




July 3, 2023




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

RE: 
Reference: #23-214

Dear Parties:

The Maryland State Department of Education, Division of Early Intervention/Special Education Services (MSDE), 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 May 5, 2023, MSDE received a complaint from Ms. , hereafter, “the complainant,” on behalf of her son. 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 above-referenced student.

MSDE investigated the following allegations:

1. The MCPS has not ensured that proper procedures were followed when determining the student’s educational placement since May 2022¹, when it did not pursue non-public placements due to the student’s enrollment in virtual learning, in accordance with 34 CFR §§300.114 -.116.
2. The MCPS has not ensured that the student has been provided with special education instruction as required by the Individualized Education Program (IEP) since May 2022, in accordance with 34 CFR §§300.101 and .323.
3. The MCPS has not ensured that the IEP developed for the student addressed his social/emotional/behavioral needs since May 2022, when it did not include the behavioral interventions that would be warranted to attend an in-person placement, in accordance with 34 CFR §300.324.

¹ The complainant shared allegations related to the student’s placement that occurred over multiple years. However, MSDE only has the authority to investigate allegations that occurred within one year of the date the complaint was received. 34 CFR §300.153.

4. The MCPS did not ensure that the IEP team considered parent information and concerns at the IEP meeting held on April 28, 2023, when it did not consider her request for behavior interventions and a 1:1 aide in order for the student to attend in-person school, in accordance with 34 CFR §300.324.

BACKGROUND:

The student is 12 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. Since the 2020 statewide closure of schools as a result of the national Covid-19 pandemic, the student has been receiving special education instruction and related services through the MCPS [REDACTED]

FINDINGS OF FACT:

ALLEGATION #1:

PLACEMENT DETERMINATION

1. Prior to the school closures necessitated by the COVID-19 pandemic, the student was placed in a nonpublic school by the Prince George's County Public Schools. In 2020, while receiving virtual instruction, he relocated to, and was enrolled in MCPS. When MCPS began in-person instruction, the student's family elected for him to continue to receive virtual instruction.
2. On April 4, 2022, the IEP team met to consider the special education services that the student required, and whether those services could be implemented in the Virtual Academy. According to the prior written notice completed following the meeting, the IEP team recommended that the student should continue in the Autism program at [REDACTED] School where he was previously assigned, but not attending. The prior written notice also states, "Referrals were made to non-public placements; however, there were no acceptances at the places explored from the MCPS CIEP team. Upon enrollment in the virtual academy, no further non-public placements were further pursued. If [the student] is to return to an in-person school, a referral can be reconsidered to the MCPS CIEP team provided updated data."
3. The student's IEP was amended to reflect the modifications to his special education and related services as delivered in a virtual setting with the following statement, "MCPS has offered an appropriate special education program at [REDACTED] as a stay-put pending alternate placement. The parent(s)/guardian(s) concur that enrollment in the Virtual Academy prohibits the request for compensatory/recovery services for any portion of the student's IEP that is unable to be implemented through the virtual academy."
4. On April 28, 2023, the IEP team met to conduct an annual review of the student's IEP. The student's IEP completed following the meeting reflects in-person services through the Autism program; however, the student would continue to attend the MCPS Virtual Academy. It was anticipated that the student would continue in the Virtual Academy for the 2023-2024 school year. Finally, the prior written notice states that during the April 2023 IEP meetings, the complainant expressed many concerns regarding decisions made by past IEP teams dating back to 2016, including the student's placement in the Autism program in the 4th grade and the non-public referral process in the 5th grade." In an email sent to MCPS staff, the complainant stated that she is scared for her child's mental and physical well-being should he ever return to in-person instruction due, in part, to the student's past behaviors not being addressed in his IEP.

DISCUSSION/CONCLUSIONS:

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child (34 CFR § 300.116). Additionally, this placement must be determined at least annually; be based on the child's IEP; and be as close as possible to the child's home (34 CFR § 300.116). Moreover, in selecting the LRE (Least Restrictive Environment), consideration should be given to any potentially harmful effect on the child or on the quality of services that he or she needs (34 CFR § 300.116).

In this case, the student's IEP, in place during the period under investigation, was developed at an IEP team meeting in April 2022. During that IEP team meeting, the MCPS staff informed the parent that they would not seek additional appropriate placement for the student, as determined by the IEP team, only because the parent elected virtual instruction.

Therefore, based on the Findings of Facts #2, #3, and #4, MSDE finds that the MCPS did not follow proper procedures when determining the student's educational placement, since June 2022, in accordance with 34 CFR §§300.114 - .116. Therefore, this office finds that a violation occurred with respect to this allegation.

ALLEGATION #2:

PROVISION OF SPECIAL EDUCATION INSTRUCTION

FINDINGS OF FACT:

5. The student's April 4, 2022, IEP requires that he be provided with the following supplementary aids and supports:
 - a. visual expressive cues (such as pictures, communication book/strip, and AAC support);
 - b. visual organizational cues (such as schedules, timer, first and then boards);
 - c. visual instructional cues (such as flashcards, written directions, and visual stories);
 - d. low-tech visuals and communication boards are beneficial for support with expressive and receptive language - as needed;
 - e. reading and clarification of directions during instruction and assessments to assist with comprehension of tasks;
 - f. a human reader to assist with grade-level reading content;
 - g. small groups and frequent breaks,
 - h. paper-based edition to independently indicate test responses;
 - i. a human reader to aid in comprehension of instruction and assessment tasks;
 - j. a scribe for all portions of assessments due to difficulty processing and producing written language;
 - k. picture schedule daily;
 - l. first/then daily;
 - m. visual timer daily;
 - n. graphic and visual organizers,
 - o. highlighters and lined paper daily;
 - p. verbal or picture warning before transitions with expectations daily; and
 - q. and the use of positive/concrete reinforcers daily.

6. The student's April 28, 2023, IEP requires that he be provided with the following supplementary aids and supports:
 - a. visual expressive cues (such as pictures, communication book/strip, and AAC support);
 - b. visual organizational cues (such as schedules, timer, first and then boards);
 - c. visual instructional cues (such as flashcards, written directions, and visual stories);
 - d. low-tech visuals and communication boards are beneficial for support with expressive and

- receptive language - as needed;
 - e. reading and clarification of directions during instruction and assessments to assist with comprehension of tasks;
 - f. a human reader to assist with grade-level reading content;
 - g. small groups and frequent breaks,
 - h. paper-based edition to independently indicate test responses;
 - i. a human reader to aid in comprehension of instruction and assessment tasks;
 - j. a scribe for all portions of assessments due to difficulty processing and producing written language;
 - k. picture schedule daily;
 - l. first/then daily;
 - m. visual timer daily;
 - n. graphic and visual organizers,
 - o. highlighters and lined paper daily;
 - p. verbal or picture warning before transitions with expectations daily; and
 - q. and the use of positive/concrete reinforcers daily.
7. The student's April 28, 2023, IEP requires that he be provided with 6 hours of instruction outside of the general education classroom daily provided by a special educator, and 30 minutes inside the general education classroom daily. Additionally, the IEP requires that the student receive 4 hours of speech/language therapy monthly.
8. There is no documentation that the student was provided with the instructional supports, accommodations, supplementary aids, or instruction required by his IEP.

DISCUSSION/CONCLUSIONS:

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP (34 CFR §300.323). In implementing the requirements of 34 CFR §300.323, each public agency must ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

Based on the Finding of Facts #6, #7, and #8, MSDE finds that the MCPS has not ensured that the student has been provided with special education instruction as required by the Individualized Education Program (IEP) since May 2022, in accordance with 34 CFR §§300.101 and .323. Therefore, this office finds that a violation occurred with respect to the allegation.

ALLEGATIONS #3 and #4: Development of the IEP

FINDINGS OF FACT:

9. The summary and recommendations from the student's last educational assessment report, dated April 23, 2021, states: "Classroom observations, generated data, and informal assessments indicate student's needs for a [structured] learning environment with direct adult support focused on communication, behavior management, functional academics, social emotional growth, behavior reduction and personal management. While the student has made several gains over the past years, his behaviors continue to interfere with overall learning. The behaviors can only be addressed in a program that offers close staff supervision, redirection, high rates of individualized rewards and intensive teaching."

10. The student's Behavior Intervention Plan (BIP), dated April 16, 2018, addresses targeted behaviors in the areas of physical aggression, non-compliance, and inappropriate language. The BIP also includes crisis intervention strategies.
11. Following the August 20, 2021, IEP team meeting, MCPS modified the student's IEP to include the following: "All special considerations will be implemented through as written with the following modifications: During Virtual instruction [the student's] BIP will not be implemented, however, behaviors will be addressed through positive supports and his supplementary aids and services."
12. The student's present level of achievement in the area of social-emotional/behavioral performance in his April 4, 2022, IEP states, "April 2022- No information provided from virtual academy. Does this area impact the student's academic achievement and/or functional performance? Yes."
13. The student's present level of achievement in the area of social-emotional/behavioral performance in his April 28, 2023, IEP states, "March 2023 - Student is receiving instruction in a virtual learning setting. [The student] is not able to follow a one step direction. He was not able to recognize his name when it was shown to him. When asked, if this is your name turn around, [the student] did not respond."
14. The student's present level of achievement in the area of social-emotional/behavioral performance in his April 28, 2023, IEP states, "Needs: In the area of completing a familiar task, [the student] needs consistent verbal prompts to start the task. He needs to be reminded to turn on his microphone or type in the chat. Oftentimes he says that it is too hard before attempting to try. He also tells us that he wants to be left alone."
15. The student's present level of achievement in the area of self-management, in his April 28, 2023, IEP states, "March 2023 - This is [the student's] second year with MCPS [virtual academy]. Due to the environment we [do] not observe the same behaviors that were seen in person. However, he has only been observed virtually. Due to what has been observed [the student] is social and always wanting to share information with the staff."
16. The student's present level of achievement in the area of self-management, in his April 28, 2023, IEP states, "Needs: [the student] needs to learn how to cope with change and control his frustration and emotions. At times he has used inappropriate language and yelled disrespectfully towards staff."
17. During the April 28, 2023, IEP team meeting the parent shared the following input: "4/12/2023: [The complainant] noted that [the student] has not had behavior concerns at home or during virtual school, but that his behavior was 'horrible' when he last attended physical school. She notes that speech remains a concern for [the student]. She shared that she has used music and songs to teach him things in the past. [The complainant] noted that she never intends for [the student] to return to physical school. [The complainant] noted that she disagrees with [the student's] placement in the Autism program. 4/28/23: [The complainant] reiterated the concerns she shared on 4/12/23 relating to past IEP team decisions dating back to 2016. She stated she does want [the student] back in physical school but only after an explanation for his challenging behaviors when he last attended physical school three years ago. She agreed that [the student] is doing well in his current Virtual Academy class but feels his academic and behavioral growth is due to her support from home rather than the school team. [The complainant] shared her lack of trust with the IEP team."
18. The student's IEP dated April 28, 2023, reflects the following with regard to Social/Behavioral Supports: "Use of positive/concrete reinforcers/Daily/Across the school day in all environments."

Additionally, "During emergency conditions resulting in the physical closure of school for 10 or more days, use of highlighters and lined paper and use of positive/concrete reinforcers would be implemented in collaboration with parent."

19. On June 13, 2023, MCPS staff amended the student's IEP to remove negative references in the student's present level of academic achievement and functional performance, and evidence that he was struggling to make progress toward his behavioral goal. Prior to the amendment, the description of his present level of academic achievement and functional performance in behavior, as well as the description of his behavioral progress, both stated: "March 2023 - Student is receiving instruction in a virtual learning setting. [The student] is not able to follow a one step direction. He was not able to recognize his name when it was shown to him. When asked if this is your name turn around, [the student] did not respond." After the amendment, the student's present level of academic achievement and functional performance in behavior states, "March 2023- Student is receiving instruction in a virtual learning setting. [The student] comes to class and participates in class. He completes all task with 3 or less verbal prompts. In Person: [The student] in person needs additional supports. He mimics the behaviors of other students in the class and in the hallways. He is easily distracted by peer behavior and will copy their behaviors." The amended description of behavioral progress states, "Student is receiving instruction in a virtual learning setting. [The student] is able to follow one step instructions with 1 verbal prompt. He shares his screen with the teacher and completes independent work. He waits his turn to speak and say please and thank you." The prior written notice for this amendment states, "The purpose of this notice is in response to the clerical amendment on April 28, 2023, on the IEP. Error was made in the Present Levels Social Emotional/Behavioral."
20. There is no documentation that the IEP team met to consider this revision or that it was done in agreement with the parent.
21. There is no documentation that the parent has proposed to the IEP team that the student be provided with the support of a dedicated aide since May 2022.

DISCUSSION/CONCLUSIONS:

In developing each child's IEP, the IEP team must consider the following: the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child. In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior in addition to information about the child provided to, or by, the parents. (34 CFR§ 300.324)

Allegation #3: Addressing the Student's Needs

In this case, the MCPS has documented that the student's IEP was written as if the student was attending in-person learning. However, by removing the student's behavioral supports, the MCPS has created a situation where a student who had extremely inappropriate behaviors when last attending in-person school would begin attending in-person school without the behavioral supports previously determined by the team to be required for him to receive a FAPE.

Based on the Finding of Facts #9, #10, #11, #12, #13, #14, #15, #16, #17, and #18, MSDE finds that the MCPS has not ensured that the IEP developed for the student addressed his social/emotional/behavioral needs, or the concerns of the parent regarding these needs, since May 2022, in accordance with 34 CFR §300.324. Therefore, this office finds that a violation occurred with respect to this allegation.

Allegation #4

Addressing the Parent's Concerns Related to the Dedicated Aide

Based on the Finding of Fact #21, MSDE finds that there is no documentation that the parent proposed that the student be provided a dedicated aide, since May 2022, in accordance with 34 CFR §300.324. Therefore, this office does not find that a violation occurred with respect to this allegation.

ADDITIONAL VIOLATION IDENTIFIED DURING THE COURSE OF THE INVESTIGATION

Amendments or changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or by amending the IEP rather than by redrafting the entire IEP with the agreement of the parent. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. (34 CFR § 300.324 (a)(6)).

Based on Findings of Facts #19 and #20, MSDE finds that the MCPS did not follow proper procedures when amending the student's IEP in June 2023, in accordance with 300.324

CORRECTIVE ACTIONS/TIMELINES:

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, MSDE requires the public agency to provide documentation of the completion of the corrective actions listed below.

MSDE has established reasonable time frames below to ensure that noncompliance is corrected in a timely manner.² This office will follow up with the public agency to ensure that it completes the required actions consistent with MSDE Special Education State Complaint Resolution Procedures.

If the public agency anticipates that any of the time frames below may not be met, or if either party seeks technical assistance, they should contact Ms. Diane Eisenstadt, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action.³ Ms. Eisenstadt can be reached at (410) 767-7770 or by email at diane.eisenstadt@maryland.gov.

Student-Specific

MSDE requires the MCPS to provide documentation by August 15, 2023, that the IEP team has updated the student's IEP to reflect the type of instruction that the student will actually receive (virtual or in-person), has updated the student's BIP to reflect supports that will be in place when the student returns to in-person learning, including the consideration of the parent's concerns, and has reviewed and revised the IEP consistent with the data to accurately reflect the student's behavioral needs. The IEP team must also determine the amount and nature of compensatory services or other remedy to redress the violations identified and developed a plan for the provision of those services within a year of the date of this Letter of Findings.

² The United States Department of Education, Office of Special Education Programs (OSEP) states that the public agency corrects 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, 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.

³ MSDE will notify the public agency's Director of Special Education of any corrective action that has not been completed within the established timeframe.

Similarly Situated Students:

MSDE requires that MCPS complete the following activities on a system-wide basis:

- Ensure that all students attending the Virtual Academy who have been referred for other placements (either public or nonpublic) have had the placement process completed;
- Review the progress reports for students attending the Virtual Academy and ensure that data reflects the student is making sufficient progress to meet their goals, and if not, that the IEP team meet to determine whether the student should continue to participate in virtual instruction or whether in person instruction is required;
- Ensure that, if the student's IEP reflects a program that can be delivered either in-person or virtually, all the components to support the student in both settings are included in the student's IEP; and
- Verify that student's IEPs are not amended without parental consent by providing a random sampling of 50 IEPs amended outside of an IEP team meeting to determine how many reflect parental agreement to the amendment.

MSDE requires that the MCPS continue to identify students as part of the ongoing corrective action for State complaint #22-191, to include students who are attending the MCPS virtual academy, but do not have an IEP that reflects the provision of virtual instruction.

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 timelines 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 Free Appropriate Public Education (FAPE) for the student, including issues subject to this State complaint investigation, consistent with the IDEA. MSDE recommends that this Letter of Findings be included with any request for mediation or a due process complaint.

Sincerely,

Dr. Deann M. Collins
Deputy Superintendent
Office of the Deputy Superintendent of Teaching and Learning

DMC/eh

c: Monifa McKnight Alison Barmat
 Philip Lynch Nicol Elliott
 [REDACTED] Paige Bradford
 Molly Connor Diane Eisenstadt
 Gerald Loiacono Elizabeth Hendricks