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State Superintendent of Schools

March 27, 2019

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Ms. Deborah Grinnage-Pulley
Executive Director, Juvenile Services Education System
Maryland State Department of Education
200 West Baltimore Street
Baltimore, Maryland 21201

RE: XXXXX
Reference: #19-104

Dear Parties:

The Maryland State Department of Education, Division of Early Intervention and 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 February 4, 2019, the MSDE received a complaint from Grace Reusing, Esq., Office of the Public Defender, hereafter “the complainant,” on behalf of the above-referenced student. In that correspondence, the complainant alleged that the Maryland State Department of Education Juvenile Services Education System (JSES) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced students.

The MSDE investigated the following allegations:

1. The JSES did not ensure that a reevaluation that was conducted was sufficiently comprehensive to identify and address the student’s cognitive needs, in accordance with 34 CFR §§300.304, .305, and .324. You specifically allege that the Individualized Education Program (IEP) team did not obtain sufficient data on the student’s adaptive

skills functioning to consider whether the student is a student with an Intellectual Disability under the IDEA, consistent with the data that recommended such consideration.

2. The JSES did not ensure that the student was provided with special education instruction in the educational placement required by the IEP, in accordance with 34 CFR §§300.101 and .323.
3. The JSES did not ensure that the student was provided with special education instruction by a special education teacher, as required by the IEP, in accordance with 34 CFR §§300.101, .149, .156, .323, and COMAR 13A.12.01 - .04.
4. The JSES did not ensure that the student was provided with the amount of related counseling services required by the IEP, in accordance with 34 CFR §§300.101 and .323.
5. The JSES did not enroll the student in courses that would enable him to achieve credit requirements necessary to progress through the general curriculum, in accordance with 34 CFR §§300.2, .17, and .149 and COMAR 13A.03.02.03 and 13A.05.01.11.

BACKGROUND:

The student is seventeen (17) years old, is identified as a student with an Emotional Disability under the IDEA, and has an IEP that requires the provision of special education instruction and related services.

From January 23, 2018 to September 19, 2018, the student was placed by the Maryland Department of Juvenile Services (DJS) at XXXXX. The student is currently placed at the Baltimore County Detention Center (BCDC), a local adult correctional facility operated by the Baltimore County Department of Corrections, where the education program is provided by the Baltimore County Public Schools (BCPS).

FINDINGS OF FACTS:

1. Prior to being placed by the DJS at XXXXXX, the student was placed at the XXXXX XXXXXXXXXXXXXXXX (XXXXXXX), a nonpublic separate special education school, where he had been placed by the BCPS. The IEP in effect when the student was placed at XXX was developed at XXXXXXXX. The documents that, at that time, there was a several year gap between the student's grade level and functional instructional levels, and that he made "approximately 6 months' improvement over the IEP school year" in reading. It states that his progress "is negatively affected most consistently due to lack of effort, disinterest in subject matter, and difficulty remaining focused and on task."

2. Although the IEP developed at XXXXXX identifies the student with an Emotional Disability, it states that the student's problems with hyperactivity, distractibility and impulsivity cause him to have difficulty learning and contribute to problems in school. It also states that the student "is unable to process his academic work and tasks at a reasonable pace in comparison to other same-aged peers," and that he "can become frustrated with work when he does not understand what is being taught" and often needs one-to-one support for understanding.
3. The IEP developed at XXXXXXXXX requires the provision of twenty-nine (29) hours of special education instruction per week from a special education teacher and one (1) hour per week of counseling services from a "counselor/therapist." It states that counseling will be delivered through individual or group sessions at the discretion of the clinician and that "some of these hours may be delivered after school as needed, for make up sessions." The services were to be provided to assist the student with improving skills in the areas of reading, writing, and math, improving his social skills, including making eye contact, and improving his ability to manage his feelings.
4. The IEP developed at XXXXXXXXXX states that the special education services are to be provided in a nonpublic separate special education school because the student's "educational and social emotional needs exceed that which can be provided in a public school setting." The IEP requires that the student receive instruction in a small classroom with a low student-to-teacher ratio, that he be provided with additional time to complete work and assistance with organization, that assignments be broken down into smaller units, that he be seated near staff and away from peers, and that he be provided with access to support staff trained in crisis intervention to assist him with maintaining safe, appropriate behavior.
5. The progress reports made on April 13, 2018 at XXXXXX document that the student was being provided with prompts, redirection throughout instruction, and seating away from peers with a staff member. The reports also document that the student was maintaining eye contact when speaking with peers and adults, managing emotions, and verbalizing feelings and thoughts with the provision of counseling services, but was inconsistent with controlling the tone of his voice and following rules.
6. The documentation reflects that the student was provided with special education instruction by a special education teacher inside a room where instruction was provided to other students by a general education teacher, and that there were eight (8) to ten (10) students in each room. One (1) of the student's special education teachers holds certification in special education for grades one (1) through eight (8) only. However, there is documentation that this teacher participates in regularly scheduled meetings with a special education teacher who is certified in special education through the twelfth (12th) grade in order to conduct lesson planning and evaluation.

7. On May 3, 2018, the IEP team at XXXX convened and discussed that, although the student had made progress, it was inconsistent, and that he continued to have difficulty learning due to his emotional, social, and behavioral issues. The team recommended that educational, intellectual/cognitive, and emotional, social, and behavior assessments be conducted. The student's mother reported that assessments had been recently performed and that she would provide copies of reports of those assessment results, and she also provided written consent for the JSES to conduct assessments.
8. At the May 3, 2018 IEP team meeting, the team documented its decision that counseling services would be provided two (2) times per week for thirty (30) minutes per session and that a nonpublic separate special education school remained appropriate for the student. The team further documented its decision that the current placement at XXXXXX is comparable to the educational placement in a separate special education classroom setting in a community-based school due to the low student-to-teacher ratio and resources to remediate skills deficits that are available in the classrooms at XXXXXX.
9. On May 9, 2018, the student's legal counsel contacted the JSES and reported that cognitive testing was already being conducted and that the results would be shared when available in order to ensure that the school staff did not conduct duplicate testing.
10. The progress reports made on June 20, 2018 at XXXX document that the student was being provided with special education instruction and supplementary aids and services to address the IEP goals, including being seated close to a teacher away from the rest of the group to ensure that he could access the supports. The reports also document that the student was making sufficient progress towards achieving goals to improve his social skills and coping strategies.
11. In June 2018, the school psychologist and the psychologist who was already conducting cognitive testing communicated about the tests that were already administered in May 2018. The school psychologist was informed that the student's parent had partially completed an Adaptive Behavior Assessment System (ABAS) form from which a social composite standard score was generated, but that no measures were provided to teachers or staff. The school psychologist agreed to obtain similar information from a couple of the student's teachers.
12. On August 10, 2018,¹ the IEP team considered information from the assessment data. The data includes the report of the testing conducted by the school psychologist on June 5, 14, and 20, 2018. The report states that the student has a Full Scale Intelligence Quotient (Full Scale IQ) in the "extremely low" range. The report states that information about the student's adaptive functioning was obtained from the student's two (2) special

¹ The communication log documents several contacts with the student's parent to attempt to schedule the meeting on an earlier date.

education teachers who have taught the student for five (5) months. While the teachers had a high rate of guesses² on subtests related to community use, functional academics, and self-care, they were able to provide reliable information in the areas of school living, health and safety, social, communication, and leisure. The student scored from “below average” in leisure and social domains to “extremely low” in community use, school living, and health and safety, and received a score in the “extremely low” range in the general adaptive composite.

13. The report of the testing by the school psychologist states that the student’s “borderline and extremely low” performance on all the indices of the cognitive assessment “shows that intellectual factors are likely a major reason as to why [the student’s] progress in school has been slow.” It further states that, although the student “also shows very impulsive behaviors, difficulty paying attention, and behavior issues in school, this is likely at least partially due to his having so much difficulty keeping up in class.” The report further states that a person is defined as having an Intellectual Disability if he or she has a Full Scale IQ score of seventy-five (75) or lower, along with at least one (1) “low” area in adaptive skills, and that the student’s Full Scale IQ score was sixty-four (64), and several of his adaptive scores were in the “extremely low” range. The school psychologist further reported that, although the student was identified as a student with an Emotional Disability, that disability only exists if the student’s learning disabilities cannot be explained by intellectual, sensory, or health factors. As a result, the school psychologist recommended that the IEP team “carefully consider whether [the student’s] primary disability should be changed from Emotional Disability to Intellectual Disability.” The school psychologist also made several recommendations for educational supports for the student in the classroom to assist him with the identified cognitive deficits.
14. The IEP team at XXXX decided that, based on the data, “intellectual factors are likely a major reason as to why [the student’s] progress in school has been slow.” However, it continued to identify the student’s primary disability as Emotional Disability, without further explanation. The IEP that was revised includes some, but not all of the supports recommended by the school psychologist, and there is no documentation of the team’s rejection of the other recommended supports.
15. The JSES staff have been in contact with the BCPS staff, who are providing educational services to the student at the BCDC, about participation in a reevaluation that the BCPS is conducting for the student.
16. While attending XXXXXX, the student was taking culinary arts, earth and space science, English 10, geometry, world history, and fine arts courses. There is documentation that, while placed at XXXX, the student was able to complete courses and earn credits in earth

² The developer of the assessment has issued guidance on how to factor guesses into the administration and scoring of the assessment.

and space science, English 10, geometry, and world history. He also earned a credit in environmental science.

17. The JSES provides students with the opportunity to complete two (2) courses during the summer term. While the student had not completed the culinary arts course he was taking at XXXXXXXX when he was placed at XXXX, he was not provided with the opportunity to do so during the summer of 2018. A review of the Maryland Course List developed by Apex Learning, Inc.,³ reflects that culinary arts is not a course that is offered in Maryland through the program.
18. The student was enrolled in the education program at XXXX for nine (9) days at the start of the fall 2018 term prior to his exit from the facility on September 19, 2018. At that time, he was enrolled in English 11, United States history, and algebra II. He was also enrolled, without explanation, in a science class that he did not require in order to graduate, and the school staff responsible for assigning him to the class is no longer with the school system.
19. There is documentation that there were insufficient staff at XXXX to provide the student with the counseling services in the amount and frequency required by the IEP. There is also documentation that the service provider kept track of missed services, that the JSES obtained a private contractor to assist with the provision of services, and that the missed sessions had been made up by August 2018.

DISCUSSION/CONCLUSIONS:

Allegation #1 Reevaluation

The IDEA does not include requirements with respect to the primary disability coding assigned to students with disabilities. However, it does require that a student be identified with a disability only if that student meets the criteria required by the IDEA for the disability. The IDEA also requires that each evaluation be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR §300.304).

When conducting a reevaluation, the IEP team must consider all evaluation data, and based on that data, review and revise the IEP, as appropriate, to reflect additions or modifications needed to enable the student to meet the annual IEP goals and to participate in the general curriculum (34 CFR §§300.305 and .324).

³ The Apex Learning, which is utilized by the JSES in the provision of instruction, is designed to accommodate a large range of personalities and learning styles. It mixes standard face-to-face interactions in the classroom with technology-based communication techniques, creating a learning environment where students engage in deliberate practice, which requires quiet, concentration, repetition, lack of distractions, and regular, individualized feedback that does not necessitate collaboration or group work.

In this case, the complainant alleges that the reevaluation conducted on August 10, 2018 was not sufficiently comprehensive to identify and address the student's cognitive needs because input was not obtained from the student's parent and the input obtained from the teachers involved a "high rate of guessing."

Based on the Findings of Facts #1, #2, #7, #9, and #11 - #14, the MSDE finds that the JSES obtained sufficient data about the student's cognitive and adaptive skills functioning to identify his cognitive needs, and added supports to the IEP to address those needs, in accordance with 34 CFR §§300.304, .305 and .324. Therefore, this office does not find that a violation occurred with respect to the allegation.

However, based on the Findings of Facts #13 - #15, the MSDE finds that there is no documentation that the JSES ensured that the IEP team considered all of the supports recommended to address those needs, and no documentation of the basis for continuing to identify the student with an Emotional Disability in light of the identified intellectual difficulties, in accordance with 34 CFR §§300.304, .305 and .324. Therefore, this office finds that a violation occurred.

Allegation #2 IEP Implementation in the Required Placement

Each public agency must ensure that students are provided with the special education and related services required by the IEP. If a student with an IEP transfers to a new public agency within the State, the new public agency (in consultation with the parents) must provide the student with a Free Appropriate Public Education (FAPE), including services comparable to those described in the student's IEP from the previous public agency, until the new public agency either adopts the sending IEP or revises the IEP (34 CFR §§300.101 and .323).

"Comparable services" is defined as services that are similar or equivalent to those that are described in the IEP from the previous public agency, as determined by the IEP team in the new public agency [Emphasis added] (Analysis of Comments and Changes to the IDEA, *Federal Register*, Vol. 71, No. 156, p. 46681, August 14, 2006).

In this case, the complainant alleges that the JSES did not ensure that the student's IEP was implemented in the educational placement required by the IEP, which was a nonpublic, separate special education school.

Based on the Findings of Facts #4 - #6, #8, and #10, the MSDE finds that the IEP was not implemented in a nonpublic separate special education school while the student was placed at XXXX, in accordance with 34 CFR §§300.101 and .323. Based on those Findings of Facts, the MSDE finds that, while the IEP team decided that the provision of services by a special education teacher away from peers receiving instruction from a general education teacher was comparable to the placement in the nonpublic separate special education school, this determination was not made for several months after the student was placed at XXXXXX, in

accordance with 34 CFR §§300.101 and .323 and Analysis of Comments and Changes to the IDEA, *Federal Register*, Vol. 71, No. 156, p. 46681, August 14, 2006. Therefore, this office finds that a violation occurred.

Notwithstanding the violation, based on those Findings of Facts, the MSDE finds that the violation did not negatively impact the student's ability to benefit from the education program because the IEP team subsequently determined that the placement was comparable to the previous placement, and there is documentation that the supports needed by the student were provided in the placement at XXXXX, in accordance with 34 CFR §§300.101 and .323.

Allegation #3 IEP Implementation by a Special Education Teacher

The IDEA requires the State Education Agency (SEA) to establish qualifications to ensure that personnel necessary to provide special education and related services are appropriately prepared and trained, including that those personnel have the content knowledge and skills to do so (34 CFR §§300.156).

In Maryland, teachers are required to have a valid certification in the area of major assignment (COMAR 13A.12.02). The MSDE has provided guidance that there must be consultation between uncertified teachers and team leaders holding certification if the teacher with primary responsibility for the curriculum content does not hold certification in that area (MSDE Technical Assistance Bulletin: *Improving Outcomes for Students with Disabilities – Curriculum, Instruction, and Assessment*, March 2018 and January 2019).

In this case, the complainant alleges that, because one (1) of the student's special education teachers did not hold certification in special education through grade twelve (12), the JSES did not ensure that special education instruction was provided by a special education teacher with the knowledge and skills necessary.

Based on the Findings of Facts #3, #5, #6, and #10, the MSDE finds that special education instruction was provided to the student by special education teachers, as required by the IEP, in accordance with 34 CFR §§300.101 and .323. Based on the Finding of Fact #6, the MSDE finds that the special education teacher who does not hold certification in special education through grade twelve (12) has consulted with a teacher who does hold certification in that area, in accordance with 34 CFR §§300.156 and the MSDE guidance. Therefore, this office does not find that a violation occurred.

Allegation #4 IEP Implementation – Related Counseling Services

As stated above, the public agency must ensure that each student is provided with the special education and related services in the manner required by the IEP (34 CFR §§300.101 and .323).

In this case, the complainant alleges that the JSES did not provide the related counseling services required by the IEP.

Based on the Findings of Facts #3 and #19, the MSDE finds that the JSES did not ensure that the amount and frequency of counseling services were provided consistent with the IEP, in accordance with 34 CFR §§300.101 and .323. Therefore, this office finds that a violation occurred.

Notwithstanding the violation, based on the Findings of Facts #3, #5, #10, and #19, the MSDE finds that the JSES ensured that missed services were made up. Therefore, no additional corrective action is required to remediate the violation.

**Allegation #5 Provision of Instruction to Enable the Student to Progress
Through the General Curriculum**

To be awarded a Maryland High School Diploma, a student must have earned a minimum of twenty-one (21) credits, including specific core credits (COMAR 13A.03.02.03). Each public agency must ensure that the education program for students with disabilities meets the educational standards of the SEA (34 CFR §§300.2, .17, and .149). Therefore, the public agency must ensure that students have access to instruction to allow them to achieve credit requirements in these areas to provide them with the opportunity to progress towards the State standards for graduation. However, there is no requirement for every school to offer the same elective courses.

In this case, the complainant alleges that the JSES did not ensure that the student was given the opportunity to complete an elective culinary arts class that he was taking during the 2018 summer session when he transferred to XXXX, in accordance with the school system's procedures.

Based on the Findings of Facts #16 and #17, the MSDE finds that the elective culinary arts class that the student was taking at XXXXXX is not available through the JSES. Therefore, the MSDE does not find a violation with respect to this aspect of the allegation.

The complainant also alleges that the JSES did not ensure that the student was provided with the opportunity to earn credit needed to graduate because he was enrolled in a science class that he did not require at the start of the 2018-2019 school year.

Based on the Finding of Fact #18, the MSDE finds that the student's placement in a science class at the start of the 2018-2019 school year did not provide him with the opportunity to earn credits needed for graduation, in accordance with 34 CFR §§300.2, .17, and .149 and COMAR 13A.03.02.03. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

Notwithstanding the violation, based on the Finding of Fact #18, the MSDE finds that the school staff member who enrolled the student in the class is no longer with the JSES, and that the violation did not negatively impact the student's ability to benefit from his education program because he was only enrolled in the course for nine (9) days. Therefore, this office finds that no corrective action is required to remediate the violation.

CORRECTIVE ACTIONS/TIMELINES:

Student-Specific

The MSDE requires that the JSES provide documentation by June 1, 2019 of the steps taken to participate in any pending reevaluation being conducted by the BCPS in order to ensure that all of the student's cognitive needs are addressed. If the BCPS IEP team decides that the IEP requires additional supports or services to address the student's cognitive needs as a result of the reevaluation, the JSES must offer the student compensatory services or another remedy for the delay in addressing his needs, in collaboration with the BCPS or any other education program in which the student is participating.

School-Based

The MSDE requires the JSES to provide documentation by August 1, 2019 of the steps taken to ensure that the IEP team at XXXX complies with the following requirements:

Convenes the IEP team promptly when a student is placed at the facility to determine whether the educational placement is comparable to that of the placement required by the IEP if the placement is not the same as is described in the IEP; and

Properly documents each determination regarding a student's primary disability, considers all services and supports recommended in the evaluation data, and properly documents its decision to accept or reject those recommendations.

TECHNICAL ASSISTANCE:

Technical assistance is available to the parties through Dr. Nancy Birenbaum, MSDE. Dr. Birenbaum may be contacted at (410) 767-0255.

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 school system and the student's parent 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.

Questions regarding the findings of facts, conclusions, and corrective actions contained in this letter should be addressed to this office in writing. The student's parent and the JSES 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 due process.

Sincerely,

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

MEF/am

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