




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

October 24, 2019




Mr. Philip A. Lynch
Director of Special Education Services
Montgomery County Public Schools
850 Hungerford Drive, Room 230
Rockville, Maryland 20850

RE: 
Reference: #20-021

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.

On August 28, 2019, the MSDE received correspondence from Ms.  hereafter “the complainant,” on behalf of her daughter, the above-referenced student. In that correspondence, the complainant alleged that the Montgomery County Public Schools (MCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the student.

The MSDE investigated the following allegations:

1. The MCPS has not ensured that the student’s Individualized Education Program (IEP) addressed her behavioral and safety needs¹ since the start of the 2018-2019 school year, in accordance with 34 CFR §§300.320 and.324.

¹ This allegation includes addressing the student’s behavioral and safety needs during Community Based Instructional (CBI) activities.

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2. The MCPS did not ensure that the reports of the student's progress towards achievement of the annual behavioral IEP goals were consistent with the data during the 2018-2019 school year, in accordance with 34 CFR §300.324.
3. The MCPS did not provide access to the student's educational record within the required timeline, since June 27, 2019, the date of your request, in accordance with 34 CFR §§300.501 and .613.

BACKGROUND:

The student is sixteen (16) years old and attends [REDACTED] School. She is identified as a student with Autism under the IDEA and has an IEP that requires the provision of special education and related services.

ALLEGATIONS #1 AND #2: ADDRESSING THE STUDENT'S BEHAVIORAL AND SAFETY NEEDS AND ENSURING PROGRESS REPORTS ARE CONSISTENT WITH THE DATA

Findings of Facts:

August 28, 2018

1. The IEP in effect at the start of the investigation period identifies that the student's primary disability is Autism, and that it "impacts her functioning in academics, self-management skills, and independent community living skills." It documents that the student's "disability affects her participation in all areas of the general curriculum."
2. The IEP also states that the student has significant impairments in cognitive and adaptive skills, has "atypical" socialization and communication skills, and restricted, repetitive behaviors that are consistent with an Autism Spectrum Disorder.
3. The IEP includes the following present levels of academic achievement and functional skills derived from frequency data, teacher observation, and teacher records. The student's management skills were measured at a level of performance that is atypical/below grade level expectancy, with needs to include working on referencing a schedule, routine changes, and using appropriate communication during schedule and routine changes. The data reflects the following:

Prior to September 2018

- Aggression 32.8 incidents per day.
- Self-injurious behavior 32.1 per day.
- Tantrum behaviors 0.3 per day; duration of tantrums 2.6 minutes per day.

September 2018 through January 2019

- Aggression 18.8 incidents per day.
 - Self-injurious behavior 8.0 per day.
 - Tantrum behaviors 0.2 per day; duration of tantrums .6 minutes per day.
4. The IEP states that the student is a multimodal communicator using verbal speech, a voice output device, gestures and visual symbols. She is able to expand her vocabulary with highly motivating pictures and varying levels of prompting.
 5. The IEP includes accommodations and supplementary aids and services to address the student's attention, social, and emotional behaviors. The IEP states that the student requires daily reinforcement of positive behaviors through the individualized use of positive, concrete reinforcers.
 6. The IEP includes annual goals in all academic areas including reading, math, and written language, as well as annual goals to address the student's needs in transition services, independent community living, speech and language pragmatics, articulation and expressive language, fine motor, and pre-vocational career skills. It also includes a goal to address the student's inappropriate and interfering behaviors.
 7. The IEP states that the student requires positive behavioral strategies in order to be able to "decrease inappropriate and interfering behaviors and engage in appropriate replacement behaviors." The objectives target decreasing pinching of staff, peers, and self, and increasing the wait time for desired food without interfering sounds, along with increasing replacement behaviors when waiting for preferred events.
 8. The IEP documents that a Functional Behavioral Assessment (FBA) was conducted and a Behavioral Intervention Plan (BIP) developed. The FBA identifies self-injurious behaviors as pinching and hitting which sometimes may result in mild bruising but staff reports there have been no instances of broken skin at school. The FBA report states that the student's aggression may be triggered by attention seeking and to escape behaviors, including access to preferred foods, community activities, and being picked up from school. It further states that the behaviors appear to coincide with denied access to preferred (or possibly anticipated) community sites or experiences within those sites. The staff report that the student's behaviors do not pose a safety risk and are not harmful or dangerous to the student or others.
 9. The IEP also states that the student's interfering behaviors have remained at a relatively low rate. It documents that the student has shown progress in waiting for preferred food items keep flexibility with routines and schedules. It also documents that the student "has been consistently employing learned strategies for more effective and appropriate communication regarding event anticipation and schedule or routine changes."

10. The IEP progress report dated November 7, 2018 for the self-management behavioral goal indicated that the student was making sufficient progress to meet the goal. The supporting data indicates that because the student's aggressive behaviors had been as low as 0 and as high as 20 incidents per day bringing her daily average to 5.19, a decrease from the previous quarter. It states that the student's self-injurious behaviors had been as low as 0 and as high as 23 incidents per day bringing her daily average to 3.88, a decrease from the previous quarter. It also states that the student waits for desired food items for 5 minutes with no interfering behaviors in 3 out of 5 trials, and that she has been adapting well to a flexible schedule. It further states that, after a change in the schedule happens once, the student is able to handle the change without any interfering behaviors. The data reflects the following:

September 2018 through November 2018

- Aggression 5.19 incidents per day.
 - Self-injurious behavior 3.88 per day.
 - Waits with appropriate behaviors for 5 minutes.
11. The IEP states that, with the exception of a 30 minute lunch period when included with non-disabled peers, the student requires 5.45 hours per day of specialized instruction in a separate special education classroom.

January 9, 2019 IEP Team Meeting

12. On January 9, 2019, the IEP team determined that the student required extensive, repeated, individualized instruction and support that is not of temporary nature and uses substantially adapted materials and individualized methods of accessing information in alternative ways to acquire, maintain, generalize, demonstrate and transfer skills across academic content. The IEP team determined that the student met the criteria and was eligible to participate in the Maryland Comprehensive Assessment Program (MCAP).
13. The IEP progress reports dated January 9, 2019 indicate the student was making sufficient progress to meet the self-management behavioral goal. The student's aggressive behaviors averaged 3 per day. They indicated that the student's self-injurious behaviors averaged 3.3 per day. They further indicated that the student is able to wait for desired food items for 5 minutes with no interfering behaviors in 4 out of 5 trials, and that she is no longer engaging in tantrum behaviors. The data reflects the following:

January 2019

- Aggression 3.00 incidents per day.
- Self-injurious behavior 3.30 per day.
- Waits with appropriate behaviors for 5 minutes.

14. The IEP was revised on January 9, 2019, to reflect an annual goal for the student to access the community safely by displaying social skills such as holding doors open, using social pleasantries, navigating down the aisle without bumping into people, walking on the right side of the aisle, remaining with the group, waiting for a staff member before crossing the street, and maintaining proper social distances.
15. The IEP progress reports dated January 25, 2019 indicate the student was making sufficient progress to meet the self-management behavioral goal. They indicate that the student's aggressive behaviors average 2.75 per day and that her self-injurious behaviors average 3.25 per day, both averaging a decrease from last quarter. They further indicate that the student is able to wait for desired food items for 5 minutes with no interfering behaviors in 3 out of 5 trials. They also indicate that the teachers report that the student has been adapting well to a flexible schedule, engaging in appropriate replacement behaviors on 2-3 out of 5 trials. The data reflects the following:

November 2018 through January 2019

- Aggression 2.75 incidents per day.
 - Self-injurious behavior 3.25 per day.
 - Waits with appropriate behaviors for 5 minutes.
16. On February 27, 2019, "the student's gagging sounds" was first documented in the daily communication journal between home and school staff. During the month of March 2019, there were 9 documented incidences of gagging sounds.
 17. On April 3, 2019, the progress report for behavioral self-management states that the student was not making sufficient progress to meet the goal. It states that the student showed an increase of 60% from the previous quarter of aggressive behaviors and that self-injurious behaviors showed an increase of 9% from the previous quarter. The progress report also documents that the student has engaged in one incident of interfering behaviors while waiting. The progress report also states that the student has made significant progress by independently approaching the teacher and asking appropriate questions related to the community outing, in every instance. The data reflects the following:

January 2019 through April 2019

- Aggression 4.39 incidents per day.
- Self-injurious behavior 3.55 per day.
- Waits with appropriate behaviors for 5 minutes.

May 6, 2019 IEP Team Meeting

18. On May 6, 2019, the IEP team met to review and revise the student's BIP. The IEP team proposed the revisions due to the student's increase of aggression and self-injurious behaviors during transitions to the community and vocational skills training.
19. On May 6, 2019, the IEP team discussed that since January 2019, the student has been exhibiting increased behaviors of pinching and self-injurious behaviors at the time of day some students left the building each day for job training sites or community based instruction. They discussed that recent antecedents for aggression and/or self injury include the student requesting a specific community site, being reminded of the scheduled destination, the bus arrival at a community site, redirection to a shopping list when she requests other store items, shopping in a small group and being prompted to allow a peer to locate an item.
20. On May 6, 2019, as a result of the increases in the student's behaviors, the IEP team added strategies to address the rates of aggression and self-injury "shown during community transitions and vocational skills training." The IEP team agreed that the student needed additional supports to successfully participate in the scheduled activities. The complainant expressed her disagreement with the continual revisions of the BIP and her belief that the changes did not appear to help the student or the staff.
21. The revised BIP required several interventions, including "subschedules" for challenging events, use of a timer for transitions, a communication system, wait program, flexibility training and positive reinforcement. The engagement behaviors included choosing a puzzle, an independent activity, or sensory strategy to access while waiting. The reinforcers used by the school staff included computer videos, Lego blocks, chips, and cheese crackers.
22. On June 14, 2019, the progress report for behavioral self-management states that while the student was making sufficient progress to meet the goal the student continued to show an increase of aggressive behaviors from the previous quarter, it also states that self-injurious behaviors showed a decrease from the previous quarter, indicating the lowest average rate reported on the previous four quarterly reports. The progress report also states that the student has made significant progress in reference to engaging in interfering behaviors while waiting. The progress report also states that the student has made significant progress with independently approaching the teacher, asking questions related to the community outing and then handing a timer to the teacher to set her departure time.

June 17, 2019 IEP Team Meeting

23. At the IEP team meeting on June 17, 2019, the complainant expressed the need for consideration of a non-public placement that uses Applied Behavioral Analysis (ABA) with the student and according to the complainant, the student has shown progress with ABA at home. The complainant also expressed concerns about the sufficiency level of staff training when preventing and blocking the student's self-injurious behaviors. The complainant stated her concern about the number of times the BIP had been revised. She indicated that "at home the student sometimes has behaviors lasting for 30 minutes or more, and she does not want the student or the staff to have to go through the risk of the extended behavioral episodes in a public setting." The complainant also shared that "she feels the school IEP team asks her and her Board Certified Behavioral Analyst (BCBA) what to do about the student's behaviors." The complainant informed the IEP team that a non-public school will have a BCBA on staff for assistance.
24. The IEP team rejected the request to make a referral to a Central IEP (CIEP) team for a non-public placement based on the information that the student is making sufficient progress on goals and objectives and that since this was the student's first year in a high school, she has made "considerable progress" and is projected to continue this rate as she becomes more acclimated to the schedule and routines within the classroom. The school staff emphasized that the student's behaviors do not pose a safety risk to the student, other students, and the staff.
25. On June 17, 2019, the IEP team revised the behavioral self-management goal into two separate goals, one to reduce the rates of interfering behaviors and one to track replacement behavior acquisition. Mastery reduction was changed from quarter to quarter to a 20% reduction over the annual IEP period to further support the student's ability to engage in appropriate replacement behaviors while decreasing inappropriate interfering behaviors and to allow clearer tracking of her progress.
26. On June 17, 2019, the revised BIP identifies "gagging sounds" as a behavior that needed to be monitored as a result of the complainant's concerns. The BIP stated that the "student makes gagging sounds and motions at lunch time," which were being effectively ignored as it does not interfere with the student's breakfast, lunch or access to instruction. The school staff decided to collect assessment and frequency data beginning in September 2019 to determine if additional interventions are needed.
27. The BIP also documents that at the start of the 2019-2020 school year, the student will have a daily schedule attached to the classroom phone to show her whether she is riding the bus home or getting picked up that day. It indicates that a social story will also be used to introduce the concept.

28. The BIP documents that obtaining “more knowledge about the student’s community experiences outside of school would be beneficial in preparing the student for the community based instructional experiences at school.”
29. Between December 2018 and October 2019, the communication log indicates 4 occasions when the student engaged in behaviors while on community based instructional outings that resulted in returning the student to the bus with an adult and in one instance having the student to remain in the classroom. As a result of these behaviors, the BIP was revised in January 2018, May 2019, and June 2019 to include visual representations of specific community destinations. Since May 2019, the student has been advocating for her own needs, using her communication device to inquire about community destinations. The revised BIP also reflects the use of “subschedules” to communicate expectations and use of a timer prior to and during community outings. The BIP also reflects that the student be provided with extensive communication support, positive reinforcement, a wait program and flexibility training.

Discussion/Conclusions:

Allegation #1: IEP that Addresses Behavioral and Safety Needs

In this case, the complainant alleges that the student’s behaviors interfere with her being able to access the community based instruction, and that it has been a challenge for the MCPS to keep the student safe.

Based on the Findings of Facts #1 - #29, the MSDE finds that the MCPS has developed an IEP that addresses the student’s behavioral and safety needs and regularly monitors her progress and makes revisions as needed.

Furthermore, based on the Findings of Facts #3, #5, #7, #8, #10, #13, #17, #19, #22, #24, #27, and #29, the student was able to access instruction, participate in community based instruction and achieve progress on behavioral goals and objectives, in accordance with 34 CFR §§300.320 and.324. Therefore this office does not find that a violation occurred with respect to the allegation.

Allegation #2: Progress Reports Consistent with the Data

Based on the Findings of Facts #3, #6, #7, #10, #13 - #15, #17, #22, and #25, the MSDE finds that the MCPS ensured that the report on the student’s progress towards achievement of the IEP goals was consistent with the data, in accordance with 34 CFR §§300.324. Therefore, the MSDE finds no violation occurred with respect to this allegation.

ALLEGATION #3: ACCESS TO THE STUDENT'S RECORD

Findings of Facts:

30. On June 27, 2019, the complainant requested the school staff provide data that was used to write the quarterly IEP progress reports. While the complainant asserted that “the progress reports indicated that the student was making sufficient progress to meet the annual IEP goals, she was not achieving them.”
31. On August 12, 2019, the MCPS complied with the request for access to the records and sent the complainant the data electronically. The complainant received the data 46 days after her request because the teacher was mostly unavailable due to the summer schedule.

Discussion/Conclusions:

Allegation #3: Access to the Student's Educational Record

In this case, the complainant asserts that she did not receive access to the student's record within a reasonable amount of time and it was more than 45 days after she made the request.

Based on the Findings of Facts #30 and #31, the MSDE finds that the MCPS did not provide the documents in a timely fashion, in accordance with 34 CFR §§300.501 and .613. Therefore, this office finds that a violation occurred with respect to this allegation.

Notwithstanding the violation, based on the Finding of Fact #31, the MSDE finds that the complainant was provided with the documents and in advance of any IEP team meetings. Therefore, no student specific corrective action is required to remediate the violation.

TIMELINE:

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.

Questions regarding the findings and conclusions contained in this letter should be addressed to this office in writing. The complainants 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 Free Appropriate Public Education (FAPE) for the student, including issues subject to this State complaint investigation, consistent with the IDEA.

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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/sf

c: Jack Smith
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