



October 9, 2012

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Dr. Kim Hoffmann
Interim Executive Director of Special Education
Baltimore City Public Schools
200 East North Avenue, Room 204B
Baltimore, Maryland 21202

RE: XXXXX
Reference: #13-007

Dear Parties:

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

ALLEGATION:

On August 17, 2012, the MSDE received a complaint from Ms. XXXXXXXXXXXX, hereafter, “the complainant,” on behalf of her son, the above-referenced child. In that correspondence, the complainant alleged that the Baltimore City Public Schools (BCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced child. The MSDE investigated the allegation that the BCPS did not ensure that the child was provided with special education instruction in the educational placement required by the Individualized Education Program (IEP) from December 2011 to June 2012, in accordance with 34 CFR §§ 300.101 and .323.

INVESTIGATIVE PROCEDURES:

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On August 20, 2012, the MSDE sent a copy of the complaint, via facsimile, to Dr. Kim Hoffmann, Interim Executive Director of Special Education, BCPS; and Ms. Nancy Ruley, Associate Counsel, BCPS.

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3. On September 6, 2012, Ms. Williams conducted a telephone interview with the complainant and clarified the allegation to be investigated.
4. On September 13, 2012, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegation subject to this investigation. On the same date, the MSDE notified the BCPS of the allegation and requested that the BCPS office review the alleged violation.
5. On September 20 and 24, 2012, the BCPS provided the MSDE with information for the investigation via electronic correspondence.
6. The MSDE reviewed documentation, relevant to the findings and conclusion referenced in this Letter of Findings, which includes:
 - a. Correspondence and attachments from the complainant to the MSDE, received on August 17, 2012;
 - b. IEP, dated November 4, 2011;
 - c. BCPS Prior Written Notice, dated November 4, 2011;
 - d. Roster of children with disabilities and nondisabled children in the child's preschool class, with personally identifiable information redacted;
 - e. IEP, dated April 26, 2012;
 - f. BCPS Prior Written Notice, dated April 26, 2012; and
 - g. Description of the BCPS Early Learning Programs.

BACKGROUND:

The child is four (4) years old. He is identified as a child with a developmental delay under the IDEA and receives special education and related services. During the time period covered by the investigation, the child attended XXXXXXXXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX), where he participated in the XXXXXXXXXXXXXXXXXX (XXXXXXX). The child is currently participating in a Pre-Kindergarten Program at the XXXXXXXXXXXXX XXXXXXXXXXXXX (XXXXXXXXXXXXXX).

The complainant participated in the education decision-making process and was provided with written notice of the procedural safeguards (Docs. b and e).

FINDINGS OF FACTS:

1. The IEP requires that the child be provided with special education services in a half-day Regular Early Childhood Program. The IEP requires that special education instruction be provided in a general education setting and that occupational and speech/language therapy be provided in a separate special education setting (Docs. a, b, and c).
2. The child participated in XXXX at XXXX. XXXX is a half-day program for three-year-olds, in which children with disabilities can receive special education services in a setting with nondisabled children receiving pre-school services (Docs. a, b, d, e, f, and g).

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3. The BCPS developed XXXXX and recruited nondisabled children to participate in the program in order to make a Regular Early Childhood Program setting available for three-year-old children with disabilities who have an IEP which can be implemented in that setting. However, there is no information or documentation that the BCPS has taken steps to ensure that there is a sufficient number of nondisabled students participating in the program in order to be able to maintain a Regular Early Childhood Program setting (Doc. g and review of the child's educational record and documentation provided by the BCPS of the Program).
4. The XXXXXXXXXXXXXXX XXXXX class roster documents that, from December 1, 2011 to June 13, 2012, there were six (6) children with disabilities and three (3) nondisabled children who participated in the program (Doc. d).

DISCUSSION/CONCLUSIONS:

The public agency is required to ensure that children with disabilities are provided with special education and related services in the educational placement determined by the IEP team (34 CFR §§300.101 and .323). In this case, the complainant alleges that, from December 2011 to June 2012, the child was not provided with special education instruction in the educational placement required by the IEP, because the student's class did not include at least fifty percent (50%) nondisabled children.

The United States Department of Education, Office of Special Education Programs (OSEP) has explained that neither the IDEA statute nor the regulations require the inclusion of a specific number of students with disabilities and nondisabled children in order for a class to constitute a regular education class. The OSEP indicated that decisions about class size, composition, and staffing ratios are left up to the State and local school systems (Letter to Anonymous, (OSEP, January 8, 1991) and Letter to Anonymous, (OSEP, July 23, 2003)).

However, for the purpose of data reporting, the OSEP directs that children who receive special education services in programs with at least fifty percent (50%) of nondisabled children (i.e., children who do not have IEPs), should be reported as participating in a Regular Early Childhood Program (OSEP Dear Colleague Letter, February 29, 2012).

Consistent with this guidance, the MSDE has directed local school systems to report children as participating in Regular Early Childhood Programs if at least fifty percent (50%) of the children in those programs are not identified as disabled¹.

In this case, based on the Findings of Facts #1 - #4, the MSDE finds that, because nondisabled children did not represent at least fifty percent (50%) of the children in the child's preschool class, the child was not provided with special education instruction in a Regular Early Childhood Program, as required by the IEP. Therefore, the MSDE finds that a violation occurred.

¹ See, The MSDE Technical Assistance Bulletin 9B, entitled, *Placement Determination of Preschool Students with Disabilities, 3 – 5 years old, in the Least Restrictive Environment* (September 2010).

CORRECTIVE ACTIONS/TIMELINES:

Child-Specific

The MSDE requires the BCPS to provide documentation, no later than November 30, 2012, that the IEP team has determined whether the violation negatively impacted the child's ability to benefit from his education program. If the IEP team determines that there was a negative impact, the documentation must also describe the amount and nature of *compensatory services*² that the team determined to remediate the violation.

The BCPS must provide the complainant with proper written notice of the determinations made at the IEP team meeting, including a written explanation of the basis for the determinations, as required by 34 CFR §300.503. If the complainant disagrees with the IEP team's determinations, she maintains the right to request mediation or file a due process complaint, in accordance with IDEA.

Similarly-Situated Children

The MSDE requires the BCPS to provide documentation, no later than December 15, 2012, that it has identified similarly-situated children with disabilities who participated in the XXXXX at XXXXXXXXXXXXXXXXXXXX, between December 2011 and June 2012. For each child identified, the BCPS must also provide documentation that it has contacted the child's parents, informed them of the violation, and offered to hold an IEP meeting to determine whether the violation negatively impacted the child's ability to benefit from the education program and the *compensatory services*² required to remediate the violation if there was a negative impact.

School-Based/Systemic

The MSDE requires the BCPS to provide documentation no later than January 15, 2012, that it is engaged in ongoing recruitment of nondisabled children to participate in early childhood programs and any other steps necessary to ensure the availability of Regular Early Childhood Programs for three-year-old children with disabilities who can receive special education services in that environment. Additionally, the Letter of Findings will be shared with the MSDE's Office of Quality Assurance and Monitoring for Continuous Improvement for its consideration during present or future monitoring of the BCPS.

Documentation of all corrective action taken is to be submitted to this office to: Attention: Chief, Complaint Investigation/Due Process Branch, Division of Special Education/Early Intervention Services, MSDE.

TECHNICAL ASSISTANCE:

Technical assistance is available to the parties through Mrs. Martha J. Arthur, Education Program Specialist, MSDE. Mrs. Arthur may be contacted at (410) 767-0255.

² Compensatory services, for the purposes of this letter, means the determination by the IEP team as to how to remediate the denial of appropriate services to the student (34 CFR §300.151).

Please be advised that the complainant and the school system 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 the Conclusion 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 Conclusion 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, Conclusions, and Corrective Actions contained in this letter should be addressed to this office in writing. The complainant and the school system 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 for the child, 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 complaint.

Sincerely,

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

MEF:tw

cc: Andrés Alonso
Nancy Ruley
XXXXXXXXXX
XXXXXXX
Dori Wilson
Donna Riley
Tom Stengel
Anita Mandis
Sandi Marx
Nancy Vorobey
Martha J. Arthur
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