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August 26, 2014

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Ms. Beth Hart
Director, Juvenile Services Education Program
Maryland State Department of Education
200 West Baltimore Street
Baltimore, Maryland 21201

RE: XXXXXXXXXX and
Similarly Situated Students
At the XXXXXXXXXXXXXXXX

Reference: #14-112

Dear Parties:

The Maryland State Department of Education, Division of Special Education/Early Intervention Services (MSDE, DSE/EIS), has completed the investigation of the complaint regarding special education services for above-referenced group of students. This correspondence is the report of the final results of the investigation.

ALLEGATIONS:

On June 27, 2014, the MSDE received a complaint from Grace Reusing, Esq., Office of the Public Defender, hereafter “the complainant,” on behalf of the above-referenced students with disabilities, who attended the Maryland State Department of Education, Juvenile Services Education Program at the XXXXXXXXXXXXXXXXXXXX from December 18, 2013 through May 20, 2014. The MSDE, DSE/EIS investigated the following allegations of violations of the Individuals with Disabilities Education Act (IDEA) listed below with respect to the Maryland State Department of Education, Juvenile Services Education Program (MSDE, JSEP).

1. The MSDE, JSEP has not ensured that the students have been provided with special education instruction to enable them to achieve the annual Individualized Education Program (IEP) goals and to be involved in and make progress in the general education curriculum by special education teachers, as required by the IEP, in accordance with 34 CFR §§300.101, .103, .320, and .323.
2. The MSDE, JSEP has not ensured that the students have been provided with the related services required by the IEP, in accordance with 34 CFR §§300.101, .103, .320, and .323.
3. The MSDE, JSEP has not ensured that the students are provided with special education instruction from qualified teachers, in accordance with 34 CFR §§300.18 and .156.

INVESTIGATIVE PROCEDURES:

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the Complaint.
2. On July 3 and 22, 2014, the MSDE, JSEP provided documents to be considered during the investigation.
3. On July 22, 2014, Ms. Anita Mandis, Section Chief, Complaint Investigation Section, MSDE, and Ms. Williams met with Mr. Samuel Kratz, Special Education Coordinator, MSDE, JSEP at the MSDE to discuss the allegations.
4. On July 22, 2014, Ms. Williams contacted the complainant to clarify the allegations being investigated.
5. On July 24, 2014, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to this investigation. On the same date, the MSDE notified the MSDE, JSEP of the allegations and requested that the MSDE, JSEP review the alleged violations.
6. On July 31, 2014 and August 1, 2014, Ms. Williams conducted telephone interviews with the complainant about the allegations being investigated.
7. On July 31, 2014 and August 4, 2014, Ms. Williams requested additional documents from the MSDE, JSEP.
8. On August 13, 2014, the MSDE, JSEP provided additional documents for consideration during the investigation.
9. On August 18, 2014, the MSDE, JSEP provided a response to the complaint.

10. The MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
 - a. Individualized Education Program (IEP), dated September 3, 2013, and Behavioral Intervention Plan (BIP);
 - b. Description of the behavioral program in which the student received special education instruction from the Frederick County Public Schools (FCPS);
 - c. Written summary of the meeting held by the school staff to review the student's educational record, dated December 19, 2013;
 - d. Counseling service provider logs from January 9, 2014 through May 27, 2014;
 - e. Notice and Consent for Assessment, dated January 31, 2014 and signed by the student's mother on February 19, 2014;
 - f. Reports on the student's progress toward achieving the annual IEP goals, dated February 4, 2014;
 - g. IEP team meeting invitations to the student's mother, dated December 19, 2013, February 4, 2014 and March 17, 2014;
 - h. Reports of the student's progress in his classes, dated April 29, 2014, May 20, 2014, and June 2, 2014;
 - i. Reports on the student's progress toward achieving the annual IEP goals, dated April 17, 2014;
 - j. IEP, dated March 25, 2014 and written summary of the March 25, 2014 IEP team meeting;
 - k. The student's class schedule at the XXXXXXXXXXXXXXXXXXXX;
 - l. Samples of the student's work, teacher lesson plans, and matrix of instructional accommodations provided;
 - m. Annual Secondary School Performance Data Summary (Student Record Card 3), signed by the school principal on May 29, 2014;
 - n. The MSDE, JSEP policies and procedures for the supervision of staff by highly qualified teachers while recruiting certified teachers in the core content areas, dated June 1, 2014;
 - o. Maryland Student Exit Record (Student Record Card 7), signed by the school principal on June 4, 2014;
 - p. Written complaint containing allegations of violations of the IDEA, received by the MSDE on June 27, 2014; and
 - q. Written response to the complaint from the MSDE, JSEP, received on August 18, 2014.

BACKGROUND:

MSDE, JSEP

In accordance with the State law, the MSDE was given the responsibility for developing and implementing the Juvenile Services Educational Programs at all fourteen (14) residential

facilities of the Maryland Department of Juvenile Services (DJS) by July 1, 2014 (Md. Code Ann., Educ., §22-303).¹ During FY 2013, the MSDE, JSEP, which was already providing educational programming in seven (7) DJS facilities, assumed the educational programming in the remaining facilities, including at the XXXXXXXXXXXXXXXXXXXX. Therefore, the MSDE, JSEP is the public agency that is responsible for ensuring that students with disabilities who are placed in these facilities receive a Free Appropriate Public Education (FAPE) consistent with the requirements of the IDEA.

The Named Student

The named student above is eighteen (18) years old and is identified as a student with an Emotional Disability under the IDEA. The student has an IEP that requires the provision of special education and related services (Doc. a).

From December 17, 2013 through May 29, 2014, while placed at the XXXXXXXXXXXXXXXXXXXX by the Maryland Department of Juvenile Services (DJS), the student participated in the educational program at the facility, which is operated by the MSDE, JSEP. During that time period, the student's mother participated in the education decision-making process and was provided with written notice of the procedural safeguards (Docs. e, g, j, m, o, and q).

ALLEGATIONS #1 & #2 PROVISION OF SPECIAL EDUCATION INSTRUCTION AND RELATED SERVICES IN THE EDUCATIONAL PLACEMENT REQUIRED BY THE IEP

FINDINGS OF FACTS:

IEP Requirements for the Named Student

1. On December 17, 2013, the DJS enrolled the student in the educational placement at the XXXXXXXXXXXXXXXXXXXX. At that time, the student had an IEP that was developed by the Frederick County Public Schools (FCPS) on September 3, 2013. The IEP required the provision of special education instruction from a special education teacher, general education teacher, instructional assistant, and behavior specialist outside of the general education classroom to assist the student in achieving the annual goals related to improving reading comprehension, written language mechanics, math problem solving, the ability to use self management strategies when experiencing frustration, and the ability to demonstrate positive choices and responsibility for his behavior. The special education instruction was to be provided in a program designed to address the needs of

¹ Prior to enactment of the law, the provision of educational services was the responsibility of the DJS staff.

students with “persistent challenging behavior.” The IEP also required the provision of weekly counseling from a school social worker (Docs. a and b).

2. On December 19, 2013, the school staff at the XXXXXXXXXXXXXXXXXXXX reviewed the student’s educational record and decided that a reevaluation should be conducted (Doc. c).
3. On March 25, 2014, the IEP team considered the results of assessments that it recommended on January 16, 2014, and determined that the student continues to meet the criteria for identification as a student with an Emotional Disability under the IDEA. At the meeting, the team discussed that the student was enrolled in English 10, World History, Biology, Geometry, Office Systems Management, and Career Research and Development classes. The team also discussed the graduation requirements and the additional credits that the students needs in order to graduate (Docs. j and k).
4. At the March 25, 2014 IEP team meeting, the team documented its consideration of information from the student’s teachers and service providers that they were able to implement the Behavioral Intervention Plan (BIP) that had been developed at his previous school, and that the student had demonstrated a “dramatic improvement in his behavior” from when he attended the previous school. Based on this information, the team decided that the student could receive special education instruction in the general education classroom with ten (10) students and three (3) adults taught by a special education teacher, instructional assistant, and general education teacher. The IEP team also decided to decrease the amount of counseling services being provided from one (1) hour per week to thirty (30) minutes per week (Doc. j).

**Provision of Special Education Instruction to Students at the
XXXXXXXXXXXXXXXXXXXX**

5. A review of samples of the student’s work, teacher lesson plans and a matrix of instructional accommodations provided, as well as reports of the student’s progress toward achievement of the annual IEP goals, documents that the goals were addressed through the provision of special education and related services. The progress reports, dated February 4, 2014 and April 17, 2014, reflect that the student made sufficient progress toward achieving all of the annual IEP goals (Docs. f, h, i, and l).
6. There are reports of the progress of other students at the XXXXXXXXXXXXXXXXXXXX toward achievement of their annual IEP goals, which document that the goals are addressed through the provision of special education and related services (Docs. f and i).
7. Prior to the March 25, 2014 revision of the named student’s IEP, the special education instruction was provided in the general education classroom based on a determination by the school staff that the special education services that would be provided in the general

education classroom at the DJS facility were comparable to those provided outside of the general education classroom when the student resided in the community (Doc. k and Interview with the MSDE, JSEP staff).

8. There is documentation that the school staff believed that another student who entered the educational program with an IEP that required the provision of special education instruction outside of the general education classroom could be provided with comparable services in the general education classroom at the facility because of the small number of students in the classroom. However, the decision that the services were comparable to those provided in the student's previous school was not made by an IEP team and the student's educational record reflects that his behavior impeded his learning, progress, and academic performance in the general education setting at the facility (Review of documents from the educational records of students at the XXXXXXXXXX XXXXXXXXXX).

Provision of Counseling Services to Students at the XXXXXXXXXXXXXXXXXXXX

9. A review of a document entitled, "Related Services Log Notes" reflects that the student was provided counseling services on a weekly basis, but that some sessions were missed (Doc. d).
10. There is documentation that other students in the educational program were provided with counseling services to address the annual IEP goals with the frequency required by each student's IEP (Review of documents from the educational records of students at the XXXXXXXXXXXXXXXXXXXX).

DISCUSSION/CONCLUSIONS:

Allegation #1 Provision of Special Education Instruction

Upon Enrollment in the Educational Program

The IDEA requires that a FAPE be provided to students with disabilities. This is achieved through the development and implementation of an IEP that requires the provision of special education and related services that meet the needs that result from each student's the disability and enable the student to be involved in and make progress in the general curriculum (34 CFR §§300.101, .103, .320, and .323).

The special education services that are provided are to be based on the decisions made by the IEP team about the student's individual needs and not solely on factors such as the configuration of the service delivery system, availability of staff, or administrative convenience. Although the IDEA does not require that each school building be able to provide all of the special education and related services needed for all types and severity of disabilities, the public agency has an obligation to

make available a full continuum of alternative placement options that maximize opportunities for students with disabilities to be educated with nondisabled students to the extent appropriate (34 CFR §300.116, COMAR 13A.05.01.10, and *Letter to Clay*, United States Department of Education, Office of Special Education Programs, 23 IDELR 341, May 17, 1995).

In determining the educational placement of a student with a disability, the public agency must ensure that the decision is made in conformity with the Least Restrictive Environment (LRE) requirements,² is based on the IEP, and is as close as possible to the student's home. Unless the IEP requires another arrangement, the public agency must also ensure that the student is educated in the school that the student would attend if not disabled (34 CFR §300.116).

If a student with an IEP transfers to a new public agency, the new public agency (in consultation with the parents) must provide the student with a 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 IEP from the previous public agency or revises the IEP (34 CFR §300.323). "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).

Since a student who is Court-ordered to be placed in secure DJS facility is prohibited from receiving special education instruction in the educational placement required by an IEP that was developed when the student resided in the community, the MSDE, JSEP will not be able to provide services in the manner described in the IEP for many of the students transferring into its educational programs. Because only the IEP team can determine the services in a DJS setting that are "comparable" to the services provided in the community, the MSDE, JSEP must, in consultation with the student's parent, ensure the provision of a FAPE to the student until the IEP team can meet and either determine comparable services at the facility or revise the IEP, if appropriate.

In this case, the complainant alleges that the named student was not provided with the special education instruction in the educational placement required by the IEP from December 18, 2013 until the IEP was revised on March 25, 2014 because instruction is provided to students based upon the available service delivery system and not on each student's needs (Doc. p).

Based on the Findings of Facts #1 - #4 and #7, the MSDE finds that the student was not provided with special education instruction in the educational placement required by the IEP from December 18, 2013 through March 25, 2014. Based on those Findings of Facts, the MSDE

² To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, must be educated with nondisabled students (34 CFR §300.114).

further finds that the school staff unilaterally determined the services to be provided until the IEP team convened and revised the IEP.

In addition, based on the Findings of Facts #7 and #8, the MSDE finds that special education instruction was provided to students in the general education classroom despite the documentation that not all of those students could be supported in that setting. Therefore, the MSDE finds that violations occurred with respect to this aspect of the allegation.

Following the Revision of the IEP on March 25, 2014

The complainant further alleges that, even after the March 25, 2014 revision of the IEP, the named student was not provided with the special education instruction required by the IEP because the instruction that is provided at the facility is not designed to assist students with disabilities to make progress with achieving their individual annual IEP goals and to progress through the general curriculum (Doc. p).

Students with disabilities in each DJS facility must have access to instruction to allow them to achieve credit requirements necessary to progress toward the standards for graduation from a public high school in Maryland and prepare them to successfully obtain a Maryland High School Diploma by examination (COMAR 13A.05.11.03). To be awarded a Maryland High School Diploma, a student must have earned a minimum of 21 credits, including specific core credits in English, fine arts, mathematics, physical education, science, social studies, and technology education. Core credits must also be earned in world language or American Sign Language, advanced technology education, or a career and technology program (COMAR 13A.03.02.04).

Based on the Findings of Facts #3, #5 - #7, and #11, the MSDE finds that there is documentation that the student was enrolled in core subject areas and that the annual IEP goals were addressed through the provision of special education instruction and related counseling services for the named student and other students at the XXXXXXXXXXXXXXXXXXXX. Therefore, the MSDE does not find that a violation occurred with respect to this aspect of the allegation.

Allegation #2 Provision of Counseling Services

Based on the Findings of Facts #1 and #9, the MSDE finds that while there is documentation that the student was provided with counseling services to assist him with achieving the goals to improve his behavior, there is no documentation that it was provided with the frequency required by the IEP. Therefore, the MSDE finds that a violation occurred with respect to this allegation.

ALLEGATION #3: PROVISION OF SPECIAL EDUCATION INSTRUCTION BY QUALIFIED TEACHERS

FINDINGS OF FACT:

12. A review of the list of staffing of the educational program at the XXXXXXXXXXXXXXXX and the named student's class schedule reflects that special education instruction was not provided to the student by teachers who are certified in the areas in which instruction was provided. The documents also reflect that there are position vacancies at the facility for teachers in the areas of math and English (Doc. k and Review of the list of staffing of the educational program at the XXXXXXXXXXXXXXXX).
13. On June 1, 2014, policies and procedures for the supervision of staff by highly qualified teachers in the core content areas while recruiting certified teachers became effective within the MSDE, JSEP. However, there is no documentation of the implementation of the procedures at the XXXXXXXXXXXXXXXX (Doc. n and Review of the list of staff of the educational program at the XXXXXXXXXXXXXXXX).

DISCUSSION/CONCLUSIONS:

The IDEA requires that public agencies ensure that personnel providing special education services are appropriately and adequately prepared and trained, and requires that school staff who are used to assist in the provision of special education and related services are appropriately trained and supervised by highly qualified staff. The IDEA requirements incorporate the requirements of the Elementary and Secondary Education Act of 1965 (ESEA). These requirements include that teachers be fully licensed or certified to teach, and that they demonstrate subject matter knowledge in the core academic subjects that they teach (20 U.S.C. §1412(a) (14), 34 CFR §§200.25, .55, and .56, and 34 CFR §§300.18 and .156).

The IDEA regulations establish requirements for special education teachers in general, as well as those teaching core academic and multiple subjects (34 CFR §§200.56, 300.18, and 300.156). Core academic subjects means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography (34 CFR §300.10). Being highly qualified means that a special education teacher has obtained full State certification as a special education teacher and holds at least a bachelor's degree (34 CFR §300.18).

If a special education teacher is teaching core academic subjects, he or she must also hold certifications in the core academic areas being taught. However, the special education teacher is not required to demonstrate subject matter competence in a core academic subject if only providing consultation services to a general education teacher who holds a certification in the subject area or if only reinforcing instruction provided by such a teacher (34 CFR §§200.56, 300.18, and 300.156 and *Questions and Answers on Highly Qualified Teachers Serving Children*

with Disabilities, United States Department of Education, Office of Special Education Programs (OSEP), January 2007).

The IDEA requires that the State Education Agency establish and maintain qualifications to ensure that personnel necessary to carry out the requirements of the IDEA are appropriately and adequately prepared and trained, including those personnel who have the content knowledge and skills to serve students with disabilities. The MSDE, JSEP is required to ensure that instruction is provided by personnel with valid Maryland Educator Certificates (COMAR 13A.05.11.07).

These requirements are designed to ensure that highly qualified personnel provide special education and related services to students with disabilities. However, they do not create a right of action on behalf of an individual student or class of students for the lack of the provision of instruction by an individual who is not highly qualified (34 CFR §§300.18, .101, .156, .323).

Based on the Findings of Facts #12 and #13, that the MSDE, JSEP has not ensured that special education instruction is provided by highly qualified teachers who are certified in the areas of instruction being provided at the XXXXXXXXXXXXXXXXXXXXX and that a violation occurred with respect to this allegation. However, because there is not an individual student entitlement to the provision of instruction from a highly qualified teacher, no student specific corrective action is required to remediate the violation.

CORRECTIVE ACTIONS/TIMELINES:

Student-Based

The MSDE requires the MSDE, JSEP to provide documentation by February 1, 2015 of the steps taken to locate the student and, if he is enrolled in an educational program, to coordinate with the current public agency to ensure that the IEP team has convened and made the following determinations based on the evaluation data:

1. The student's current levels of academic and functional performance;
2. The levels of academic and functional performance that were expected to be achieved by that time;
3. The amount and nature of services needed to compensate the student for the violations identified, based upon any identified discrepancy between the student's expected and actual levels of performance; and
4. A plan for how and when the services are to be provided within one (1) year of the date of this Letter of Findings.

Similarly-Situated Students

The MSDE requires the MSDE, JSEP to provide documentation by February 1, 2015 that the educational records for students with disabilities participating in the educational program at the XXXXXXXXXXXXXXXXXXXX since December 18, 2013 have been reviewed for compliance with the requirements addressed in this investigation. For each student for which a violation is identified, the MSDE, JSEP must provide documentation of the steps taken to locate the student, and if he is enrolled in an educational program, to coordinate with the current public agency to ensure that the IEP team has convened and made the following determinations based on the evaluation data:

1. The student's current levels of academic and functional performance;
2. The levels of academic and functional performance that were expected to be achieved by that time;
3. The amount and nature of services needed to compensate the student for the violations identified, based upon any identified discrepancy between the student's expected and actual levels of performance; and
4. A plan for how and when the services are to be provided within one (1) year of the date of this Letter of Findings.

School/System-Based

The MSDE requires the MSDE, JSEP to provide documentation by November 1, 2014 of the steps taken to ensure that the school staff at the XXXXXXXXXXXXXXXXXXXX follow proper procedures for providing a FAPE to each student until an IEP team determines the comparable services that will be provided in the facility, or revises the IEP consistent with the data.

In addition, by February 1, 2015, the MSDE, JSEP must provide a plan for ensuring the implementation of procedures for the supervision of staff by highly qualified teachers in core content areas within one (1) year of the date of this Letter of Findings.

TECHNICAL ASSISTANCE:

Technical assistance is available to the parties through the Family Support and Dispute Resolution Branch, MSDE, at (410) 767-0255.

Please be advised that the complainant and the MSDE, JSEP have the right to submit additional written documentation to this office, which must be received within fifteen (15) days of the date of this letter, if they disagree with the findings of facts or conclusions reached in this Letter of Findings. The additional written documentation must not have been provided or otherwise

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available to this office during the complaint investigation and must be related to the issues identified and addressed in the Letter of Findings.

If additional information is provided, it will be reviewed and the MSDE will determine if a reconsideration of the conclusions is necessary. Upon consideration of this additional documentation, this office may leave its findings and conclusions intact, set forth additional findings and conclusions, or enter new findings and conclusions. Pending the decision on a request for reconsideration, the school system must implement any corrective actions consistent with the timeline requirements as reported in this Letter of Findings.

Questions regarding the findings of facts, conclusions, and corrective actions contained in this letter should be addressed to this office in writing. The named student's parents and the MSDE, JSEP 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 named 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 Special Education/
Early Intervention Services

MEF/am

cc: XXXXXXXX
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