DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN AND EARLY CHILDHOOD EDUCATION BRANCH

FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION

DE AC-15-02 (*February 5, 2015*)

On December 11, 2014, Parent filed a complaint with the Delaware Department of Education ("Department" or "DOE") on behalf of Student.[1] The complaint alleges that the Capital 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 investigations included a review of Student's educational records and interviews with school staff and Parent.

FINDINGS OF FACT

1. Student is currently 11 years of age and enrolled in the fifth grade at a District middle school ("the School"). Student is identified with an emotional disturbance and is eligible to receive special education and related services. Student has been attending the School since August 2014.

2. On December 11, 2014, Parent filed this complaint with the Department alleging that Student is being treated unfairly as a student with a disability. Within the complaint, Parent does not dispute the content of Student's IEP, nor does Parent contend that the IEP is inappropriate as written. Rather, Parent claims that specific provisions in Student's IEP were not implemented by the School's staff, resulting in an incident in which Student violated the School's code of conduct.

Background Summary

3. Student transferred from another state to the School in August 2014. Student receives special education services as a student with an Emotional Disability and is in the general education setting for at least 80% of the school day.

4. Student was evaluated in Student's previous state of residence on November 28, 2011. Student's cognitive evaluation yielded the following scores: Verbal Comprehension Index 102, Perceptual Reasoning Index 123, Working Memory Index 88, Perceptual Speed Index 78, resulting in a Full Scale IQ score of 101 (Average range). Student's

[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.

language evaluation found no difficulties in receptive or expressive language, with scores being in the Above Average to Superior range. Student's behavior rating scales from home and school found Student to be unusually active, aggressive, having difficulty complying with conduct expectations, often anxious, depressed, withdrawn, and not using words to have needs met. Student's Occupational Therapy evaluation noted significant differences in sensitivity as compared to norms.

5. An Evaluation Summary Report ("ESR") conducted in Student's previous state of residence, dated December 7, 2011, found Student eligible for special education services as a student with Emotional/Behavioral Disorder. Concerns reported included noncompliance with school conduct expectations, which was identified as a major impediment to Student's/others' learning. Unhappiness/depression and physical symptoms or fears associated with personal and school problems were noted in the report. Recommendations were formed for math, written expression, and social-emotional (i.e., improve ability to cope with changes in routine, learn more efficient strategies for productively managing frustration and increase ability to comply with classroom and school conduct expectations). The ESR Team noted "unsettling developmental experiences" (*unspecified*). Information provided by Grandfather, with whom Student lived at that time, indicated that Student's father had moved across country in 2010 and Student's mother was still involved with Student. Grandfather stated that counseling had begun and expressed concern regarding Student's "violent outbursts" and "harsh words." Medical history in Student's school records indicates "DV" and a vehicular accident in December 2009 with no serious injuries or head injuries. Records indicate a diagnosis of asthma, which Parent questions.

6. At the School, all general education teachers receive training regarding needs in students' IEPs, including professional development opportunities and participation in professional learning communities. Student's teachers also have a copy of Student's IEP in the classroom and are aware of Student's needs. A daily monitoring system (daily logs) is used to track Student's progress toward goals and is completed consistently. Administrators and Case Manager do at least weekly visits and walk-throughs to ensure that teachers are implementing Student's IEP. There was also a formal observation of General Education Teacher done in Student's classroom. The School uses a school-wide program of Positive Behavior Support ("PBS"). PBS is also implemented in Student's classroom.

7. The School requested permission for Student's triennial re-evaluation on September 9, 2014, which Parent consented to September 10, 2014. "School or classroom behavior" was checked as a parent concern and a case study (review of records) was planned. Achievement testing done at the School included an August 28, 2014 Baseline Text-Based Opinion Writing Prompt-Total Score 1/4, Performance Level Red, a September 5, 2014 Scholastic Reading Inventory 56th percentile (Proficient), and Scholastic Math Inventory 48th percentile (Basic).

8. On September 25, 2014, Student's IEP Team convened to conduct an annual review of Student's IEP and ESR. Participants in this meeting were: Parent, Grandmother,

General Education Teacher, Special Education Teacher, Case Manager as administrative designee, and School Psychologist. Student's strengths were described as being a fluent reader, enjoying reading, and liking and doing well in science. General Education Teacher noted a concern about frustration management, stating that Student hits himself/herself in head at which time General Education Teacher consoles him/her. General Education Teacher reported that Student reads and writes on grade level, but has a task completion issue for classwork and homework. It was noted that Student needs development in: complying with classroom expectations, recalling what has been learned in class, completing work on time, requesting help, increasing frustration tolerance. Small group and individual help is provided to Student.

9. At the September 25, 2014 meeting, Parent expressed concern regarding math and asking questions in general and said that Student will see a mental health counselor. The Team reviewed documents, including IEP-related records and test scores, and concluded that Student met Delaware's eligibility criteria under the disability category of Emotional Disturbance and required special education services.

10. Student's IEP contains goals for social-emotional, written language, and task completion. Goals are as follows:

    1. Social-Emotional: When given a situation which makes him/her frustrated, Student will verbally express feelings improving anger management skills from reacting inappropriately verbally and/or physically to reacting appropriately in 5/5 situations;
    2. Written Language: Given a writing topic across content areas, Student will complete prompt scoring 3.0 on the analytical rubric; and
    3. Task Completion: When given task to complete in content areas, Student will complete 4/5 with minimal teacher assistance.

    Learning challenges were noted as: distracted easily, poor attention to task, and trouble getting ideas on paper. For involvement in general education curriculum, Student needs extra time to complete tasks, frequent redirection, frequent checks for understanding of materials and directions. Accommodations in the classroom are: tracking system to help Student monitor Student's negative self-talk (Student completes a daily goal sheet and has positive self-talk reminders available at his/her desk), rewards when Student engages in positive self-talk and behavior, practicing expected behaviors, redirection and refocusing when off-task or noncompliant, assistance with redirection and focus with reminders given as needed by teacher, seat away from distractions, limit distractions and clutter on desk, use of both written and oral directions, use of nonverbal cues, allow extra time to complete tasks, provide frequent reminders and feedback, praise specific behaviors, self-monitoring, teach to replace self-talk with positive affirmations, modeling of appropriate behavior, use of graphic organizers, teacher modeling, teacher conference during pre-write stage and before final draft of writing piece. Testing accommodations for reading are: read test questions, multiple choice answers, and writing prompts (as allowed). Accommodations for social studies, science, math and reading are: small group, preferential seating, and refocusing. Accommodations for

math are: use of calculator, arithmetic tables, and manipulatives. Extra notes in the IEP summary include: engages in open negative self-talk, can be off-task or noncompliant, needs redirection, and refocusing. Under this IEP, Student does not require any related services and is not eligible for extended school year ("ESY") services.

11. An IEP Progress report, dated November 17, 2014, indicated that Student had made sufficient progress to meet annual goals.

12. A Conduct Referral Report for "Inappropriate Behavior" written by General Education Teacher on December 4, 2014, states:

> *As class began, [Student] stated that another student was looking at [him/her] so I told [Student] not to look at the other student and if [Student] was doing [his/her] work [Student] would not see the other student. I began calling on students in class to answer questions pertinent to the lesson so I called on [Student]. [Student] slapped [his/her] head as [he/she] oftentimes does. I stated to [Student] that I was not moving on and I needed [him/her] to answer. [Student] responded but it was very, very low. I asked [Student] to speak up. Finally about the third time, I said to [Student] that if [he/she] could not speak up, [he/she] could do so during lunch with me on tomorrow. [Student] mumbled something under [his/her] breath and I was not clear about what [Student] said. I asked the students near [Student] what [Student] said and one student replied "[Student] said [he/she] was going to kill 19 people." She said "[Student] said 19 people but when you told [him/her] to speak up the last time, [Student] said that makes 20." I immediately called for [redacted] [Student] saw me going to the phone and began to cry. I then asked the three students who heard [Student] to write exactly what they heard.*

13. When asked by Associate Principal, Guidance Counselor, a School Resource Officer, and a coach, Student admitted statements and continued to state that he/she wanted to kill people in Delaware. Student also wrote a statement "Now I'm going to kill 10 people! I said that because I got a problem wrong in reading." Student's statements were classified as Terroristic Threatening, the Dover Police Department was notified, and a police report was completed. A risk assessment done by Child Priority Response indicated no significant risk. Student was assigned five days of out-of-school suspension. A discipline hearing was scheduled for December 11, 2014, with a Manifestation Determination meeting scheduled for December 10, 2014.

14. A follow-up meeting held with Parent, Student, Grandmother, Assistant Principal, Assistant Principal, General Education Teacher, Guidance Counselor, and School Resource Officer recommended that Student be evaluated at Dover Behavioral Health ("DBH") since Student was still indicating that he/she wanted to kill people. In response to a question by School Resource Officer, Parent indicated that Parent had a shotgun at home kept in a locked case, but had no ammunition. Parent agreed to have Student evaluated at DBH and to keep the shotgun inaccessible to Student. Parent signed a District form for At-Risk students and Student was released to Parent. A parent

conference and documentation of evaluation were to be required for Student's return to school. However, Student returned to school on December 6, 2014, without notice of evaluation. Parent was notified that Student would be suspended for five days out of school (December 5, 2014 being the first day). Student was picked up from school. Because scheduling issues delayed the Manifestation Determination meeting, the School offered homebound services. A homebound instructor contacted Parent twice, but services were declined.

15. On December 12, 2014, a Manifestation Determination meeting was held and was attended by: Parent, Grandmother, Assistant Principal, General Education Teacher, Special Education Teacher, Guardian Ad Litem (via telephone from Student's previous state of residence), and School Psychologist (via telephone). During this meeting, the incident was reviewed and teacher observations included: often threatens to harm self, bangs head and then panics (for example, clenches fists when in fear of consequences). Information from Parent included: Student gets along well with Student's sister, Grandmother, and Parent. Student seems frustrated when school work has to be done. Student wishes to please Parent.

16. Student's discipline history was reviewed. This incident is the only incident reported in Delaware's E-school records. Discipline referrals from Student's previous state of residence were noted:

    - *10/18/11: Told teacher [he/she] was going to poke her eyes out and make her bleed. Calling teacher names. Shooting her with imaginary machine guns. Told her was going to teach her a lesson and made slitting motion with finger. Hit another student on back. Was climbing up the ramp and over the rails. OSS assigned.*
    - *11/22/11: Ran out of classroom three times without permission this morning. This afternoon [Student] was on [his/her] knees and lifting up a large table to [his/her] chin. When asked to get [his/her] coat, [Student] flung it around angrily. Was banging [his/her] head on the wall in the office. OSS assigned.*
    - *12/09/11: Lifted up another student's shirt and scratched him several times leaving one 7 inch and five 3 inch marks on the student's back. Said I'm going to kill you. OSS assigned.*
    - *03/03/12: Adult took away a metal object. [Student] threw self-down. Said [he/she] was going to call 911. Poked self with pencil saying [he/she] was going to hurt self. Stood on swivel chair. Poked self in the head with a fork. Shaking with anger. Told staff member [he/she] hated her. Grandfather to attend school with Student after returns from OSS.*

17. The Manifestation Determination Team concluded that the behavior incident was caused by, or had a direct and substantial relationship to, Student's disability. The Team also concurred that the behavioral incident was the direct result of the school's failure to implement the IEP. In summary, the Team determined that the behavior was a manifestation of Student's disability (Emotional Disturbance). Further, a description of the incident suggests the possibility that a specific IEP accommodation (i.e., redirection when noncompliant) may not have been implemented.

18. During the Manifestation Determination meeting, no team member signed to indicate disagreement with this finding and no explanation of this finding was given on the form. School staff now indicates that this statement was checked in error and expresses their disagreement with this statement. However, Parent was in agreement with the statement.

19. Parent signed permission for behavioral data collection in order to conduct a Functional Behavioral Assessment deemed necessary, with information to be used to develop a Behavior Intervention Plan. This evaluation is currently in progress.

20. During the building-level hearing held on December 12, 2014, it was determined that, since Student's statements were a manifestation of Student's disability, and because there was no documentation of similar statements made for the preceding two years, Student would be able to return to school on December 15, 2014, with the following agreed to by Parent: a Permission to Evaluate was signed to complete a Functional Behavioral Assessment (completed during Manifestation Determination meeting), Parent/designee conduct check of Student and belongings for unsafe items before Student goes to school, daily safety check upon arrival at school, services to be opened with a school-contracted behavioral health consultant, Parent to ensure that Student does not have access to shotgun or other unsafe items in the home, and Student will abide by the district's code of conduct. If similar statements are made, Student will be referred for a district-level hearing. Student is a client of Center for Mental Wellness for individual counseling and family is to participate in "Strengthening Families" Program through the Delaware Division of Family Services.

CONCLUSIONS

When evaluating a claim of failure to implement a student's IEP, the Department must determine whether the alleged failure to implement the IEP has deprived the student of an entitlement to FAPE as required by state and federal law. *Ross v. Framingham School* Committee, 44 F. Supp. 2d 104 (D. Mass 1999). A school fails to implement the student's IEP when: (1) the failure to implement the IEP is complete; (2) the variance from the program described in the IEP deprives the student of FAPE; and (3) the student does not make progress toward IEP goals. *See id.* Further, only a material failure to implement the IEP or a failure to implement a significant or essential component of the IEP will amount to an actual denial of FAPE. *See e.g., Falzett v. Pocono Mountain Sch. Dist.*, 152 F. App'x. 117 (3d Cir. 2005) (holding that "substantial evidence exists in the record to support the finding that [the school] provided [the student] with meaningful educational benefit despite some failures").

As a general matter, Student's teachers have a copy of Student's IEP in the classroom and are aware of Student's needs. A daily monitoring system is used to track Student's progress toward goals. Training, walk-throughs, and classroom observations are done to ensure that teachers are implementing Student's IEP. Finally, Student is deriving reasonable educational benefit from his/her IEP, as evidenced by the fact that Student's is making sufficient progress towards meeting his/her IEP goals.

Notwithstanding the above, Student violated the School's code of conduct in an incident subsequently charged as Terroristic Threatening. During the Manifestation Determination meeting, the Team concluded that the incident was caused by, or had a direct and substantial relationship to, Student's disability (Emotional Disturbance). The Team also concluded that the behavioral incident was the direct result of the School's failure to implement Student's IEP. Further, a description of the incident suggests the possibility that a specific IEP accommodation (i.e., redirection when noncompliant) may not have been implemented.

Here, the School's failure to implement a specific accommodation in Student's IEP did not amount to a complete failure to implement Student's IEP. Nor did the variance from Student's IEP, or the School's subsequent action in response thereto, result in a denial of FAPE to Student. Indeed, if the School's code of conduct is breached by a student with a disability, and if a change of placement (in this case, out-of-school suspension) is recommended, a Manifestation Determination meeting must be held, which was done here. As a result of that meeting, the School was required to take immediate action to remedy whatever deficiency was present and consistently implement Student's IEP as written. In this case, homebound instruction was offered for the duration of the five-day out-of-school suspension, which was declined by Parent. Additionally, the School has a Functional Behavior Assessment in progress to assist in developing more effective intervention strategies.

School districts have a legal responsibility to maintain safe, violence-free schools. School districts also recognize that classroom and external factors can result in inappropriate, dangerous, and reactive behaviors from students with disabilities. Here, notwithstanding the School's failure to implement a specific provision of Student's IEP during Student's behavioral incident, the School followed through with its legal obligations. **Therefore, I have not identified a violation of Part B of the IDEA, or corresponding state regulations, resulting in a substantive denial of FAPE to Student.**

RECOMMENDATIONS

The Department is required to ensure that corrective actions are taken when violations of the requirements are identified through the complaint investigation process. *See* 14 DE Admin. Code § 923.51.3.3. In this case, no violation of IDEA was identified. Therefore, "no further action by the DOE shall be taken." 14 DE Admin. Code § 923.51.3.2. However, the IEP team is reminded of its ongoing responsibility to implement all of the IEP provisions as written in the IEP. As mentioned, however, there has been no substantive denial of FAPE.

By: /s/ *Sharon L. Collins*
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