




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

September 17, 2020




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

RE: 
Reference: # 21-003

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.

ALLEGATIONS:

On July 19, 2020, the MSDE received a complaint from Dr.  hereafter, “the complainant,” on behalf of his son, 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 developed an Individualized Education Program (IEP) that addresses identified functional academics, behavioral, communication and transition needs that result from the student’s disability of Autism, to enable him to function independently, since July 2019,¹ in accordance with 34 CFR §§300.320 and 324.

¹ In the State complaint the complainant alleged that the violation began prior to July 2019. He was informed, in writing, that only those violations that are alleged to have occurred within one (1) year of the date of the filing of the State complaint can be addressed through the complaint investigation procedure.

2. The MCPS has not ensured that the report of the student's progress towards achievement of the annual IEP goals, made since July 2019, was consistent with the data, in accordance with 34 CFR §§ 300.324.

BACKGROUND:

The student is twenty (20) years old, is identified as a student with Autism under the IDEA and has an IEP that requires the provision of special education instruction and related services.

The student is placed by the MCPS at [REDACTED] a nonpublic, separate, special education school, where he attended until the March 2020 Statewide closure of schools as a result of the national COVID-19 pandemic.

ALLEGATION #1: IEP DEVELOPMENT

FINDINGS OF FACTS:

1. The IEP in effect on July 19, 2019 was developed on November 30, 2018. It identifies the need to improve functional academics, behavior, life, and communication skills consistent with the evaluation data including data that the student's Full Scale Intelligence Quotient (FSIQ) of 25 and his adaptive functioning fall within the "extremely low" range of cognitive ability. The IEP includes goals for the student to improve his functioning in these areas. It also includes special education and related services to assist him with achieving the goals, along with numerous accommodations and supplementary aids and services to assist with accessing instruction. These include one-to-one adult assistance throughout the school day and a Behavioral Intervention Plan (BIP) to address maladaptive behaviors, including aggressive and self-injurious behaviors of biting, hitting, kicking, and grabbing, as well as pica.²
2. The IEP includes transition goals and activities in the areas of employment, training, and independent living based on a classroom observation and input from the student's parents and teachers because the student could not participate in a formal assessment due to the severity of his disability.
3. On September 3, 2019, the IEP team considered information that the student was not making sufficient progress towards achieving the annual goals because his interfering behaviors had intensified. The team revised the goals and decided to slow the pace of instruction on the goals due to the student's low tolerance for development of new skills.

² Pica is a disorder characterized by an appetite for substances that are non-nutritive (marylandpublicschools.org/programs/AutismSpectrumDisorder.pdf).

4. On October 3, 2019, it was reported that the student had mastered the math IEP problem solving and written expression goals. However, it was also reported that he was not making sufficient progress to achieve the functional reading comprehension and communication goals due to his interfering behaviors.
5. On November 6, 2019, the IEP team conducted the annual IEP review. The team revised the BIP based on an updated Functional Behavioral Assessment (FBA) that reflected that the interfering behaviors might be decreased if the student could improve his ability to communicate his needs. The team added a new transition goal for independent living and revised the self-management goals based on the reported progress. The IEP was revised to require an increase in the behavioral supports with an emphasis on targeted functional communication to assist the student with communicating his needs in order to prevent interfering behavior. The written summary of the meeting reflects that linkages were made with adult service agencies, that the student meets the eligibility criteria for the Division of Rehabilitation Services and the Developmental Disabilities Administration, and that he is connected with Optimal Health for coordination of community services.
6. On December 20, 2019, the student was reported to be making sufficient progress on the IEP goals.
7. On March 13, 2020, the student was reported to be making sufficient progress on the IEP goals and had achieved some of the goals.
8. On April 16, 2020, the IEP team met to determine the services to be provided virtually as a result of the closure of school buildings due to the COVID-19 pandemic. The team documented its decision that, due to the severity of the student's disability, he would have difficulty accessing instruction virtually, and that the only goals that can be addressed in this manner are two of the functional life skills goals. The team determined the services and supports to be provided virtually, and discussed that the student's mother, who serves as his parent under the IDEA, will continue to receive training on supporting the use of functional communication, to prevent interfering behaviors, through weekly video/audio meetings with the program coordinator. There is no documentation that the team decided that the student no longer has needs in the areas addressed by the goals that would not be implemented through virtual instruction. The documentation reflects that the team determined that "once the school system is able to resume regular programming, the services outlined in the IEP will be implemented in their entirety." It also documented its decision to reconvene at that time to consider the student's needs and make any needed revisions to the IEP.
9. On June 10, 2020, the student was reported to be making sufficient progress on the IEP goals. The student's mother reported that the student participates in a variety of chores (e.g., setting the table, watering the garden, taking out trash, carrying laundry), with support from caregivers, while refraining from engaging in target behaviors. She also reported that the student engaged in 2 iPad games for at least 1 minute each throughout the day, with minimal redirection, to remain engaged in the game.

10. On June 11, 2020, the IEP team met to plan a reevaluation. The team discussed that face-to-face testing could not occur due to the COVID-19 pandemic, and that the assessments that require face-to-face interaction will be administered when school buildings reopen. The student's mother, who participated on the team, agreed.

CONCLUSIONS:

Based on the Findings of Facts #1 - #7, the MSDE finds that the IEP addressed all of the student's needs from July 2019 until the closure of school buildings due to the COVID-19 pandemic, in accordance with 34 CFR §300.324. Therefore, this office does not find that a violation occurred with respect to this time period.

Based on the Findings of Facts #8 - #10, the MSDE finds that the IEP has not addressed all of the student's needs, since the closure of school buildings, due to the student's inability to access instruction virtually, in accordance with 34 CFR §300.324. Therefore, this office finds that a violation has occurred since the closure of school buildings.

Notwithstanding the violation, based on the Findings of Facts #8 - #10, the MSDE finds that the IEP team considered the student's needs following the closure of school buildings and has addressed those areas where the student can benefit from instruction without face-to-face interaction with school staff. In addition, the team has properly determined the need to reconvene when school buildings reopen to determine the student's needs at that time.

ALLEGATION #2:

PROGRESS REPORTING

FINDINGS OF FACTS:

11. The IEP requires that progress on the functional academic goals be evaluated using classroom based assessments with 80% - 100% accuracy and 3-5 opportunities with assistance from 2 instructors. The IEP progress report documents clear, pertinent details including supporting benchmark data points that were used in making the reports of progress. The documentation includes charts, pictures, samples, and results from curriculum based assessments that are consistent with the progress reported.
12. The IEP requires the behavioral goals to be evaluated using observation and recording of behavioral data with 80% - 100% accuracy with several opportunities and 2 instructors. The IEP progress report indicates that when the behavior intervention plan with functional communication was used, the student was able to make sufficient progress because he was able to reduce self-injurious behaviors from an average of 9 occurrences per week to an average of 3, pica decreased from 4 occurrences to none per week and events of aggression decreased from 7 to 5 occurrences per week. The supporting documentation of this includes observation reports, charts, and graphs to show the student's behavioral progress was consistent with the reports of progress.

CONCLUSION:

Based on the Findings of Facts #3, #4, #6, #7, #9, #11 and #12, the MSDE finds that the IEP progress reports are consistent with the data described in the IEP that is to be used to measure progress, since July 2019, in accordance with 34 CFR §§ 300.324. Therefore, this office does not find that a violation occurred with respect to the allegation.

CORRECTIVE ACTION:

The MSDE requires the IEP team to meet when schools reopen to determine the student's needs, revise IEP consistent with the data, and determine compensatory/recovery services needed to redress the delay in addressing all of the student's needs as the result of his inability to access virtual instruction.

TIMELINES/TECHNICAL ASSISTANCE:

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.³

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.⁴ Dr. Birenbaum can be reached at (410) 767-7770.

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.

³ The 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.

⁴ The MSDE will notify the Directors of Special Education of any corrective action that has not been completed within the required timelines.

Mr. Philip A. Lynch
September 17, 2020
Page 6

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.

Sincerely,

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

MEF:sf

c:

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