



Nancy S. Grasmick
State Superintendent of Schools

200 West Baltimore Street, Baltimore, MD 21201 410-767-0100 410-333-6442 TTY/TDD

April 21, 2011

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Ms. Mary Lee Phelps, Interim Acting Director
Department of Special Education Operations
Montgomery County Public Schools
850 Hungerford Drive, Room 225
Rockville, Maryland 20850

RE: XXXXX
Reference: #11-068

Dear Parties:

The Maryland State Department of Education, Division of Special Education/Early Intervention 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 March 9, 2011, MSDE received correspondence from Dr. XXXXXXXXX, hereafter “the complainant,” on behalf of her daughter. 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. MSDE investigated the following allegations:

1. MCPS did not ensure that the Individual Education Program (IEP) team followed proper procedures when determining the student’s educational placement for the 2010-2011 school year, in accordance with 34 CFR §§300.114 and .116;
2. MCPS did not ensure that proper procedures were followed in response to requests for an IEP team meeting during the 2010-2011 school year, as required by 34 CFR §§300.324 and .503; and
3. MCPS did not provide the complainant with notice of her right to a hearing after refusing to amend the student’s education record, in accordance with 34 CFR §300.618(c).

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INVESTIGATIVE PROCEDURES:

1. Ms. Christine Hartman, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On March 14, 2011, MSDE sent a copy of the correspondence received on March 9, 2001, via facsimile, to Ms. Gwendolyn Mason, Director, Special Education Services, MCPS, and Ms. Alison Steinfelds, Supervisor, Equity Assurance and Compliance Office, MCPS.
3. On March 15, 2011, Ms. Hartman attempted to reach the complainant by telephone and left a voice mail message when the complainant was not available.
4. On March 15, 2011, Ms. Hartman spoke to Ms. XXXXXXXXXXXX, Montgomery County Protective Services & Child Welfare Services (Protective Services), to report a possible allegation of child abuse contained in the complaint.
5. On March 16, 2011, MSDE made a written report of a possible allegation of child abuse to Protective Services.
6. On March 16, 2011, Ms. Hartman conducted a telephone interview with the complainant to clarify the allegations to be investigated.
7. On March 18, 2011, MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to the investigation. On the same date, MSDE notified Ms. Mary Lee Phelps, Interim Acting Director, Department of Special Education Operations, MCPS, and Ms. Mason of the allegations and requested that their office review the alleged violations.
8. On March 22 and 25, 2011, Ms. Hartman conducted telephone interviews with Ms. Meryl Benko, Paralegal, Equity Assurance and Compliance Office, MCPS, regarding the allegations in the complaint.
9. On April 1, 2011, MSDE received, via facsimile, MCPS's written response to the allegations in the complaint, dated April 1, 2011.
10. On April 5, 2011, MSDE received correspondence, dated March 15, 2011, from Protective Services acknowledging receipt of our written report of a possible allegation of child abuse.
11. On April 5, 2011, Ms. Hartman received two electronic mailings from the complainant concerning the allegations in the complaint and inquiring about issues not subject to this investigation. On that same date, Ms. Hartman responded to the complainant by electronic mail and by telephone. At the request of the complainant, on that same date Ms. Hartman also spoke with Dr. Eric Levine, the complainant's advocate, concerning the allegations in the complaint.

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12. On April 7, 2011, Ms. Hartman and Mrs. Anita Mandis, Section Chief, Complaint Investigation Section, Complaint Investigation and Due Process Branch, MSDE, conducted a review of the education record at the Central Office and conducted interviews with the following MCPS staff:
 - a. Mr. George R. Moore, Coordinator, Placement and Assessment Services Unit (PAS), MCPS;
 - b. Ms. Brenda Aswall, Placement Specialist, PAS, MCPS; and
 - c. Mr. David A. Patterson, Supervisor, PAS, MCPS.

Ms. Steinfelds, Ms. Benko, and Ms. Patricia Grundy, Paralegal, Equity Assurance and Compliance Office, MCPS, attended the visit as representatives of MCPS and to provide information on MCPS policies and procedures, as needed.

13. MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings (LOF), which includes:
 - a. Audio recording of IEP team meeting held on July 30, 2010;
 - b. Audio recording of IEP team meeting held on August 23, 2010;
 - c. Letter from MCPS to complainant dated August 26, 2010;
 - d. Letter from Savit & Szymkowicz, LLP, complainant's legal counsel, to MCPS dated June 22, 2010;
 - e. Addendum to Special Education Forms dated August 23, 2010;
 - f. IEP dated August 23, 2010;
 - g. Letter from Savit & Szymkowicz, LLP to MCPS dated December 20, 2010;
 - h. Letter from Savit & Szymkowicz, LLP to MCPS dated January 14, 2011;
 - i. Letter from Savit & Szymkowicz, LLP to MCPS dated January 21, 2011;
 - j. Letter from Savit & Szymkowicz, LLP to MCPS dated January 28, 2011;
 - k. Letter from MCPS to Savit & Szymkowicz, LLP dated January 14, 2011;
 - l. Letter from MCPS to Savit & Szymkowicz, LLP dated January 21, 2011; and
 - m. Letter from MCPS to Savit & Szymkowicz, LLP dated February 4, 2011.

BACKGROUND:

The student is nineteen (19) years old and is identified as a student with an emotional disability under IDEA. During the period covered by this investigation, the student has been residing at the XXXXXXXXX, an in-patient psychiatric hospital, as the result of voluntarily admitting herself to the facility. She is not currently receiving special education and related services. The complainant has participated in the educational decision-making process and has been provided with notice of the procedural safeguards and of the IEP team's decisions (Docs. a, b, and c and discussions with complainant and MCPS staff).

ALLEGATION #1: PLACEMENT DETERMINATION

FINDINGS OF FACT:

1. On July 30, 2010, the IEP team convened at the complainant's request to review the student's IEP.¹ At that meeting, the team considered the following:
 - Information from staff from both XXXXXXXXXXXXXXXXXXXX (XXXXXXX, a XXXXXXXXXXXXXXXXXXXX where the student had previously been treated and received instruction, and XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX where the student had been hospitalized from late June 2010 to July 29, 2010. This included information that the student mimics maladaptive behavior of peers to seek attention and would benefit from a transitional educational program that includes a half-day of classes with a half-day of work; and
 - Information from the complainant that the student needs mental health care in order to benefit from educational services and that the complainant was seeking an XXX for educational purposes.

The team was unable to complete the IEP process at this meeting and agreed to continue the meeting on August 23, 2010 (Docs. a, d and e).

2. At the August 23, 2010 IEP team meeting, the team discussed that there was no information was available from XXXX, where the student was currently hospitalized, because the student, who is over eighteen (18) years of age, refused to consent to the release of her medical records.²
3. There is no documentation that the school system was provided with verification by the student's physician, psychiatrist or psychologist that she is unable to attend school due to a medical or emotional condition. As a result, no decisions were made about whether special education services would be provided at XXXX (Doc. b and review of education record).
4. At the August 23, 2010 meeting, the IEP team completed the IEP, including drafting goals and objectives, determining the special education and related services to be provided to the student, determining the supplementary aids, services and program modifications and supports to be provided to the student, and determining the least restrictive environment in which the IEP can be implemented. After considering less

¹ On June 5, 2010, the student returned to Maryland from XXXXX, where she had been parentally placed at the XXXXXXXXXXXXXXXXXXXX, XXXXXXXXXXXX (Doc. a).

² Because the student is over the age of majority, she has the right to withhold consent for the release of medical information, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (see, http://www.hhs.gov/ocr/privacy/hipaa/faq/personal_representatives_and_minors/230.html, for official guidance from the U.S. Department of Health & Human Services on this issue).

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restrictive environments with the provision of supplementary aids and services, the team determined that, due to the student's social emotional needs, the least restrictive environment in which the student's IEP can be implemented is a nonpublic separate special education school. The team also determined that any potential harmful effects to the student or the quality of services she needs are outweighed by the benefits of being in a specialized program. It was decided that MCPS staff would make referrals to several nonpublic separate special education schools, including those being requested by the complainant's advocate. MCPS staff indicated that, for one of the schools to which a referral was being made, the student would be able to receive educational services even without the application process when she was discharged from the hospital. Notwithstanding the IEP team's determination, the complainant indicated she intended to apply to XXXX for the student (Docs. b, c, e and f).

DISCUSSION/CONCLUSION:

IDEA requires that the public agency ensure that, to the maximum extent appropriate, students with disabilities are educated with students who are not disabled. Further, the IDEA requires that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved (34 CFR §§300.114 - .116).

Unless the IEP of a student requires some other arrangement, the student must be educated in the school setting that the student would attend if not disabled. In selecting the LRE, the public agency must consider any potential harmful effect on the student or on the quality of services that the student needs. A student with a disability may not be removed from education in an age-appropriate regular classroom setting solely because of needed modifications in the general curriculum (34 CFR §300.116 and COMAR 13A.05.01.10(C)(1)).

Home and hospital teaching is to be provided only when a school psychologist, licensed physician or psychiatrist provides verification that a student is unable to attend school due to a physical or emotional condition (COMAR 13A.03.05.03 and .04). Placement in the home is the most restrictive environment along the continuum of placements because it does not permit instruction to take place with other students. Therefore, it is required that public agencies make home and hospital teaching services available to students in a way that is consistent with the least restrictive environment requirements of both IDEA and of COMAR (34 CFR §§300.114-116 and COMAR 13A.05.01.10).

Based on Findings of Fact #1 – 4, MSDE finds that, because the student has withheld her consent for the release of medical records, there is no documentation available that she is unable to attend a school-based program due to a medical or emotional condition. MSDE further finds that there is documentation that the team considered less restrictive environments with the provision of supplementary aids and services when determining that the least restrictive environment in which the IEP can be implemented is a nonpublic separate special education day school and that this decision is consistent with the data. Therefore, MSDE finds no violation regarding this allegation.

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MSDE understands that the complainant does not agree with the IEP team's placement determination. 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 IDEA, the state educational agency must review the procedures used by a school system to reach determinations about the program. Additionally, the state educational agency must also review the evaluative 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 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 state agency can require the local public agency to ensure that the IEP team follows proper procedures to review and revise, as appropriate, the program to ensure that the program addresses the needs identified in the data and determine a remedy to the student for loss of appropriate services (OSEP Letter #00-20).

The state educational agency may not, however, overturn an IEP team's decisions. 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). Therefore, MSDE reminds the complainant that if she continues to disagree with the team's decision, she may file a due process complaint to resolve the dispute.

ALLEGATION #2: RESPONDING TO THE COMPLAINANT'S REQUEST FOR AN IEP TEAM MEETING

FINDINGS OF FACT:

5. On December 20, 2010, January 14, 2011, January 21, 2011 and January 28, 2011, the complainant, through her attorney, requested that MCPS schedule an IEP team meeting to discuss concerns that the student could not leave the hospital to participate in interviews at the nonpublic separate special education schools to which MCPS made applications. In that correspondence, the complainant's attorney asked that "MCPS revisit its prior decision to authorize only a day placement for [the student] as she was not at the time, and is not currently, able to derive meaningful educational benefit from one." The complainant's attorney also indicated that the complainant's disagreement with the IEP team's decision was clear to everyone on the date of the IEP team meeting, and that her disagreement with the decision continues (Docs. g – j).
6. MCPS, through its legal counsel, rejected the requests to reconvene the IEP team because the complainant had not provided any new information for the team to consider (Docs. k, l, and m).

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DISCUSSION/CONCLUSION:

The public agency must ensure that the IEP team reviews the IEP not less than annually to determine whether the annual goals are being achieved. Additionally, the public agency must ensure that the team reviews and revises the IEP, as appropriate, to address information provided by the parents (34 CFR §300.324).

Written notice must be provided to parents before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or provision of a free appropriate public education (FAPE) to a student. That notice must include, among other things, a description of the action proposed or refused by the public agency, as well as an explanation of the reason for the proposal or refusal (34 CFR §300.503). Therefore, if a parent requests an IEP team meeting, the public agency must either ensure that the team is convened or provide the parent with proper written notice of the refusal to do so.

Based on Findings of Fact #5 and 6, MSDE finds that MCPS provided prior written notice of the rejection of the requests for an IEP team meeting and that there is no documentation that the complainant provided new information for the team to consider. Therefore, MSDE does not find that a violation occurred with respect to this allegation.

ALLEGATION #3: RESPONSE TO THE COMPLAINANT'S REQUEST TO AMEND THE STUDENT'S EDUCATION RECORD

FINDINGS OF FACT:

7. During the July 30, 2010 IEP team meeting, the complainant indicated that she believed that the student was awarded credit for courses the student had not completed. The IEP chair explained that the decision to award credits is not an IEP team determination, and that the complainant should write to the registrar or the principal of the student's school of enrollment to request that the credits be amended (Doc. a).
8. There is no documentation that the complainant made a request to the registrar or principal to amend the record, and MCPS staff report that no request was made by the complainant (Review of education record and interviews with the complainant and MCPS staff).

DISCUSSION/CONCLUSION:

If a parent believes that a student's education record contains inaccurate information, he or she maintains the right, under IDEA and the Family Educational Rights and Privacy Act (FERPA), to request that the school system amend the information (34 CFR §§300.618-.621 and 34 CFR §§99.20-.22). If the school system refuses to amend the record, it must advise the parent of that decision and of the right to request a hearing regarding the issue. This hearing may be conducted by any individual, including an official of the school system, who does not have a direct interest in the outcome of the hearing. If, as a result of such a hearing, there is a determination that the information is accurate, the school system must inform the complainant of the right to place in

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the education record a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the school system.

Based on Findings of Fact #7 and 8, MSDE finds that there is no documentation that the complainant requested an amendment of the record. Therefore, MSDE does not find that a violation occurred with respect to this allegation.

The complainant is reminded that she maintains the right to request an amendment of the student's education record, pursuant to IDEA and FERPA, if she believes the record continues to have incorrect information. If the school system refuses to amend the record, it must advise the complainant of that decision and provide her with the opportunity to request a hearing to challenge the content of the student's education record (34 CFR §§300.567-.568 and 34 CFR §§99.20-.22).

Please be advised that both parties have the right to submit additional written documentation to this office within fifteen (15) days of the date of this letter if they disagree with the findings of fact or conclusions reached in this LOF. 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 LOF. If additional information is provided, it will be reviewed and 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.

Questions regarding the findings and conclusions 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 FAPE for the student, including issues subject to a State complaint investigation, consistent with IDEA. MSDE recommends that this LOF be included with any request for mediation or due process.

Sincerely,

Carol Ann Heath, Ed.D.
Assistant State Superintendent
Division of Special Education/
Early Intervention Services

CAH/crh

cc : Jerry D. Weast
Gwendolyn J. Mason
Alison Steinfels
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Dori Wilson
Christine Hartman