



Karen B. Salmon, Ph.D.
State Superintendent of Schools

October 28, 2020

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Ms. Kristin Mentges
Supervisor of Special Education
Talbot County Public Schools
12 Magnolia Street
Easton, Maryland 21601

RE: [REDACTED]
Reference: #21-010

Dear Parties:

The Maryland State Department of Education (MSDE), Division of Early Intervention and Special Education Services, has completed the investigation of the complaint regarding special education services for the above-referenced student. This correspondence is the report of the final results of the investigation.

ALLEGATION:

On September 2, 2020, the MSDE received a complaint from Ms. Jennifer Falter, Esq., hereafter “the complainant,” on behalf of the above-referenced student and his parents, Dr. [REDACTED] and Mrs. [REDACTED]. In the September 2, 2020 correspondence, the complainant alleged that the Talbot County Public Schools (TCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the student.

The MSDE investigated the allegation that the TCPS has not provided the student with a Free Appropriate Public Education (FAPE) in the educational placement required by the Individualized Education Program (IEP), since September 2, 2019, in accordance with 34 CFR §§300.101 and .323 and §§300.114 and .116.

BACKGROUND:

The student is fourteen (14) years old and is identified as a student with Autism under the IDEA. He has an IEP that requires the provision of special education instruction.

During the 2019-2020 school year, the student attended [REDACTED] a nonpublic, separate, special education school, where he was placed by the TCPS until the March 16, 2020 Statewide closure of all schools, as the result of the national COVID-19 pandemic. The student has not received education services since the end of the 2019-2020 school year.

FINDINGS OF FACTS:

1. The IEP in effect at the beginning of the investigation period, dated August 26, 2019, stated that the student requires thirty (30) hours of special education services per week to be provided in a nonpublic, separate, special education school. The documentation of the meeting reflects that the team discussed that the student was only accessing ten (10) hours per week due to his interfering behavior and decided that the student's needs could not be addressed in a nonpublic separate special education school. The IEP team documented that the Least Restrictive Environment (LRE) in which the IEP can be implemented is a residential treatment center (RTC). At that time, the student's parents were not in agreement with the placement decision and refused to sign the necessary consent forms to send the student's information to RTCs.
2. After repeated requests to the parents by the school system to support the implementation of the placement decision required by the IEP, on December 20, 2019, the TCPS filed a request for mediation and due process complaint with the Maryland Office of Administrative Hearings in order to implement the IEP in the placement determined by the IEP team.
3. On January 22, 2020, a mediation agreement was signed by TCPS and the complainant through both parties' respective legal counsel. The parties agreed that the TCPS would withdraw its pending due process complaint and the parents would sign consent forms for applications to be sent to the residential programs at [REDACTED] and [REDACTED] ([REDACTED]). However, the mediation agreement also stated "TCPS will modify the copy of the IEP that will be sent to [REDACTED] – [REDACTED] Program to remove the IEP Team's determination that a residential placement is necessary."
4. On January 27, 2020, the TCPS made application for the student to the RTCs and the [REDACTED] – [REDACTED] as agreed upon on January 22, 2020.
5. On February 3, 2020, [REDACTED] rejected the student's application.
6. On February 3, 2020, the [REDACTED] – [REDACTED] Program rejected the student's application.
7. On February 10, 2020, the parents received a letter informing them that the student was accepted to [REDACTED]. However, the letter indicates that there were no current openings and that the parents would be notified when an opening became available for the student at the RTC.

8. On February 14, 2020, the TCPS began attempting to convince the parents to attend another IEP team meeting to consider additional placements. The parents eventually agreed to participate in an IEP team meeting, which was held on June 2, 2020.
9. At the June 2, 2020 IEP team meeting, the team reviewed and revised the IEP to include additional services such as speech/language therapy and psychological consultations and the availability of psychiatric services. The team discussed that an application would be made again to [REDACTED] with the revised IEP, as well as to the residential program at [REDACTED] ([REDACTED]).
10. On June 18, 2020, the TCPS made application for the student to the RTCs at [REDACTED] and [REDACTED]. There is documentation that the TCPS was also investigating the appropriateness of other programs for the student as well.
11. By email, dated June 24, 2020, [REDACTED] again accepted the student into their program. However, it did not indicate that an opening had become available.
12. By email, dated July 7, 2020, [REDACTED] responded that, due to the COVID 19 pandemic, they were currently closed to new admissions and could not predict a date of availability of placement for the student.
13. On August 12, 2020, the TCPS contacted the student's parents and expressed concern regarding whether the [REDACTED] residential program could provide the student with all of the services required by his IEP and requested that the IEP team meet to discuss this concern.
14. On September 10, 2020, the IEP team, including an admissions representative for [REDACTED] convened. The [REDACTED] representative reported that the program at [REDACTED] provided two (2) hours of educational instruction per day and offered a one to one teacher/student staffing ratio. However, the representative could not provide details about the services that are provided during the remainder of the day. The representative also reported that a student's IEP is "followed as closely as possible," and then, after a thirty (30) day period, the staff assess students and "create a proposed plan to be incorporated into the student's IEP." The TCPS staff expressed concerns about the program meeting the student's needs because he requires more than a one-to-one teacher staffing ratio and two (2) hours of academic instruction per day.
15. There is no documentation that the TCPS included a representative of any of the nonpublic schools or facilities in any of the IEP teams prior to September 10, 2020.
16. On September 18, 2020, and again on October 16, 2020, the TCPS sent parental consent forms for four (4) additional RTCs, which have not been returned by the parents, who are not in agreement with looking into other placements, as the student has been accepted at [REDACTED].

17. On September 23, 2020, the complainant provided documentation to the TCPS from [REDACTED] stating that they accepted the student because their program meets his needs, as outlined in his IEP as follows:

[The student] will receive 30 hours a week of special education services outside of the general education setting in a structured environment.
[The student] requires intensive one to one and small group instruction for academic behavior, social needs as well as personal hygiene.

The correspondence also indicated that there are currently no openings available at [REDACTED]

18. There is no documentation that the TCPS has reconvened the IEP team to address the clarification by [REDACTED] about its ability to implement the IEP or to discuss the additional placements that have been recommended by the school system.
19. There is no documentation that the TCPS determined whether and how the student can be provided with special education services, including considering additional behavioral supports to assist the student with accessing instruction, until an appropriate placement is obtained.

DISCUSSION/CONCLUSIONS:

In order to ensure the provision of a FAPE, the public agency must provide the student with special education and related services in the educational placement required by the IEP (34 CFR §§300.101 and .323). Before a public agency places a student in or refers a student to a nonpublic school or facility, the public agency must ensure that the IEP team reviews the IEP and that a representative of the nonpublic school or facility participates in the IEP team meeting (34 CFR §300.325). When reviewing and revising the IEP, the public agency must ensure that the IEP team considers supplementary aids and services and program modifications and supports, as well as positive behavioral interventions that can be provided to address interfering behavior (34 CFR §§300.320 and .324).

Based on the Findings of Facts #1 - #19, the MSDE finds that the TCPS has not ensured that the student has been provided with special education and related services in the educational placement required by the IEP since January 22, 2020, in accordance with 34 CFR §§300.101 and .323.

Based on the Findings of Facts #2 and #8 - #16, the MSDE finds that, while the student's parents have contributed to the delay in obtaining an appropriate educational placement for the student, the TCPS has not ensured that representatives of the nonpublic school and facilities to which the student was referred, participated in the IEP team meetings for the student prior to September 10, 2020, in accordance with 34 CFR §300.325.

In addition, based on the Findings of Facts #16 - #18, the MSDE finds that the TCPS has not reconvened the IEP team with participation by representatives of [REDACTED] and additional

recommended RTCs to determine whether any of those programs are appropriate following the September 10, 2020 IEP team meeting, in accordance with 34 CFR §300.325.

Furthermore, based on the Finding of Fact #19, the MSDE finds that the TCPS has not determined whether and how the student can be provided with special education services, including considering additional behavioral supports to assist the student with accessing instruction, until an appropriate placement is obtained, in accordance with 34 CFR §§300.320 and .324. Therefore, this office finds that the student has been denied a FAPE since September 2, 2019.

CORRECTIVE ACTIONS/TIMEFRAMES:

The IDEA requires that State complaint procedures include those for effective implementation of the decisions made as a result of a State complaint investigation, including technical assistance activities, negotiations, and corrective actions to achieve compliance (34 CFR §300.152). Accordingly, the MSDE requires the public agency to provide documentation of the completion of the corrective actions listed below.¹

This office will follow up with the public agency to ensure that it completes the required action consistent with the MSDE Special Education State Complaint Resolution Procedures. If the public agency anticipates that the timeframe below may not be met, or if any of the parties seeks technical assistance, they should contact Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action.² Dr. Birenbaum can be reached at (410) 767-7770 or by email at Nancy.birenbaum@maryland.gov.

Student-Specific

The MSDE requires the TCPS to provide documentation that it has convened an IEP team meeting with representatives of [REDACTED] and each nonpublic school and facility for which it is recommending for referrals for the student, and takes the steps necessary to place the student in an appropriate educational placement without further delay.

The MSDE also requires the TCPS to determine whether and how the student can be provided with special education services, including considering additional behavioral supports to assist the student with accessing instruction, until an appropriate placement is obtained.

¹ The United States Department of Education, Office of Special Education Programs (OSEP) states that the public agency must correct noncompliance in a timely manner, which is as soon as possible, but not later than one (1) year from the date of identification of the noncompliance. The OSEP has indicated that, in some circumstances, providing the remedy could take more than one (1) year to complete. If noncompliance is not corrected in a timely manner, the MSDE is required to provide technical assistance to the public agency, and take tiered enforcement action, involving progressive steps that could result in the redirecting, targeting, or withholding of funds, as appropriate.

² The MSDE will notify the Directors of Special Education of any corrective action that has not been completed within the required timelines.

The MSDE further requires the TCPS to provide documentation that the IEP team has determined the compensatory services or other remedy for the loss of FAPE from September 2, 2019 until an appropriate placement is obtained.

System-Based

The MSDE requires the TCPS to provide documentation that it has taken steps to ensure that, before it refers a student to a private school or facility, an IEP team meeting is conducted with participation of the representatives from those private schools or facilities and that IEP teams consider whether additional supports can be provided until an appropriate placement is obtained.

As of the date of this correspondence, this Letter of Findings is considered final. This office will not reconsider the conclusions reached in this Letter of Findings unless new, previously unavailable documentation is submitted and received by this office within fifteen (15) days of the date of this correspondence. The new documentation must support a written request for reconsideration, and the written request must include a compelling reason for why the documentation was not made available during the investigation. Pending this office's decision on a request for reconsideration, the public agency must implement any corrective actions within the timeframes reported in this Letter of Findings.

The parties maintain the right to request mediation or to file a due process complaint, if they disagree with the identification, evaluation, placement, or provision of a FAPE for the student, including issues subject to this State complaint investigation, consistent with the IDEA. The MSDE recommends that this Letter of Findings be included with any request for mediation or a due process complaint.

Sincerely,

Marcella E. Franczkowski, M.S.
Assistant State Superintendent
Division of Early Intervention
and Special Education Services

MEF/dec

c: [REDACTED] and [REDACTED] c/o Jennifer Falter, Esq.
Kelly Griffith
Dori Wilson
Anita Mandis
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Nancy Birenbaum