

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN RESOURCES**

**FINAL REPORT
ADMINISTRATIVE COMPLAINT RESOLUTION**

DE AC 18-01 (October 2, 2017)

On August 3, 2017, Parent filed a complaint with the Delaware Department of Education (“the Department”). The complaint alleges the School District (“the District”) violated state and federal regulations concerning the provision of a free, appropriate public education to Child (“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 Child’s educational records, and correspondence between the District and Parent. Interviews were conducted with Parent and District staff.

COMPLAINT ALLEGATIONS

Parent alleges the District violated Part B of the IDEA by failing to develop an IEP for Child and proposing an educational placement without consideration of least restrictive environment factors in an out-of- District public program requiring Child to be transported on a school bus for four (4) hours a day.

ONE YEAR LIMITATIONS PERIOD

Pursuant to the IDEA and corresponding state and federal regulations, the complaint must allege violations that occurred not more than one (1) year prior to the date the Department receives the complaint. *See*, 34 C.F.R. § 300.153(c); 14 DE Admin Code § 923.53.2.4. In this case, the Department received the complaint on August 3, 2017. Therefore, the Department’s findings address alleged violations from August 3, 2016 to the current.

FINDINGS OF FACT

1. Child is currently three (3) years of age and eligible to receive special education and related services under the disability category of “autism” as defined in 14 DE Admin Code § 925.6.6. Child is a resident of the School District.

2. Redacted as required by FERPA (14 DE Admin. C. 251; Federal – 20 U.S.C. § 1232 g & h and FOIA 29 *Del. C.* Chapter 100; Federal - 5 U.S.C. § 552)

3. Redacted as required by FERPA (14 DE Admin. C. 251; Federal – 20 U.S.C. § 1232 g & h and FOIA 29 *Del. C.* Chapter 100; Federal - 5 U.S.C. § 552)

4. The District does not operate its own preschool program or elementary school.

Relevant Background Facts

5. Child received Part C early intervention services through an Individualized Family Service Plan (“IFSP”) to address developmental delays in fine motor and speech skills.
6. On February 8, 2016 and March 14, 2016, Child was evaluated by Delaware’s Child Development Watch (“CDW”) when Child was three (3) years of age. The Department of Health and Human Services, Division of Public Health is the lead agency in Delaware responsible for providing early intervention services to eligible children under Part C of the IDEA through its Child Development Watch (CDW) Program.
7. A March 23, 2016 Multi-Disciplinary Evaluation Report from CDW reflects Child was found eligible for Part C early intervention services due to developmental delays in the areas of cognition, adaptive development, social-emotional, fine motor, gross motor, and receptive and expressive communication. The Evaluation Report recommends Child receive early childhood education, speech evaluation and therapy, neurology consultation, social-emotional and behavioral consultation, occupational therapy evaluation and therapy, hearing evaluation, genetics consultation, and visual evaluation.
8. An IFSP was developed describing Child’s present levels of functioning, strengths, concerns, and needs in the areas of cognition, adaptive skills, social-emotional, physical, and communication skills.
9. Pursuant to the IFSP, Child received speech and language therapy services twice a week, and occupational therapy and physical therapy once a week in the home setting.
10. An August 10, 2016 letter from Doctor at Medical Center recommended Child receive neuropsychological testing for an educational classification of autism.
11. Child was approaching the third (3rd) birthday on January 25, 2017.
12. At least ninety (90) days before the third (3rd) birthday of a child with a disability who may be eligible for Part B services, CDW must notify the school district the child will shortly reach the age of eligibility for Part B services. *See*, 34 C.F.R. § 300.209(b)
13. In addition, CDW must also convene a transition conference among CDW, the family, and the school district not fewer than ninety (90) days before the child’s third (3rd) birthday to discuss the special education and related services the child may receive under Part B. *See*, 34 C.F.R. § 303.209(c)(1). Further, the child’s IFSP must include a transition plan developed at the transition conference, to include appropriate steps for the child to exit Part C, and any transition services needed by the child and the family. *See*, 34 C.F.R. § 303.209(d)(2)-(3).

14. In this case, CDW notified the District's Director of Special Education by E-mail on October 6, 2016 of Child's impending third (3rd) birthday, and requested dates for a transition conference. The Director responded by E-mail the same day requesting CDW records and Parent's preferred dates and times for a meeting. On October 18, 2016, CDW sent the referral to the District related to Child's potential eligibility for Part B services, and noted Parent's preferences for meeting dates as October 31, November 14, 2016 and later. On October 19, 2016, the District's Director of Special Education sent an E-mail to CDW advising the District had not yet received Child's CDW records and the District was available on November 14, 2016. The same day, CDW sent Child's records to the District, and the transition conference was subsequently scheduled for November 14, 2016.
15. While CDW's notification to the District was provided in compliance with the ninety (90) day timeline, the transition conference was not. Child's transition conference was not held until November 14, 2016, less than ninety (90) days before Child's third (3rd) birthday.
16. Parent attended the November 14, 2016 transition conference, in addition to Child's relative, the CDW Service Coordinator, the CDW Licensed Clinical Social Worker ("LCSW"), the District's Speech-Language Pathologist, and the District's Director of Special Education.
17. The District's Director of Special Education discussed the availability of Part B services at the transition conference, and Child's need for an educational evaluation through the Program to determine Child's eligibility under the disability category of autism.
18. At the transition conference, Child's IFSP was revised to include a transition plan and described next steps as "making a referral to the County Autism Program for evaluation of autism".
19. On November 14, 2016, Parent provided written consent for the District to evaluate Child through the County Autism Program to determine eligibility for Part B services under the classification of autism. The District also provided Parent with prior written notice on November 15, 2016 proposing to conduct the initial evaluation for Part B services.
20. County Autism Program is a county wide public program located within the Z School District serving children with moderate to severe disabilities ranging from age three (3) to age twenty-one (21) and providing an early childhood education program to eligible children living in X County. The County Autism Program is also the County branch of the Delaware Autism Program, serving children from birth to age twenty-one (21).
21. The approximate distance between Child's home and the County Autism Program is thirty-seven (37) miles.

Child's Evaluation
and Eligibility for Part B Services

22. Child was evaluated by the School Psychologist and Speech and Language Pathologist of the County Autism Program. The evaluation included review of records, direct observation in the home setting, parent questionnaire, Parent Interview for Autism – Clinical Version (PIA-CV), Gilliam Autism Rating Scale, 3rd Edition (GARS-3), and Autism Diagnostic Observation Schedule - 2 (ADOS-2): Module 1.
23. According to the January 23, 2017 Multi-Disciplinary Evaluation Report from the County Autism Program, all four raters on the GARS-3 indicated the probability of autism spectrum disorder as “very likely” with a severity level of three (3) indicating Child will likely require very substantial support. On the ADOS-2, Child’s scores suggested identification of an autism spectrum disorder.
24. Based on direct observations and parent interviews related to Child’s functional levels in the areas of communication, socialization, and behavior rating scales, and the ADOS-2, the Multi-Disciplinary Evaluation Report concluded Child meets the specific criteria in 14 DE Admin Code § 925.6.6 for an educational classification of autism.
25. Within the Multi-Disciplinary Evaluation Report, it is recommended that Child receive intensive programming emphasizing the development of communication and socialization skills, as well as teaching of functionally equivalent alternative behaviors, in an early childhood education program with peers. Child’s programming needs include multi-modal teaching methodology, direct instruction in social approach behaviors, and consistent positive reinforcement of appropriate behaviors.
26. The District scheduled an IEP Team meeting for January 23, 2017 to review the results of the evaluation, determine Child’s eligibility for special education services, and plan an IEP. On January 6, 2017, the District sent written notice of the January 23, 2017 IEP Team meeting to Parent in compliance with 34 C.F.R. § 300.322 and 14 DE Admin Code § 925.22.0.
27. Parent attended the January 23, 2017 IEP Team meeting, in addition to the District’s Director of Special Education, the District’s School Psychologist, a general education teacher, a special education teacher, the School Psychologist from the County Autism Program, the Speech-Language Pathologist from the County Autism Program, the District’s Speech-Language Pathologist, and the CDW LCSW.
28. The IEP Team reviewed the January 23, 2017 Multi-Disciplinary Evaluation Report and determined Child met the eligibility criteria to receive special education and related services under the disability category of autism.

29. Per the January 23, 2017 conference notes, the District proposed Child's placement in the early childhood education program at the County Autism Program, and Parent was advised someone from the County Autism Program would be in touch to set up transportation, enrollment, and Child's first day of attendance.
30. Parent agreed with the Part B eligibility decision, and Child's educational need for intensive special education support, services, and therapies.
31. The District did not develop an IEP at the January 23, 2017 IEP Team meeting. Rather, the District adopted Child's IFSP as the IEP and informed Parent an IEP would be developed within sixty (60) days of Child attending the County Autism Program.¹
32. On January 23, 2017, the District sent prior written notice to Parent stating, in relevant part:
 - (a) Child meets eligibility criteria to receive special education services as a child with autism.
 - (b) Child's IFSP will serve as the initial IEP as Child has been receiving itinerant services through CDW.
 - (c) Child's placement is pursued at the County Autism Program in order to provide for an appropriate educational program, as the District is not currently able to provide appropriate services within the District.
33. The prior written notice and conference notes from the January 23, 2017 IEP Team meeting do not reflect consideration of least restrictive environment factors related to Child's proposed educational placement at the County Autism Program. In addition, the records do not reflect consideration of any special transportation services based on Child's individual needs, preschool age, and the need to be transported across X County to attend the County Autism Program.
34. On January 25, 2017, Child turned the age of three (3), and CDW itinerant therapy services terminated.
35. On January 27, 2017, Parent visited the County Autism Program, and met with the Special Education Coordinator to discuss the County Autism Program's program and services. Parent was then informed Child would have to ride the bus to and from the County Autism Program for two (2) hours each way, totaling four (4) hours a day.

¹ If Child attends the County Autism Program, the District considers Child to be a transfer student as defined in 14 DE Admin Code § 925.23.4. Delaware regulations provide if a child with a disability (who had an IEP that was in effect in a previous school district) transfers to a new school district in Delaware, and enrolls in a new school within the same school year, the new school district shall provide FAPE to the child (including services comparable to those described in the child's IEP from the previous school district). Within sixty (60) days of the child's initial attendance in the receiving school district, the receiving school district must either adopt the child's IEP from the previous school district at an IEP Team meeting, or develop, adopt, and implement a new IEP.

36. On this basis, Parent rejected the proposed placement at the County Autism Program. Parent contends Child should not have to endure a four (4) hour bus ride on a daily basis to receive FAPE, and the County Autism Program is too far from Child's home.
37. As stated, the approximate distance between Child's home and the County Autism Program is about 37 miles. Child would be transported to the County Autism Program on a school bus, and picked up about 6:20 a.m., and dropped off about 4:50 p.m.
38. The District's Director of Special Education encouraged Parent to visit the County Autism Program, learn more about the program, and talk with other parents in the District who send their preschool age children to the County Autism Program.
39. A February 22, 2016 contact log reflects the District's Director of Special Education called Parent to discuss Child's placement at the County Autism Program. Parent explained his/her rejection of the proposed placement due to the long four (4) hour bus ride and distance away from Child's home. The District's Director of Special Education offered to set up a meeting to discuss the benefits of the County Autism Program, and Parent declined.
40. A March 14, 2016 contact log reflects Parent called the District's Director of Special Education to discuss scheduling a facilitated IEP Team meeting. At the Parent's request, the District scheduled an IEP Team meeting for April 3, 2017.
41. On March 21, 2017, the District sent written notice of the April 3, 2017 IEP Team meeting to Parent. Parent signed a waiver of his/her right to receive ten (10) school days prior notice of the IEP Team meeting under 34 C.F.R. § 300.322 and 14 DE Admin Code § 925.22.0.
42. The April 3, 2017 IEP Team meeting was facilitated by the Special Education Partnership for the Amicable Resolution of Conflict Program ("SPARC").
43. Parent attended the April 3, 2017 IEP Team meeting, in addition to the District's Director of Special Education, the District's School Psychologist, a general education teacher, a special education teacher, a County Autism Program Representative, the District's Speech-Language Pathologist, an advocate, and a representative from Autism Delaware.
44. The April 3, 2017 conference notes state, in relevant part:
 - (a) Parent discussed his/her specific concerns with transportation. In addition to the four (4) hour long bus ride, Parent is concerned if Child is hurt or sick during the school day, Parent would be an hour away from Child.
 - (b) The District offered to reimburse Parent for mileage if Parent was willing to drive Child to the County Autism Program. Parent declined.

- (c) Parent confirmed no interest in pursuing other transportation options to the County Autism Program because the distance is too far from home.
 - (d) The Autism Delaware representative requested whether the District could hire an autism consultant. The District Director of Special Education declined, explaining the District does not have an elementary school.
 - (e) The Autism Delaware representative and PIC advocate requested whether the District could confer with District X and District Y to explore possible programs for Child closer to home. The Director of Special Education agreed to do so.
45. On April 7, 2017, the District sent prior written notice to Parent stating, in relevant part:
- (a) Child's educational placement is proposed at the County Autism Program.
 - (b) Child qualifies for special education services as a child with autism and School District cannot meet Child's needs, and proposes services at the County Autism Program.
 - (c) The District rejected Parent's request to provide itinerant services because Child requires the intensive, comprehensive services at the County Autism Program.
46. An April 7, 2017 contact log reflects the District's Director of Special Education called Parent to confirm the early childhood education and special programs at District X and District Y are not available options for Child. The Director asked if Parent is interested in the District exploring other transportation options for Child to the County Autism Program, and Parent declined.
47. The District scheduled an IEP Team meeting for May 5, 2017 to develop, review, and/or revise Child's IEP. On April 12, 2017, the District sent written notice of the May 5, 2017 IEP Team meeting to Parent in compliance with 34 C.F.R. § 300.322 and 14 DE Admin Code § 925.22.0.
48. An April 26, 2017 contact log reflects the District's Director of Special Education called Parent to inquire if Parent received the notice of May 5, 2017 IEP Team meeting. The Director explained the District did not previously prepare an IEP because temporary placement was decided on the IFSP with the understanding the County Autism Program would convene within sixty (60) days of enrollment to present an IEP draft after collecting data during the sixty (60) day period. Parent stated Child would not be attending the County Autism Program, and Parent declined to attend an IEP Team meeting.

49. Given Parent's refusal to attend, the District canceled the May 5, 2017 IEP Team meeting. By letter dated May 10, 2017, the District sent Parent a draft IEP prepared by the District noting the draft IEP was to be discussed at the May 5, 2017 IEP Team meeting.

CONCLUSIONS

A. Development of Child's IEP and Least Restrictive Environment

A school district responsible for providing FAPE to a preschool age child must ensure that FAPE is provided in the least restrictive environment ("LRE") where the child's unique needs (as described in the IEP) can be met, regardless of whether the school district operates a public preschool program for children with disabilities or not. If the school district does not offer a public preschool program, the school district must consider alternative methods to ensure the LRE requirements are met for each preschool child with a disability, which may include:

- (1) Providing opportunities for the participation of preschool children with disabilities in preschool programs operated by other public programs, such as Head Start and community-based child care facilities;
- (2) Enrolling preschool children with disabilities in private preschool programs;
- (3) Locating classes for preschool children with disabilities in regular elementary schools; or
- (4) Providing home-based services.

See, Dear Colleague Letter: Preschool Least Restrictive Environments, 69 IDELR 106 (OSEP 2017).

A preschool child with a disability has the right to be educated in the LRE. Pursuant to 34 C.F.R. § 300.116, in determining the educational placement a child with a disability, the school district must ensure the child's placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and is made in conformity with the LRE provisions in 34 C.F.R. §§ 300.114 through 300.118. *See, 14 DE Admin Code § 923.16.1.*

In addition, the IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children. *See, 34 C.F.R. § 300.320(a)(5); 14 DE Admin Code § 925.20.1.5.* Before the child can be placed outside the regular educational environment, the group of persons making the placement decision must consider whether supplementary aids and services could be provided that would enable the education of the child, including a preschool child with a disability, in the regular educational setting to be achieved satisfactorily. *See, 34 C.F.R. 300.114(a)(2).* The school district must make available the full continuum of alternative placements, including instruction in regular classes, special classes, special school, and home instruction, to meet the needs of all preschool children with disabilities for special education and related services. *See, 34 C.F.R. § 300.115; 14 DE Admin Code § 923.15.*

Importantly, the child's educational placement must be based on the child's IEP. Following the development of the child's IEP, the IEP Team determines the child's educational placement in the LRE based on the child's individual needs and the services identified in the IEP. *See*, 34 C.F.R. 300.116(b); 14 DE Admin Code § 923.16.2. Consistent with LRE considerations, the child's placement should be as close as possible to the child's home. *See*, 34 C.F.R. § 300.116(b); 14 DE Admin Code § 923.16.2.

In this case, the District proposed an educational placement at the County Autism Program without developing Child's IEP in conformity with 34 C.F.R. § 300.320 and 14 DE Admin Code § 925.20 and LRE requirements. While the County Autism Program may be an appropriate program for Child, there is no evidence the placement decision was made in accordance with LRE considerations in 34 C.F.R. §§ 300.114 through 300.118. The prior written notice and conference notes do not reflect consideration of LRE factors related to Child's educational placement at the County Autism Program, nor do the records reflect individualized consideration of Child's transportation needs. Rather, the District offered transportation to Child based on the standardized service that was available, and not based on an individualized assessment of Child's specific needs as identified in an IEP developed in conformity with Part B requirements. The District informed Parent of its limited resources to serve Child. Parent raises a valid concern with placing his/her preschool age child with a disability on a bus for four (4) hours each day in order to receive FAPE.

In lieu of developing an IEP, the District adopted the IFSP to serve as Child's temporary IEP. In Delaware, the IFSP *may* serve as the IEP for a child with a disability when a two (2) year old child with a disability who will turn three (3) during the school year transitions into Part B, but only if:

- (1) The child's parents are provided with information for using the IFSP as the IEP;
- (2) The child's parents are provided a detailed explanation of the differences between an IEP and an IFSP;
- (3) Written informed consent is obtained from the parents if the parents choose an IFSP;
- (4) The IFSP contains the IFSP content, including the natural environments statement;
- (5) The IFSP includes an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs; and
- (6) The IFSP is developed in accordance with the IEP procedures under Part B of the IDEA.

See, 34 C.F.R. § 300.323(b); *see also*, *Delaware's Early Childhood Transition Operations Agreement for the Administration of Delaware's Child Development Watch Birth to Three Program*, April 2015.

In this case, there is no record of Parent providing written informed consent choosing the IFSP as the IEP. Parent only signed the cover page of the IEP form that was stapled to the IFSP. The prior written notice contains no explanation of the differences between an IFSP and an IEP, and how to use the IFSP as the IEP. The conference notes from the January 23, 2017 IEP Team meeting contain no record of discussion with Parent concerning the differences between an IFSP and the IEP. The April 26, 2017 contact log demonstrates Parent had some misunderstanding about the IFSP serving as the IEP, as Parent questioned why the District had not yet developed the IEP.

Child is entitled to FAPE provided through an IEP based on Child's individual needs in the LRE. In addition, eligibility for special education and related services in Delaware under the disability category of autism begins at birth. *See*, 14 DE Admin Code § 925.6.6.3 ***For the reasons stated, I find a violation of Part B of the IDEA and implementing regulations as the District failed to timely develop an IEP for Child in conformity with 34 C.F.R. § 300.320 and 14 DE Admin Code § 925.20, including consideration of LRE provisions by the IEP Team.***

B. Timeliness of Child's Transition Conference

The Department of Health and Human Services, Division of Public Health, provides provide early intervention services to eligible children under Part C of the IDEA through its CDW program. At least ninety (90) days before the third (3rd) birthday of a child with a disability who may be eligible for Part B services, CDW must notify the school district the child will shortly reach the age of eligibility for Part B services. *See*, 34 C.F.R. § 300.209(b). In addition, CDW must also convene a transition conference among CDW, the family, and the school district not fewer than ninety (90) days before the child's third (3rd) birthday to discuss the special education and related services the child may receive under Part B. *See*, 34 C.F.R. § 300.209(c)(1). Further, the child's IFSP must include a transition plan developed at the transition conference, to include appropriate steps for the child to exit Part C, and any transition services needed by the child and the family. *See*, 34 C.F.R. § 303.209(d)(2)-(3).

In this case, CDW's notification to the District was provided in compliance with the ninety (90) day timeline, but Child's transition conference was not. Child's transition conference was due to be held on or before October 27, 2016, but was not held until November 14, 2016, and less than ninety (90) days prior to Child's third (3rd) birthday.

The roles and responsibilities of the public agencies involved in administering Delaware's Child Development Watch Birth to Three Early Intervention System, as authorized under the IDEA and federal regulations for Parts B and C, are outlined in *Delaware's Early Childhood Transition Operations Agreement for the Administration of Delaware's Child Development Watch Birth to Three Program*, April 2015, ("Delaware's Transition Agreement"). Delaware's Transition Agreement provides that CDW is primarily responsible for scheduling and convening a child's transition conference, which must necessarily include the District's representative to discuss the availability and provision of Part B services at the meeting. In this case, the District was notified on October 6, 2016 of Child's impending third (3rd) birthday, and the need to schedule a transition conference on or before October 27, 2016. Once such notice was given, the District should have taken steps with CDW to ensure Child's transition conference was held in a timely manner and within the ninety (90) day timeline.

CORRECTIVE ACTIONS

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

Student Level Corrective Actions

1. On or before November 3, 2017, the District shall schedule an IEP Team meeting and develop an IEP based on Child's individualized needs and in conformity with 34 C.F.R. § 300.320 and 14 DE Admin Code § 925.20. The District shall provide the notice of IEP Team meeting to Parent, with required content, and prior written notice.
2. The District shall ensure Child's individualized needs and services are outlined in the IEP prior to proposing an educational placement and consistent with LRE provisions.
3. The District shall further ensure, through development of the IEP, Child's individualized needs and preschool age are considered with respect to transportation services and consistent with LRE provisions. The District shall ensure the IEP does not require Child to be transported by bus four (4) hours a day in order to receive FAPE.
4. The District shall provide a copy of the IEP and prior written notice to the Director of Exceptional Children Resources on or before November 10, 2017.
5. On or before November 3, 2017, the District shall develop a written plan of compensatory services for the time period January 25, 2017 to the date the IEP is developed and proposed at an IEP Team meeting. The District shall submit an explanation of how the amount of compensatory services were calculated. The District shall also submit a plan for delivering the compensatory services, including a timeline for service delivery and how the services shall be provided, in consultation with Parent. The written plan shall be provided to the Director of the Exceptional Children Resources Work Group for the Department on or before November 10, 2017.
6. The compensatory services may be provided in the home setting. Compensatory services should be based on the Child's identified needs as outlined in the IFSP, as well as on any additional needs identified in the IEP.

District Corrective Actions

1. On or before January 10, 2018, the District shall ensure professional development is provided to District office special education staff and administrators regarding LRE, and the requirement that educational placement decisions and transportation services be consistent with the needs outlined in IEPs and LRE provisions. The District shall also ensure professional development is provided on timely transitions from Part C to B, including the scheduling of transition conferences and development of transition plans within the ninety (90) day timeline. The Department's Liaison shall assist with

developing a corrective action plan regarding timely and quality transition conferences pursuant to Delaware's Transition Agreement, to include District and CDW staff.

2. Copies of professional development materials, PowerPoint presentations, agendas, and attendance rosters shall be provided to the Director of Exceptional Children Resources Work Group for the Department on or before January 20, 2018.

Complaint Investigator