which a staff member tried to restrain Student, and in doing so, caught staff member's finger in Student's clothing, tearing it. Parent alleges Parent was not informed, and no documentation was provided. The Terry Center did not complete a Reportable Event Summary, and there is no record Parent was notified. No documentation is available, other than the progress notes.

(h) A February 19, 2015 Reportable Event Summary documents Student was hitting and punching staff, and refusing to stop. Staff placed Student in seated cradle assist. Student refused to calm when released, and continued to punch and kick staff. During these aggressions, Student was laughing, but continued to kick and hit staff. The restraint occurred at approximately 11:00 a.m., and Parent was contacted at 1:45 p.m.

(i) A March 9, 2015 Reportable Event Summary documents Student was placed in a two person bicep assist following physical and verbal aggressions directed to staff. The incident occurred at 10:25 a.m., and Parent was contacted at 1:28 p.m.

(j) A March 9, 2015 Reportable Event Summary describes Student was placed in a multi-person standing assist after Student slapped, scratched, and hit staff, which continued, upon Student's release. The restraint occurred at 2:00 p.m., and Parent was contacted at 2:30 p.m.

14. Restraints were used on Student on or about September 15, 2014 and February 2, 2015. However, the Terry Center did not complete Reportable Event Summaries on these dates, nor did it notify Parent in apparent violation of DSCYF policy.

15. In addition, there appear to be other incidents when restraints were used, but not documented by the Terry Center. As one example, Parent refers to March 19, 2015 treatment plan note referencing the use of restraint on an occasion that was not documented. Parent also identifies other occasions when the Terry Center failed to document the use of restraints in a timely manner, and did so only after Parent brought it to the attention of staff.

16. According to the Terry Center, the use of restraints is the responsibility of youth care workers, supervisors, and the program manager. The educational staff rarely provide behavior management through the use of physical restraints or escorts. The counseling and therapeutic staff at the Terry Center complete restraint training annually, and work in daily consultation with the educational staff.

17. In addition to alleged violations of DSCYF policy, Parent alleges DSCYF failed to comply with DOE regulations requiring uniform documentation and reporting on the use of restraints and seclusion by public school personnel under 14 DE Admin Code § 610.

18. DSCYF acknowledges the Terry Center does not adhere to the DOE's regulations on the use of restraint and seclusion under 14 DE Admin Code § 610, or the specific reporting requirements as outlined in sections 5.0 and 6.0.

Student's Status

19. Student's attendance at the Terry Center was not consistent. Between August 18, 2014 and October 22, 2014, Student attended approximately 15 out of 32 days. Student was admitted to the Rockford Center on or about September 25, 2014 through October 7, 2014 as a result of continual aggressive behaviors in and out of the classroom. Student returned to the Terry Center after October 22, 2014. Parent's request for a one-on-one aide was denied which resulted in Parent's reluctance to send Student back to Terry Center.

20. Attendance reports submitted by the Terry Center staff document monthly attendance percentages as follows: September 89%; October 23%; November 100%; December 94%; January 68%; February 78% and March 40%.

21. On February 5, 2015, a multidisciplinary team meeting was held to discuss Student's progress and concerns in treatment at the Terry Center. Student's attendance was discussed, and the team encouraged Student's attendance on a daily basis to ensure Student received structure and consistency in the program.

22. On March 16, 2015, Student was discharged from the Terry Center and enrolled at a residential school for children with disabilities in Maryland.

CONCLUSIONS

A. The Terry Center is Not Required to Report the Use of Restraints and Seclusion to the DOE.

The complaint alleges DSCYF, through the Terry Center, failed to document and report the use of restraints and seclusion on Student as required by 14 DE Admin Code § 610, sections 5.0 and 6.0. ***For the reasons that follow, I find the Terry Center is not subject to the requirements of 14 Del. C. § 4112F and the DOE's regulations on reporting the use of restraints and seclusion.***

Title 14, Section § 4112F of the Delaware Code sets specific limitations on the use of restraints and seclusion by public school personnel. Public school personnel are prohibited from using any chemical restraint on a student, and the use of a mechanical restraint or seclusion is specifically subject to a waiver authorized by the DOE. 14 Del. C. § 4112F(b)(1). Public school personnel may impose physical restraint on a student, but only in limited circumstances when certain standards are met. 14 Del. C. § 4112F(b)(2).

"Public school personnel" are specifically defined as "an employee or contractor of a public school district or charter school". "Public school personnel" does not include: (a) a law-enforcement officer as defined in 9200(b) of Title 11; or (b) an employee or contractor providing educational services within a Department of Correction or Division of Youth Rehabilitative Services facility. 14 Del. C. § 4112F(a)(4).

