



July 16, 2012

[REDACTED]
Public Charter School

RE: State Complaint No. 011-024

LETTER OF DECISION

PROCEDURAL BACKGROUND

The State Complaint Office of the Office of the State Superintendent of Education (OSSE), Division of Special Education received a State Complaint on [REDACTED] from [REDACTED], hereinafter “complainant,” alleging violations in the special education program of [REDACTED] (Student ID # [REDACTED] hereinafter “student” or “child,” while enrolled at [REDACTED] Public Charter School ([REDACTED] PCS).

The complainant alleged that the school violated certain provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and regulations promulgated at 34 CFR Part 300, specifically, failure to ensure provision of supplementary aids and services to provide nonacademic and extracurricular services and activities in the manner necessary to afford the child an equal opportunity for participation in those services and activities; failure to include in the IEP a statement of the special education and related services and supplementary aids and services provided to enable the child to participate in extracurricular and other nonacademic activities; failure to determine whether conduct that prompted suspension of a child with a disability was caused by or had a direct and substantial relationship to the child’s disability, or was the direct result of the LEA’s failure to implement the IEP; failure to ensure that the IEP Team includes, at the discretion of the parent, other individuals who have knowledge or special expertise regarding the child; and failure to consider the use of positive behavioral interventions and supports and other strategies to address behavior which impedes the child’s learning.

The State Complaint Office for OSSE has completed its investigation of the State Complaint. This Letter of Decision is the report of the final results of OSSE’s investigation.

COMPLAINT ISSUES

The allegations raised in the complaint, further clarified by a review of documents and interviews or revealed in the course of the investigation, raised the following issues under the jurisdiction of the State Complaint Office:

1. Whether [REDACTED] PCS failed to include in the IEP a statement of the special education and related services and supplementary aids and services that would be provided to enable the child to participate in extracurricular and other non-academic activities, as required by 34 CFR §300.320(a)(4)(ii) and failed to ensure provision of supplementary aids and services to provide nonacademic and extracurricular services and activities in the manner necessary to afford the child an equal opportunity for participation in those services and activities, as required by 34 CFR §300.107(a)?
2. Whether [REDACTED] PCS failed to determine whether conduct that prompted suspension of a child with a disability was caused by or had a direct and substantial relationship to the child’s disability, or was the direct result of the LEA’s failure to implement the IEP according to the requirements of the IDEA promulgated at 34 CFR §§300.530(e) and 300.536?
3. Whether [REDACTED] PCS failed to ensure that the IEP Team includes, at the discretion of the parent, other individuals who have knowledge or special expertise regarding the child, as required by 34 CFR §300.321(a)(6) and to notify the parent of his or her right to invite such other individuals, as required by 34 CFR §300.322(b)(ii)?
4. Whether in developing the child’s IEP, [REDACTED] PCS failed to consider the use of positive behavioral interventions and supports and other strategies to address behavior which impedes the child’s learning, as required by 34 CFR §300.324(a)(2)(i)?

INVESTIGATIVE PROCEDURE

This investigation included interviews with the following individuals:

1. Parent
2. [REDACTED] PCS [REDACTED]
3. [REDACTED] PCS [REDACTED]
4. [REDACTED] PCS [REDACTED]

The investigation also included review of the following documents which were either submitted by the complainant, submitted by [REDACTED] PCS or accessible via the Special Education Data System (SEDS):

[REDACTED]

[REDACTED]

GENERAL FINDINGS OF FACT

1. The student is a child with a disability as defined by 34 CFR §300.8.
2. The student’s disability category is Multiple Disabilities (MD).
3. The student attended [REDACTED] PCS during the [REDACTED] and [REDACTED] school years.

ISSUE ONE: STATEMENT IN IEP AND PROVISION OF SUPPLEMENTARY AIDS AND SERVICES TO PROVIDE NONACADEMIC AND EXTRACURRICULAR SERVICES AND ACTIVITIES

Findings of Fact

1. The [REDACTED] IEPs do not include a statement of the special education and related services and supplementary aids and services to be provided to the student to enable [REDACTED] to participate in extracurricular and other nonacademic activities.
2. [REDACTED] PCS [REDACTED] reported that supplementary aids or services were not discussed and had they been necessary, they would have been included in the student’s IEPs.
3. Prior to the development or review of the student’s [REDACTED], [REDACTED], and [REDACTED] IEPs, the student had been denied participation in a June [REDACTED] school trip to [REDACTED] as a result of the number of referrals

- student had received throughout the school year and in the time immediately preceding the trip.
4. The student's parent did not request that any of the student's IEPs include a statement related to supplementary aids and services to be provided in order to enable the student to participate in extracurricular and other nonacademic activities.
 5. The [REDACTED] IEP was in effect on [REDACTED], when the parent was informed that the student could not attend the school camping trip during the week of [REDACTED].
 6. Notes from the [REDACTED] IEP state that the student was meeting target behaviors established in the student's BIP 49% of the time.
 7. The [REDACTED] BIP states that the student has a deficit in maintaining attention, has a difficult time staying on-task during class, can distract students by making inappropriate noises or engaging in inappropriate noises, and requires multiple redirections from teachers as a result of the student's disability.
 8. The student was not allowed to participate in the June [REDACTED] camping trip as a result of the number of referrals [REDACTED] received throughout the school year and in the time immediately preceding the trip.
 9. The Discipline Report from [REDACTED] – [REDACTED] reflects that the student was involved in fifty-nine disciplinary incidents.
 10. Notes from the [REDACTED] Multidisciplinary Team meeting state that the student was meeting the target behaviors established in [REDACTED] BIP 46% of the time.
 11. Notes from the [REDACTED] IEP state that the student was meeting target behaviors established in [REDACTED] BIP 54% of the time.
 12. The [REDACTED] Psychiatric Assessment contains the diagnoses of ADHD Combined Type, Oppositional Defiant Disorder, Mood Disorder Not Otherwise Specified (NOS), and Anxiety Disorder NOS.
 13. The [REDACTED] IEP was in effect on [REDACTED], when the parent was informed that the student could not attend the Freshman Retreat during the week of [REDACTED].
 14. The [REDACTED] IEP does not include a statement of the special education and related services and supplementary aids and services to be provided to the student to enable [REDACTED] to participate in extracurricular and other nonacademic activities.
 15. The [REDACTED] BIP indicates that as a result of the student's disabilities, the student may demonstrate: difficulty maintaining attention and staying on-task during class; attention seeking from peers by making inappropriate noises, engaging in inappropriate activities, and requiring multiple redirections from teachers and other authority figures; becoming emotionally agitated and having difficulty regulating emotions in social settings, which could result in angry or emotional outburst; and becoming oppositional and/or defiant to authority figures, which may result in difficulty following directions and arguing.
 16. The [REDACTED] Analysis of Existing Data reflects that: the student's behavior pervasively impacted the student's functioning during all parts of the school day; the student was not responding to adults or interventions; and the student was not making progress in the area of Emotional, Social, and Behavioral Development.
 17. A week prior to Freshman Retreat, the parent, student, and [REDACTED] PCS [REDACTED] met and discussed the student's participation in the retreat, and decided that for safety reasons, the student could not attend if [REDACTED] received any disciplinary referrals for refusal to follow instructions, gross disrespect, or being out of area during the week prior to the Retreat.

18. The [REDACTED] PCS [REDACTED] is not a member of the student's IEP team.
19. Neither the student's special education teacher nor the [REDACTED] PCS SEC participated in the discussion of the student's participation in the retreat.
20. During the week prior to the Freshman Retreat, The student received two disciplinary referrals in one evening for failing to follow instructions and gross disrespect.
21. On [REDACTED], the student's parent was notified that the student was not allowed to participate in the Freshman Retreat during the week of [REDACTED] due to the two disciplinary referrals received during the week immediately preceding the trip.

Discussion/Conclusion

[REDACTED] PCS is out of compliance with 34 CFR §300.107(a) and 34 CFR §300.320(a)(4)(ii).

Pursuant to 34 CFR §300.320(a)(4)(ii), a student's IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities. In addition, pursuant to 34 CFR §300.107(a), a public agency must take steps to provide nonacademic and extracurricular services and activities in the manner necessary to provide children with disabilities an equal opportunity for participation in those services and activities. IDEA's requirement that students with disabilities be educated in the Least Restrictive Environment (LRE) applies whether the public agency is providing a general educational curriculum or nonacademic or extracurricular activities. (34 CFR §§300.114-300.117)

[REDACTED] PCS denied the student the opportunity to participate in multi-day off-campus programs in June [REDACTED] and April [REDACTED]. The student is diagnosed with ADHD Combined Type, Oppositional Defiant Disorder, Mood Disorder NOS, and Anxiety Disorder NOS. The student displays a variety of behaviors related to [REDACTED] disabilities, and received 59 disciplinary referrals between [REDACTED] and [REDACTED]. The referrals are for a range of behaviors including chewing gum, punching a fellow student and refusing to apologize, cursing, tardiness, wandering the school or residence area without a pass, and rude or disrespectful interactions with staff members. The [REDACTED] Analysis of Existing Data states that the student's behavior pervasively impacted the student's functioning during all parts of the school day, that the student was not responding to adults or interventions, and that [REDACTED] was not making progress in the area of emotional, social, and behavioral development. [REDACTED] PCS developed and implemented a BIP for the student, but during the one-year time frame covered by this Letter of Decision, the student was able to meet established behavioral targets only 46-54% of the time.

Though the school was aware that the student's behavior had prevented [REDACTED] from participating in the school camping trip in June [REDACTED] the IEP team failed to consider what additional aides and services would allow the student the maximum appropriate participation with nondisabled students in the [REDACTED] Freshman Retreat. (34 CFR §300.117) The school could have introduced additional supports, such as a one-to-one aide or a peer model for behavior during extracurricular or off-campus activities, which would have enabled the student to participate in the retreat. Instead, a [REDACTED] PCS staff member who is not part of the IEP team determined that the student's

participation in the retreat would depend upon the student going a week without refusal to follow instructions, gross disrespect, or being out of area during the week prior to the Retreat. █████ PCS had abundant evidence that the student's disabilities negatively impact the student's behavior, and was aware that the student received an average of 11-12 disciplinary referrals per month. █████ PCS was also aware that the student was unable to meet behavioral targets more than 54% of the time. Given this evidence and █████ PCS's understanding that the student's behavior was connected to █████ disability, it was not educationally appropriate to predicate participation in the Freshman Retreat on 100% compliance with behavioral targets by this student, particularly as the student was not offered different or additional behavioral support to meet this goal.

Despite their knowledge that this student's behavior had been a barrier to participating in similar activities in June █████ █████ PCS did not take steps to include a statement in the student's IEP of the special education and related services and supplementary aids and services would be provided to enable █████ to participate in extra-curricular and other nonacademic activities as required by 34 CFR §300.320(a)(4)(ii) or to provide the student with an equal opportunity to participate in the Freshman Retreat as required under 34 CFR §300.107(a). That the student's parent did not explicitly request such supports does not release █████ PCS from the responsibility of including such a statement in the student's IEP. It is possible that there were no supports and services that █████ PCS could have put in place to enable the student to participate in the Freshman Retreat but the IDEA requires a public agency to consider and implement measures to enable participation in extra-curricular and non-academic activities and █████ PCS failed to do that here.

Therefore, █████ PCS is out of compliance with 34 CFR §§ 300.320(a)(4)(ii) and 300.107(a).

OSSE notes that the LEA's response includes reference to multiple cases in support of its actions. These were considered, but ultimately not held to be persuasive on this issue because all of the cited cases were decided prior to the release of the IDEA 2004 regulations in August 2006. Section 34 CFR 300.107(a), at issue here, was revised by regulations released by the Department of Education in August 2006. Furthermore, some of the cases rely heavily or exclusively on analysis of the issue under Section 504 and the ADA, which are not under consideration here.

OSSE also questions whether the Freshman Retreat is best classified as an extra-curricular activity. The materials given to parents to describe the Retreat describe it as "█████ programming" that is provided to █████ students in lieu of traditional academic programming, and specify that participation is "mandatory." Given this description, the Freshman Retreat may actually be part of the regular educational programming at █████ in which case the LEA's failure to provide the student with adequate support and services to support participation is even more serious. (34 CFR §300.114 (a)(2)(ii))

ISSUE TWO: MANIFESTATION DETERMINATIONS

Findings of Fact

1. For the portion of the [REDACTED] school year covered by this complaint, the student was suspended for a total of 9 days.
2. A Manifestation Determination Review was held on [REDACTED].
3. During the [REDACTED] Manifestation Determination Review, it was determined by the IEP Team that the student's disability needed to be reevaluated before the meeting could proceed.
4. The student's psychiatric assessment was completed on [REDACTED].
5. The Manifestation Determination Review was reconvened on [REDACTED].
6. At the [REDACTED] Manifestation Determination Review, the team determined the conduct in question was caused by or had a direct and substantial relationship to the child's disability.

Discussion/Conclusion

[REDACTED] PCS is in compliance with 34 CFR §§ 300.530(e) and 300.536.

Pursuant to 34 CFR §300.530(e), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the IEP.

A change of placement occurs if the removal is for more than 10 consecutive school days or the child has been subjected to a series of removals that constitute a pattern. (34 CFR §300.536(a))

The complaint alleged that behavioral referrals were used in a pre-textual manner to suspend the student for weeks at a time. This allegation is not supported by the record. The record reflects that the student was suspended for nine days total as of the date the complaint was filed. The school regularly reviewed the BIP after suspensions and conducted a manifestation determination though it was not required. The record indicates that the special education team at [REDACTED] PCS took the matter of suspension seriously, investigated the cause of each suspension, and took affirmative steps to attempt to support the student's behavior after each incident of suspension.

Therefore, [REDACTED] PCS is in compliance with 34 CFR §§300.530(e) and 300.536.

ISSUE THREE: SERVICES – IEP TEAM INCLUSION OF OTHER INDIVIDUALS

Findings of Fact

1. The [REDACTED] IEP meeting invitation and scheduling was accomplished by a series of emails exchanged between the parent and [REDACTED] PCS SEC.
2. The IEP meeting invitation emails did not indicate that [REDACTED] PCS had in effect a policy requiring advance-notice of attendance of advocates or other parentally-selected individuals at IEP meetings.

3. In the Special Education Data System (SEDS), the standard Letter of Invitation (LOI) to IEP meetings includes a statement that the parent has the right to invite additional participants who have knowledge or special expertise regarding the student to the IEP meeting.
4. SEDS generated LOIs do not require or recommend that the parent give advance notice to the school before bringing additional participants to an IEP meeting.
5. The parent invited [REDACTED] special education advocate to attend the student's [REDACTED] IEP Meeting.
6. Upon arrival of the advocate at the [REDACTED] IEP Meeting, representatives of [REDACTED] PCS said that the meeting would need to be rescheduled in order to allow legal counsel for [REDACTED] PCS to also attend the meeting.
7. The parent agreed to proceed with the [REDACTED] IEP Meeting without [REDACTED] advocate in attendance.
8. The [REDACTED] IEP Meeting proceeded without the advocate or legal counsel for [REDACTED] PCS.
9. After the IEP meeting, by email dated [REDACTED], the [REDACTED] [REDACTED] indicated that if the advocate wanted to attend IEP meetings in the future, arrangements for [REDACTED] attendance should be made in advance of the meeting, as part of the invitation process.

Discussion/Conclusion

[REDACTED] PCS is out of compliance with 34 CFR §§300.321(a)(6) and 300.322(b)(1)(ii).

The IDEA regulations at 34 CFR §300.321(a)(6) requires each public agency to ensure inclusion, at the discretion of the parent or the agency, of other individuals who have knowledge or special expertise regarding the child. The regulation does not require the parent to provide the public agency with notice of other individuals who in the parent's discretion have knowledge or special expertise regarding the child and who the parent has invited to attend. To the contrary, IDEA regulations require the public agency to notify parents of their right to invite other individuals with knowledge or special expertise. In accordance with 34 CFR §300.322 (b)(1)(ii), the standard LOI to IEP meetings generated through SEDS states that parents have the right to invite additional participants who have knowledge or special expertise regarding the student to the IEP meeting. The standard LOI does not require or recommend that parents give notice to the school before bringing an additional participant to the IEP meeting.

[REDACTED] PCS did not use the standard SEDS LOI when scheduling the [REDACTED] IEP meeting. Instead, the meeting was scheduled by exchange of emails between the parent and the [REDACTED] SEC. The IEP invitation emails from [REDACTED] PCS do not comply with IDEA requirements because they do not include a statement of parental right to invite additional participants. (34 CFR §300.322 (b)(1)(ii))

The parent invited [REDACTED] special education advocate to attend the student's [REDACTED] IEP meeting, and did not give advance notice to [REDACTED] PCS. When [REDACTED] arrived at the student's [REDACTED] IEP meeting, the parent was informed by representatives of [REDACTED] PCS that if [REDACTED] wanted [REDACTED] advocate to attend the meeting, the meeting would have to be rescheduled so as to include [REDACTED] PCS's legal counsel. As a result, the parent agreed to proceed with the [REDACTED] IEP Meeting without [REDACTED] advocate. In an exchange of emails following the IEP, the [REDACTED] PCS

SEC informed the advocate that to participate in future IEP meetings at [REDACTED] PCS, the advocate would need to be involved in the invitation process in advance of the meeting.

Pursuant to 34 CFR §300.321(a)(6), both the parent and the public agency are granted discretion to permit IEP Team inclusion of other individuals who have knowledge or special expertise regarding the child. Under the IDEA, only the public agency is subject to an advance notice requirement of who the public agency has invited to the meeting. (See 34 CFR §300.322(b)(1)(i)) It was within the parent's discretion to invite [REDACTED] special education advocate to participate in the [REDACTED] IEP Meeting. [REDACTED] PCS improperly deprived the parent of [REDACTED] right to include an individual with special knowledge or expertise in the IEP, and inappropriately asserted a previously unannounced and unadvertised policy requiring advance notice for an advocate to accompany a parent to an IEP meeting.

Therefore, [REDACTED] PCS is out of compliance with 34 CFR §300.321(a)(6) and 34 CFR §300.322 (b)(1)(ii).

ISSUE FOUR: POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS

Findings of Fact

1. The student's behavior impedes the student's learning.
2. The IEPs in effect during the time frame for this complaint contain multiple goals that specifically address behavior through the use of positive behavior supports and strategies in the area of academic-mathematics, academic-reading, academic-written expression, adaptive/daily living skills, and emotional, social, and behavioral development.
3. The IEPs in effect during the time frame covered by this complaint contain related services and consultation through one to one and group counseling in the area of Behavioral Support Services.
4. The student has had a BIP in place during the time frame by this complaint, and it has been reviewed and/or updated twice during the year.
5. Notes from the student's [REDACTED] Multidisciplinary Team meeting state that a success plan was created for the student to enable [REDACTED] to support and monitor [REDACTED] own behavior.
6. Notes from the [REDACTED] IEP describe the development of a menu of three activities the student could choose to engage in to help [REDACTED] manage [REDACTED] behavior while in class.

Discussion/Conclusion

[REDACTED] PCS is in compliance with 34 CFR §300.324(a)(2)(i).

The IDEA regulations at 34 CFR §300.324(a)(2)(i) requires that when developing an IEP for a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions, supports, and other strategies to address that behavior. [REDACTED] PCS has considered and implemented multiple positive behavioral supports and strategies for the student that are utilized throughout [REDACTED] educational program.

The student's IEPs during the time period under consideration are replete with behavioral goals in the areas of academic-mathematics, academic-reading, academic-written expression, and emotional, social, and behavioral development. The student's IEPs also include behavioral support services in the form of group and direct counseling services. The IEP team has reviewed and updated the student's BIP twice during the year under review, and has incorporated a variety of strategies that encourage the student to monitor and regulate [REDACTED] own behavior in a positive, non-punitive manner.

The complainant alleged that the IEP Team did not use appropriate strategies to address the student's behavior. [REDACTED] PCS's use of behavioral supports and strategies preceding the Freshman Retreat was inadequate. It was not educationally appropriate to predicate participation in the Freshman Retreat on 100% compliance with behavioral targets by this student, particularly as the student was not offered different or additional behavioral support to meet this goal. The school could have introduced additional supports, such as a one-to-one aide or a peer model for behavior during extracurricular or off-campus activities, which would have enabled the student to participate in the retreat. Conversely, the IEP team has given serious consideration to the issue of behavior for the student during the regular instructional day and has implemented a wide variety of positive behavior support strategies for the student.

Therefore, [REDACTED] PCS is in compliance with 34 CFR §300.324(a)(2)(i).

CORRECTIVE ACTION

[REDACTED] PCS is required to take the following actions:

1. To correct the noncompliance with 34 CFR §§300.107(a) and 300.320(a)(4)(ii), [REDACTED] PCS must convene a meeting of the student's IEP Team, by no later than [REDACTED]. At the meeting, the team must amend student's current IEP by including a statement of the special education and related services and supplementary aids to be provided to enable the student to participate in extracurricular and other nonacademic activities. The team must also consider and elect a manner through which supplementary aids and services will be provided to the student in order to ensure the student is afforded an equal opportunity to participate in extracurricular and nonacademic activities. Within five business days of the date of the meeting, [REDACTED] PCS must upload proof of the above into SEDS.
2. To correct noncompliance with 34 CFR §300.322 (b)(1)(ii), [REDACTED] PCS must either implement an internal policy of using the standard LOI in SEDS to invite parents to meetings, or include a statement of the parental right to invite additional participants in invitation emails. All SECs, school administrators, and school staff involved with issuing special education meeting invitations must be provided training on this issue by [REDACTED]. By [REDACTED], [REDACTED] PCS must provide documentation demonstrating implementation of this correction to OSSE.
3. To correct noncompliance with 34 CFR §300.321(a)(6), [REDACTED] PCS must provide training to all school administrators and SECs by [REDACTED] that clarifies that parents may bring additional participants to IEP meetings without advance notice to the school. The school may only require advance notice from the parent if the parent brings an attorney to a meeting.

If you have any questions regarding this report, please contact Jennifer Masoodi, State Complaints Manager, at 202-741-0479 or jennifer.masoodi@dc.gov.

Sincerely,

Amy Maisterra, Ed.D., MSW
Assistant Superintendent for Special Education

cc: [REDACTED], Complainant
[REDACTED], U.S. Department of Education, Office of Civil Rights