



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

August 6, 2020



Mr. Philip A. Lynch
Director of Special Education Services
Montgomery County Public Schools
850 Hungerford Drive, Room 225
Rockville, Maryland 20850

RE: 
Reference: #20-136

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 June 9, 2020, the MSDE received a complaint 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 above-referenced student.

The MSDE investigated the following allegations:

1. The MCPS did not ensure that the student was provided with transportation services required by the Individualized Education Program (IEP) between January 6, 2020 and January 15, 2020, in accordance with 34 CFR §§300.101, and .323.
2. The MCPS did not provide the student with the services and supports required by the IEP, including the following, prior to the closure of schools due to the COVID-19 pandemic, in accordance with §§300.101, and .324:
 - a. occupational therapy (OT);
 - b. speech/language therapy;

- c. physical therapy (PT); and
 - d. use of a gait trainer.
3. The MCPS has not addressed the student's identified needs in the area of OT since February 11, 2020, in accordance with 34 CFR §300.324.
 4. The MCPS has not followed proper procedures to offer a Free Appropriate Public Education (FAPE) to the student since March 16, 2020, in accordance with 34 CFR §§300.101, .323, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, United States Department of Education, March 21, 2020, and the MSDE Technical Assistance Bulletin, *Serving Children with Disabilities Under IDEA During School Closures Due to the COVID-19 Pandemic*, March 30, 2020.

BACKGROUND:

The student is thirteen (13) years old and is identified as a student with Multiple Disabilities under the IDEA, including Intellectual, Speech/Language, and Orthopedic Impairments. She has an IEP that requires the provision of special education instruction and related services.

The student transferred to the MCPS on January 6, 2020 from [REDACTED] with an IEP developed in [REDACTED] (XX IEP). Since that time, she has been placed at the [REDACTED] a public separate special education school, where she attended school until the March 16, 2020 Statewide closure of all schools as a result of the national COVID-19 pandemic.

ALLEGATION #1 PROVISION OF TRANSPORTATION FROM JANUARY 6, 2020 TO JANUARY 15, 2020

FINDINGS OF FACTS:

1. The student was enrolled in the MCPS on January 6, 2020. There is documentation that MCPS staff made a request was made for the student to be added to a transportation route on that day.
2. The MCPS informs parents¹ that "on average, it takes approximately 7 - 10 school days to process a start or change of transportation services." There is documentation reflecting that the student was transported to school by bus on January 15, 2020.

DISCUSSION/CONCLUSION:

The IDEA requires that each student's IEP be implemented as soon as possible. This includes the IEP for a student transferring into another State (34 CFR §§300.323).

¹ <https://www.montgomeryschoolsmd.org/departments/transportation/about/specialed.aspx>

The United States Circuit Courts of Appeal, including the Fourth (4th) Circuit, have held that “as soon as possible” does not mean immediately, and that only a material implementation failure will result in a loss of a Free Appropriate Public Education (FAPE) (*Board of Education of Montgomery County v. Brett Y.*, 28 IDELRA 460, 4th Cir. 1998; *Sumter County Sch. Dist. 17 v. Heffernan*, 56 IDELR 186, 4th Cir. 2011).

Based on the Findings of Facts # 1 and #2, the MSDE finds that the MCPS provided the student with transportation as soon as possible following the student’s transfer to the school system, in accordance with 34 CFR §§300.101, and .323. Therefore, this office does not find that a violation occurred with respect to the allegation.

**ALLEGATION #2 THE PROVISION OF SUPPORTS AND RELATED SERVICES
PRIOR TO THE CLOSURE OF SCHOOLS DUE TO
COVID-19 PANDEMIC**

FINDINGS OF FACTS:

3. The IEP in effect on January 6, 2020 required the provision of one (1) session of OT each month for one (1) hour and twenty (20) minutes each session. On February 11, 2020, the IEP was revised to require that the student be provided with one (1) session each week for twenty (20) minutes each session.
4. The OT service logs document that the student was provided with the amount of OT required by the IEP.
5. The IEP in effect on January 6, 2020 required the provision of one (1) session of speech/language therapy each month for two (2) hours each session. On February 11, 2020, the IEP was revised to require the student to be provided with two (2) sessions each week for thirty (30) minutes each session.
6. The speech/language service logs document that the student was provided with the amount of speech/language services required by the IEP.
7. The IEP in effect on January 6, 2020 required the provision of one (1) session of PT each month for one (1) hour and twenty (20) minutes each session. On February 11, 2020, the IEP was revised to require the student to be provided with one (1) session each week for thirty (30) minutes each session.
8. The PT services logs document that the student was provided with the amount of PT services required by the IEP.
9. The IEP did not require the use of a gait trainer until February 11, 2020. At that time, the IEP was revised to require the student to be provided with adaptive equipment “including, but not limited to a gait trainer” under the supervision of the physical therapist.

10. The progress report on the student's annual goal to improve gross motor skills during the 2019 - 2020 school year documents that the student was provided with a gait trainer, and that she was making sufficient progress to achieve the goal with the use of the adaptive equipment.

DISCUSSION/CONCLUSIONS:

In this case, the complainant alleges that the student was not provided with the related services and the support of a gait trainer, which were required by the IEP.

Based on the Findings of Facts #3 - #10, the MSDE finds that the MCPS provided the student with the related services and support of the gait trainer required by the IEP prior to the closure of schools due to the COVID-19 pandemic, in accordance with §§300.101, and .324. Therefore, this office does not find that a violation occurred with respect to the allegation.

ALLEGATION #3 ADDRESSING OT NEEDS SINCE FEBRUARY 11, 2020

FINDINGS OF FACTS:

11. The IEP in effect on February 11, 2020, reflects that the student is identified with the need to improve functional upper extremity/hand skills. The IEP includes a goal for the student to improve this skill and services, including OT, to assist her with achieving the goal.
12. The progress reports made during the 2019 - 2020 school year reflect that the occupational therapist, physical therapist, and speech/language pathologist worked collaboratively to support the student, and that the student was making sufficient progress to achieve the goal.

CONCLUSION:

Based on the Findings of Facts #11 and #12, the MSDE finds that MCPS has addressed the student's identified OT needs since February 11, 2020, in accordance with 34 CFR §300.324. Therefore, this office does not find that a violation occurred with respect to the allegation.

ALLEGATION #4 OFFERING A FAPE TO THE STUDENT SINCE MARCH 16, 2020

FINDINGS OF FACTS:

13. On February 11, 2020, the IEP team considered information from the student's teachers and the complainant that the student appeared to be struggling with her vision. Based on this information, the IEP team recommended a functional vision assessment to determine visual access, and the complainant provided consent for the assessment at the meeting.

14. On March 3, 2020, the functional vision assessment was conducted. The assessment report states that visual latency, a common trait of Cortical Visual Impairment, was observed. The report explains that the impairment is a neurological condition common with students with a brain injury, which results in atypical visual reflexes and vision fluctuating at different times of the day or different days, making it a challenge to observe and identify. The report states that the student was observed to be fixated on overhead lights but could be redirected when the lights were blocked out. It contains recommendations for positioning classroom materials in the upper fields of vision, presenting materials on a non-reflective solid black field, moving objects to encourage visual attendance, and providing breaks that require visual attention to minimize fatigue.
15. On March 16, 2020, there was a Statewide closure of all school buildings due to the national COVID-19 pandemic.
16. The documentation reflects that, on March 28, 2020, the MCPS provided the complainant with a laptop computer to assist the student in accessing virtual instruction during the Statewide closure. The documentation reflects that the complainant expressed difficulties with accessing the curriculum with the use of the laptop provided by MCPS, and that the school staff was able to assist the complainant with the accessibility of the instruction for the student.
17. On April 2, 2020, the MSDE issued a Technical Assistance Bulletin indicating that, with parent agreement, a student's IEP could be amended to reflect changes to how the IEP would be implemented during the COVID-19 pandemic, consistent with guidance issued by the United States Department of Education on March 16 and 21, 2020.
18. On April 6, 2020, the complainant and the school staff amended the IEP to reflect how services would be provided through virtual instruction. There is no documentation that the recommendations from the functional visual assessment were incorporated into the amended IEP.
19. The progress reported on the annual IEP goals in April 2020, reflect that the student was making sufficient progress to achieve the goals.
20. The documentation reflects that the school staff attempted to schedule an IEP team meeting on May 5, 2020 to consider the results of the functional vision assessment, but scheduled the meeting for June 12, 2020 at the complainant's request.
21. On June 12, 2020, the IEP was revised to include accommodations consistent with the functional vision assessment, including enlarging touchscreen electronic devices, limiting the complexity of materials presented, and providing frequent breaks to limit visual fatigue.

DISCUSSION/CONCLUSIONS:

In this case, the complainant alleges that the student was unable to access virtual instruction because her visual needs were not addressed.

Based on the Findings of Facts #13 - #21, the MSDE finds that the MCPS did not ensure that the IEP in effect from April 6, 2020 to May 5, 2020 addressed the student's visual needs, in accordance with 34 CFR §300.324. Therefore, this office finds that a violation occurred with respect to this time period.

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

The 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 the 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 Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action.³

Student-Specific

The MSDE requires the MCPS to provide documentation that the IEP team has determined the compensatory or other services needed to remediate the loss of access to special education instruction from April 6, 2020 to May 5, 2020.

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

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

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

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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 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/Special Education Services

MEF:ac

c: Jack R. Smith
Kevin Lowndes
Tracee Hackett
Julie Hall
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Dori Wilson
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