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January 28, 2016

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

RE: XXXXX
Reference: #16-053

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 the above-referenced student. This correspondence is the report of the final results of the investigation.

ALLEGATIONS:

On December 2, 2015, 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 Schools (JSES)¹ violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student.

¹ Formerly known as MSDE, Juvenile Services Education (JSE) and the MSDE, Juvenile Services Education Program (JSEP).

The MSDE investigated the following allegations:

1. The JSES did not ensure that the student was provided with the special education instruction in the educational placement required by the Individualized Education Program (IEP) while he was placed by the Maryland Department of Juvenile Services (DJS) at the XXXXXXXXXXXXXXXX (XXXXXXXXXXXX) from February 26, 2015 to August 19, 2015, in accordance with 34 CFR §§300.101 and .323.
2. The JSES did not ensure that the student was provided with the amount of psychological services required by the IEP from February 26, 2015 to August 19, 2015, in accordance with 34 CFR §§300.101 and .323.
3. The JSES did not ensure that educational instruction was provided by teachers who hold a valid Maryland certification in the areas of instruction from February 26, 2015 to August 19, 2015, in accordance with 34 CFR §§300.2, .18, .101, .156, .323, and COMAR 13A.05.11.07 and 13A.12.01.01.

INVESTIGATIVE PROCEDURES:

1. On December 9, 2015, the MSDE sent correspondence to the complainant that acknowledged receipt of the correspondence containing allegations of violations of the IDEA and identified the allegations subject to this investigation. On the same date, the MSDE notified the JSES of the allegations and requested that JSES review the alleged violations.
2. On December 11, 2015, Ms. Anita Mandis, Section Chief, Complaint Investigation Section, MSDE, requested documents from the JSES.
3. On December 22, 2015, the complainant provided documentation to the MSDE.
4. On December 28, 2015, Ms. Mandis met with Ms. Dawn Hubbard, Compliance Specialist, JSES, to review documents and discuss the allegations.
5. The MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
 - a. The student's IEP, dated November 7, 2014;
 - b. The results of a Basic Achievement Skills Inventory (BASI) Survey of the student's verbal and math skills, taken on March 11, 2015 and July 23, 2015;
 - c. Log of the provision of services by the school psychologist for the months of March through July 2015;
 - d. Certificates of recognition awarded to the student during the months of April, May, and June 2015;

- e. Reports of the student's progress towards achievement of the annual IEP goals, dated April 17, 2015 and June 30, 2015;
- f. Letter of Findings issued in Complaint #15-083 on November 3, 2015;
- g. IEP, dated November 5, 2015;
- h. The student's transcript for the ninth (9th), tenth (10th) and eleventh (11th) grades;
- i. The XXXXXXXXXXXX school schedule in effect since December 1, 2014;
- j. Correspondence from the complainant alleging violations of the IDEA, received by the MSDE on December 2, 2015;
- k. Written summary of an IEP team meeting held on December 22, 2015; and
- l. The *JSES Special Education Policy and Procedures*.

BACKGROUND:

The student is eighteen (18) 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 (Docs. a and g).

From February 26, 2015 to August 19, 2015, the Maryland Department of Juvenile Services (DJS) placed the student at the XXXXXXXXXXXXXXXXXXXX (XXXXXXXXXXXX). During that time period, he was enrolled in the JSES (Docs. h and j).

On August 19, 2015, the student returned to the community, and there is documentation that he enrolled in the Baltimore City Public Schools (BCPS) at the XXXXXXXXXXXXXXX (Docs. g and j).

**ALLEGATIONS #1 AND #2 PROVISION OF SPECIAL EDUCATION
INSTRUCTION IN THE REQUIRED
EDUCATIONAL PLACEMENT AND
PROVISION OF PSYCHOLOGICAL SERVICES
FROM FEBRUARY 26, 2015 TO AUGUST 19, 2015**

FINDINGS OF FACTS:

- 1. During the time period covered by this investigation, the IEP required the provision of fifteen (15) hours per week of special education instruction in the areas of math, English, and science from a special education teacher outside of the general education classroom setting. The IEP states that the student required this placement due to his need for "a smaller structured classroom" where he could be provided with support and assistance accessing the grade level curriculum and completing work due to his difficulty in processing information. The IEP also required the provision of two (2) thirty (30) minute sessions of psychological services per month from a school psychologist (Doc. a).

2. A review of the classroom roster, the school schedule, and staffing documents reflects that the student received instruction in general education classroom with six (6) to nine (9) other students, staffed by general education teachers with support from a special education teacher (Doc. i and review of staffing documents and observation reports).
3. The XXXXXXXXXXXX school schedule reflects that there is insufficient special education teacher staff to provide the amount of special education instruction required by the student outside of the general education classroom (Doc. i and review of staffing documents).
4. The service logs reflect that the student was provided with psychological services, as required by the IEP, from March 2015 through July 2015. However, there is no documentation that the student was provided with psychological services in August 2015 prior to his release back into the community on August 19, 2015. While the school psychologist left the JSE in August 2015, there is documentation that a substitute provider has been delivering these services pending the filling of the school psychologist position (Docs. c and j and review of service provider logs for students at XXXXX XXXXXXXXXXXX).
5. The reports of the student's progress towards achievement of the annual IEP goals, which were generated on April 17, 2015 and June 30, 2015, document that the student was provided with special education instruction to assist him with making sufficient progress towards achieving the goals, including the goal to increase his coping skills by identifying triggers to aggression, developing appropriate problem solving skills, and beginning and ending assignments with only two (2) prompts (Doc. e).
6. While placed at XXXXXXXX, the student was able to complete and earned credit for an English 10 course that he was taking at the time that he was placed at XXXXX XXXXX. He also earned credits in English 11, geometry, biology, and world history, as well as in a career and technology education course² (Doc. h).
7. The results of a Basic Achievement Skills Inventory (BASI) Survey of the student's verbal skills, taken on March 11, 2015, indicated that the student scored a total grade equivalent of below third (3rd) grade. The results of the BASI taken on July 23, 2015 indicated a total grade equivalent of 3.7. The results of the BASI Survey of the student's math skills, taken on March 11, 2015, indicated that the student scored a total grade equivalent of 4.6. The results of the BASI taken on July 23, 2015 indicated a total grade equivalent of 6.3 (Doc. b).

² The student's transcript reflects that he earned no credits during the previous school year while attending a school in the community (Doc. h).

8. The student was awarded a certificate of recognition as Student of the Week for exhibiting appropriate behavior and satisfactory performance in the classroom for the weeks ending April 10 and 24, 2015, May 8, 22, and 29, 2015, and June 12, 2015. He was awarded a certificate of recognition as Student of the Month in May 2015 (Doc. d).
9. On December 22, 2015, the IEP team convened and determined that, based on the progress the student had made on the annual IEP goals and in the general curriculum, the provision of special education instruction with nondisabled peers by both general and special education teachers did not negatively impact his ability to benefit from the education program (Doc. k).
10. At the December 22, 2015 IEP team meeting, the IEP team determined that arrangements will be made with the student's current school system to make up the one (1) thirty (30) minute session of psychological services missed by the student (Doc. k).

PRELIMINARY DISCUSSION:

The implementing regulations of the IDEA explain that the federal requirements related to the education of students with disabilities apply to all political subdivisions of a State that are involved in the education of students with disabilities, including juvenile correctional facilities. These regulations require that each educational program for students with disabilities meet the educational standards of the State Education Agency (SEA) (34 CFR §§300.2 and .149).

In order to implement the State law mandating the development and implementation of educational programs in the DJS residential facilities, regulations were promulgated requiring the JSES to provide a comprehensive education program for youth in these facilities in order to meet their special needs and circumstances (Ann. Code of Md. Ed. Art. §§22-306 and COMAR 13A.05.11).

DISCUSSION/CONCLUSIONS:

Each public agency must ensure that students are provided with the special education and related services in the educational placement required by the IEP (34 CFR §§300.101 and .323 and COMAR 13A.05.11.06).

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 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).

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In this case, the complainant alleges that the student was not provided with the amount of special education instruction outside of the general education classroom from a special education teacher or the amount of psychological services required by the IEP (Doc. j).

Allegation #1 Provision of Special Education Instruction in the Educational Placement Required by the IEP

Based on the Findings of Facts #1 - #3, the MSDE finds that a violation occurred.

Notwithstanding the violation, based on the Finding of Fact #9, the MSDE finds that the IEP team has determined that the violation did not negatively impact the student’s ability to benefit from the educational program. Based on the Findings of Facts #5 - #7, the MSDE finds that the IEP team’s decision is consistent with the data.³

On November 3, 2015, the MSDE issued a Letter of Findings as a result of an investigation of an unrelated complaint (State complaint #15-083). As reported in that Letter of Findings, the JSES is required to provide the MSDE with documentation by February 1, 2016 of the steps taken to ensure that sufficient staff are assigned to XXXXXXXXXX if a student is placed at the facility who requires special education instruction in a separate special education classroom (Doc. f).

Thus, the MSDE finds that the JSES has already been required to take steps to ensure that sufficient staff is assigned if a student is placed at the facility who requires special education instruction in a separate special education classroom. Therefore, no additional corrective action is required to remediate the violation.

³ The United States Department of Education, Office of Special Education Programs (OSEP), requires that, during the investigation of an allegation that a student has not been provided with an appropriate educational program under the IDEA, the State Education Agency (SEA) review the procedures that were followed to reach determinations about the program. The SEA must also review the evaluation data to determine if decisions made by the IEP team are consistent with the data (OSEP Letter #00-20, July 17, 2000 and *Analysis of Comments and Changes to the IDEA*, Federal Register, Vol. 71, No. 156, p.46601, August 14, 2006).

When it is determined that the public agency has not followed proper procedures, the SEA can require it to ensure that the IEP team follows proper procedures to review and revise, as appropriate, the program to ensure that it addresses the needs identified in the data. The SEA may not, however, overturn an IEP team’s decisions when proper procedures have been followed and there is data to support the team’s decisions. The OSEP indicates that parents may challenge an IEP team’s decisions by filing a due process complaint or requesting mediation to resolve the dispute (OSEP Letter #00-20, July 17, 2000 and *Analysis of Comments and Changes to the IDEA*, Federal Register, Vol. 71, No. 156, p.46601, August 14, 2006).

Allegation #3 Provision of Psychological Services Required by the IEP

Based on the Findings of Facts #1 - #4, the MSDE finds that, while the student was not placed at XXXXXXXXXXXX for the entire month of August 2015, at least one (1) session of psychological services should have been provided by the date of his release on August 19, 2015. Therefore, this office finds that a violation occurred.

Notwithstanding the violation, based on the Findings of Facts #4 and #10, the MSDE finds that the IEP team has determined that arrangements will be made with the student's current school system to make up the missed session and steps have been taken to provide services to students while a new school psychologist is recruited. Therefore, no corrective action is required to remediate the violation.

**ALLEGATION #3: PROVISION OF SPECIAL EDUCATION INSTRUCTION
FROM TEACHERS WHO ARE CERTIFIED IN THE
AREAS TAUGHT**

FINDING OF FACT:

11. A review of the school schedule, staffing documents, and observation reports reflects that during the time period that the student was placed at XXXXXXXXXXXX, teachers who did not hold certification in their areas of instruction worked with teachers who do hold certification in those areas on the planning and evaluation of instruction. The documents further reflect that the principal has conducted classroom observations of the teachers who do not hold certification in the areas in which they are providing instruction (Doc. i and review of staffing documents and observation reports).

DISCUSSION/CONCLUSIONS:

The IDEA requires that the SEA 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. These qualifications must be designed to ensure that highly qualified personnel provide special education and related services to students with disabilities. However, this requirement does 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).

The JSES is required to ensure that instruction is provided by personnel with valid Maryland Educator Certificates so that educational staff possess the minimum essential knowledge and skills needed to achieve outcomes for public education and maintain competent practice through career-long engagement with their content area (COMAR 13A.05.11.07 and 13A.12.01.01).

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The *JSES Special Education Policy and Procedures*, in effect since August 10, 2014, state that, in the event that a content area teacher is not available to provide instruction for an extended period of time, a highly qualified teacher will provide oversight to the staff designated to provide instruction. It also states that, in the event that a related service provider is not available, an alternative related service provider will be identified to provide the related service (Doc. l).

In this case, the complainant asserts that the public agency has developed procedures to strengthen recruitment efforts and to obtain substitute teachers who are supervised by certified teachers while vacancies are being filled, and alleges that these procedures are not being implemented (Doc. j).

Based on the Finding of Fact #11, the MSDE finds that the documentation does not support the allegation. Therefore, a violation is not found with respect to the allegation.

TECHNICAL ASSISTANCE:

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

Please be advised that the complainant and the JSES 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 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 student's parents 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 Free Appropriate Public Education (FAPE) for the student, including issues subject to this State complaint investigation, consistent

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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

c: XXXXXX
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