



Lillian M. Lowery, Ed.D.
State Superintendent of Schools

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August 1, 2014

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

RE: XXXXX
Reference: #14-103

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 student. This correspondence is the report of the final results of the investigation.

ALLEGATIONS:

On June 3, 2014, the MSDE received a complaint from Ms. XXXXXXXXXXXXXXXX, hereafter, “the complainant,” on behalf of the above-referenced student. 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 student. The MSDE investigated the allegations listed below.

1. The BCPS has not developed an Individualized Education Program (IEP) that addresses the student’s social, emotional, and behavioral needs since June 3, 2013,¹ in accordance with 34 CFR §§300.101 and .324;

¹ While the complainant’s allegations pre-dated June 3, 2013, she was informed, in writing, on June 23, 2014 that this office has authority to investigate allegations of violations that occurred not more than one (1) year from the date the complaint is received, in accordance with 34 CFR§300.153.

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2. The BCPS has not ensured that daily “tracking sheets” about the student’s behavior have been provided in accordance with the decisions made by the IEP team in January 2014, in accordance with 34 CFR §§300.101 and .323;
3. The BCPS has not ensured that the student has been consistently provided with behavioral supports required by the IEP since June 3, 2013,¹ in accordance with 34 CFR §§300.101 and .323;
4. The BCPS did not ensure that the complainant was provided with the Functional Behavioral Assessment (FBA) report that the IEP team considered at the May 15, 2014 IEP team meeting at least five (5) business days before the meeting, in accordance with Md. Code Ann., Educ., § 8-405; and
5. The BCPS did not follow proper procedures when deciding that the student would be provided with home and hospital teaching (HHT) services, in accordance with COMAR13A.03.05.01 - .05.

INVESTIGATIVE PROCEDURES:

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On June 5, 2014, the MSDE sent a copy of the complaint, via facsimile, to Dr. Kim Hoffmann, Executive Director of Special Education, BCPS; and Mr. Darnell Henderson, Associate Counsel, BCPS.
3. On June 9, 2014, Ms. Williams conducted a telephone interview with the complainant to clarify the allegations to be investigated.
4. On June 9, 2014 and July 2, 23, and 24, 2014, Ms. Williams spoke with the complainant regarding the allegations that were being investigated.
5. On June 16 and 17, 2014, and July 1 and 21, 2014, the MSDE contacted the BCPS staff to clarify information regarding the documentation the BCPS submitted for consideration during the investigation.
6. On June 23, 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 Dr. Hoffmann of the allegations and requested that her office review the alleged violations.

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7. On July 3, 2014, Ms. Williams and Ms. Koliwe Moyo, Education Program Specialist, MSDE, conducted a site visit at the XXXXXXXX XXXXX and interviewed the staff listed below:
 - a. Ms. XXXXXXXX, Special Educator;
 - b. Ms. XXXXXXXX, General Education Teacher; and
 - c. Mr. XXXXXXXX, School Psychologist.

Mr. Darnell Henderson, Associate Counsel, BCPS, Ms. Rebecca Melburn, Coordinator, Psychological Services, BCPS, Ms. Pamela Montgomery, Education Program Specialist, Special Education Parent Response Unit, BCPS, and Ms. Kathy Stump, Educational Specialist, Network Nine, BCPS, attended the site visit as representatives of the BCPS and to provide information on the BCPS policies and procedures, as needed.

8. The MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
 - a. Correspondence and attachments from the complainant to the MSDE, received on June 3, 2014;
 - b. BCPS communication logs, dated March 6, 2013 to May 8, 2014, and November 13, 2013 and April 11, 2014;
 - c. IEP and IEP team meeting documents, dated August 19, 2013;
 - d. Logs of the provision of psychological counseling from August 30, 2013 to June 12, 2014;
 - e. Report of the student's progress, dated March 17, 2014;
 - f. IEP and IEP team meeting documents, dated January 16, 2014;
 - g. IEP team meeting documents dated May 15, 2014;
 - h. BCPS Extended School Year Services correspondence; and
 - i. Email correspondence from the complainant's representative to the BCPS, dated July 2, 2014.

BACKGROUND:

The student is fourteen (14) years old and he is identified as a student with an Other Health Impairment, under the IDEA, related to his diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). He has an IEP that requires the provision of special education instruction and related services. The student attended the XXXXXXXXXXXX during the 2013-2014 school year.

During the time period of the investigation, the complainant participated in the education decision-making process and was provided with written notice of the procedural safeguards (Docs. c, f, and g).

ALLEGATION #1: IEP THAT ADDRESSES SOCIAL, EMOTIONAL, AND BEHAVIORAL NEEDS SINCE JUNE 2013

FINDINGS OF FACTS:

January 8, 2013 IEP Team Meeting

1. On January 8, 2013, the IEP team developed the IEP which was in effect in June 2013. The documentation from the meeting indicates that the IEP team considered information from the student's teachers and service providers which identified needs related to remaining on task, developing positive peer interactions, and attending class regularly. The IEP team documented that the student was skipping classes to obtain the attention of adults and that it occurred during periods when he was not under the direct supervision of adults (Doc. c).
2. The IEP team developed an annual goal for the student to improve peer interactions, and included special education instruction and psychological counseling to assist him in achieving the goal, and accommodations to assist him with maintaining attention to tasks. However, the IEP does not address the student's needs related to attending class regularly (Doc. c and Review of the educational record).

August 19, 2013 IEP Team Meeting

3. On August 19, 2013, the IEP team met and considered the complainant's concerns that more supports were needed for the student because the current supports had not addressed the student's interfering behaviors enough for him to make sufficient academic progress. The IEP team also considered the teacher's concerns about whether the student had needs related to his cognitive ability that might impact the effectiveness of the behavioral supports which had been provided. The IEP team recommended assessments in the areas of academic performance, functional/adaptive performance, intellectual/cognitive functioning, and emotional, social, and behavior development, as well as a classroom observation, and the complainant provided consent for the recommended assessments (Doc. c).

January 16, 2014 IEP Team Meeting

4. On January 16, 2014, the IEP team reconvened to review the assessment results. The IEP team considered the assessment results, which did not identify any new areas of need and did not identify any cognitive needs. However, the assessments did contain recommendations for addressing the student's continuing behavioral issues that were interfering with his access to instruction (Doc. e).
5. The recommendations contained in the assessment reports included presenting instructions, directions, and questions in a slow, step-by-step fashion; providing rewards for demonstrating on task behavior; having the student rephrase directions for an

assignment to increase focused attention; and modifying tests to limit the student's need to recall information (Doc. e).

6. In addition, one of the student's teachers suggested that the student may require additional adult support to assist with the redirection of the student in the classroom and to assist the student with completing his work (Doc. e).
7. Based on the information, the IEP team recommended that a Functional Behavioral Assessment (FBA) be conducted in order to clarify the cause of the student's interfering behaviors before considering different strategies for addressing the behavioral needs. In the meantime, the IEP team agreed to provide supports that include a planner to facilitate communication between the special education teacher and the complainant regarding homework assignments, testing in smaller group settings, repetition of directions, frequent or immediate feedback, texts divided into understandable parts, and a limit for the amount of reading the student is required to compete (Doc. e and interview with the complainant).

May 15, 2014 IEP Team Meeting

8. On May 15, 2014, the IEP team began reviewing the FBA report, but did not complete its review due to the complainant's concerns about the accuracy of information contained in the report. The IEP team agreed that revisions would be made to the FBA report and that the team would reconvene to complete the review (Docs. b and g).
9. There is no documentation that an IEP team has reconvened to review the FBA report (Review of the educational record).

DISCUSSION/CONCLUSIONS:

In order to provide a student with a Free Appropriate Public Education (FAPE), the public agency must ensure that an IEP is developed that includes a statement of the student's present levels of academic achievement and functional performance, including how the disability affects the student's progress in the general curriculum, which is based on the evaluation data. The IEP must also include measurable annual goals designed to meet the needs that arise out of the student's disability, and the special education instruction and related services required to assist the student in achieving the goals (34 CFR §§300.101 and .320).

If the IEP team determines the need for additional data in order to ensure that all of the student's needs are identified, the public agency must ensure that assessments are conducted, the results are considered by the IEP team, and the IEP is reviewed and revised, as appropriate, within ninety (90) days of the recommendation to obtain the data (COMAR 13A.05.01.06).

Based on the Findings of Facts #1 and #2, the MSDE finds that the BCPS has not ensured that the student's IEP has addressed his needs to improve class attendance since June 2013. Based on the Findings of Facts #3 - #9, the MSDE also finds that the BCPS has not ensured that the

reevaluation that was begun August 19, 2013 has been completed in order to make sure that all of the student's social, emotional, and behavioral needs are identified and addressed. Therefore, this office finds that a violation occurred with respect to this allegation.

**ALLEGATIONS #2 AND #3: PROVISION OF DAILY "TRACKING SHEETS"
AND BEHAVIORAL SUPPORTS**

FINDINGS OF FACTS:

10. The IEP developed on January 8, 2013 includes the following accommodations and supplementary aids: a human reader or audio recording, visual cues to assist the student with attending to given tasks, monitored work and test responses to ensure the student remains on task, calculation devices to assist with answering questions, visual and graphic organizers, extended time, reduced distractions for the student, modified work, checks to ensure that work is understood, frequent breaks, and frequent eye contact with the student to ensure the student remains focused (Doc. c).
11. At the August 19, 2013 IEP team meeting, the IEP team documented that the student had received the support of a scribe to assist him with tracking his responses to test questions and focusing on tasks (Docs. a and c).
12. At the January 16, 2014 IEP team meeting, the IEP team documented that the student receives extra time, redirection, and modified homework (Doc. e).
13. At the January 16, 2014 IEP team meeting, the IEP team decided that additional supports would be provided, including a planner to facilitate communication between the special education teacher and the complainant regarding homework assignments, testing in smaller group settings, repetition of directions, frequent or immediate feedback, texts divided into understandable parts, and a limit for the amount of reading the student is required to compete. However, there is no documentation that the supports have been provided (Doc. e and review of the educational record).
14. There is no documentation that daily "tracking sheets" have been developed to inform the complainant of the student's daily behavior, in accordance with the IEP team's decisions January 16, 2014 (Docs. a and g and review of the educational record).
15. The IEP requires that the student be provided with psychological counseling for thirty (30) minutes per week. The counseling logs maintained by the school psychologist indicate that the student received this related service in accordance with the IEP, during the 2013-2014 school year (Doc. d).

DISCUSSION/CONCLUSIONS:

The public agency must ensure that special education services, accommodations, and supplementary aids and services, are provided in accordance with each student's IEP (34 CFR §300.101).

Allegation #2: Daily Tracking Sheets

Based on the Finding of Fact #14, the MSDE finds there is no documentation that the daily tracking sheets have been developed to inform the complainant of student's daily behaviors since January 16, 2014, in accordance with the IEP team's decisions. Therefore, this office finds that a violation has occurred with respect to this allegation.

Allegation #3: Behavioral Supports

Based on the Findings of Facts #10 - #12, and #15, the MSDE finds that there is documentation that the student has been provided with some of the required behavioral supports and counseling services required, in accordance with the IEP team's decisions. However, based on the Findings of Facts #10, #12, and #13, the MSDE finds that there is no documentation that all of the required supports have been provided. Therefore, this office finds that a violation has occurred with respect to this allegation.

ALLEGATION # 4: PROVISION OF THE FUNCTIONAL BEHAVIORAL ASSESSMENT REPORT AT LEAST FIVE (5) DAYS BEFORE THE MAY 15, 2014 IEP TEAM MEETING

FINDING OF FACT:

16. A purpose of the May 15, 2014 IEP team meeting was to discuss the results of the FBA. However, there is no documentation that the assessment report was provided to the complainant prior to the IEP team meeting (Doc. g and Review of the educational record).

DISCUSSION/CONCLUSION:

In order to ensure meaningful participation as an IEP team member, the parent must be provided with a copy of each assessment, report, data chart, draft IEP, or other document that the team plans to discuss at an IEP team meeting at least five (5) business days before the meeting (Md.Code Ann., Educ., §8-405(c)(2010) and COMAR 13A.05.01.07D).

Based on the Finding of Fact #16, the MSDE finds there is no documentation that the complainant was provided with a copy of the FBA that the IEP team planned to discuss at the May 15, 2014 IEP team meeting. Therefore, the MSDE finds that a violation has occurred with respect to this allegation.

**ALLEGATION #5: SPECIAL EDUCATION INSTRUCTION DURING
THE SUMMER OF 2014**

FINDINGS OF FACTS:

17. The IEP includes goals to address the student's needs related to mathematics calculation and problem solving skills. The IEP requires that special education instruction be provided in a separate special education classroom by a special education teacher in order to assist him with achieving the goals (Doc. c).
18. On January 16, 2014, the IEP team determined that the student would receive Extended School Year (ESY) services during the summer of 2014 to address his mathematics calculation goal and that the instruction would continue to be provided in a separate special education classroom by a special education teacher. The IEP team also documented that the ESY services would "be provided in a location as determined by ESY coordinators" (Doc. e).
19. Following the 2013-2014 school year, the BCPS sent the complainant a form letter indicating that ESY services would be provided in the student's home consistent with a decision that was made by the IEP team. The BCPS staff report that this letter was not sent to the complainant with the belief that the student required Home and Hospital Teaching (HHT) services (Doc. h and interviews with the BCPS staff).
20. There is no documentation that a physician, psychologist, or psychiatrist provided verification that the student is unable to attend school due to a physical or emotional condition and no documentation that the IEP required the provision of special education services in the home during the time that ESY services were to be provided (Review of the educational record).
21. The complainant decided to enroll the student in a summer program sponsored by the Baltimore City Department of Recreation and Parks because she was unable to stay at home with the student in order for the ESY services to be provided. The summer program in which the student was enrolled is designed to provide educational enrichment opportunities for students during the summer, but it is not designed for students with disabilities (Interview with the complainant and www.bmoresummer.org/activities/coldstream).
22. After the student had started participating in the summer program, the BCPS contacted the complainant and offered to provide ESY services in the summer program. However, the complainant was unable to accept ESY services for the student in that setting because the staff from the summer program would not permit services to be provided at the program site without advanced planning (Doc. i and Interviews with the complainant and the BCPS).

LEGAL REQUIREMENTS:

Free Appropriate Public Education (FAPE)

In order to ensure the provision of a FAPE, the public agency must offer each student with a disability an IEP that requires the provision of special education and related services needed to address the individual needs of the student in the Least Restrictive Environment (LRE) in which the IEP can be successfully implemented (34 CFR §§300.101, .320, and .323).

Least Restrictive Environment (LRE)

The public agency must ensure that, to the maximum extent appropriate, students with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled (34 CFR §300.114).

Educational Placement

The public agency must ensure that the decision regarding the educational placement in which the IEP will be implemented is made in conformity with the LRE requirements and is individually determined on the basis of each student's abilities and needs and the IEP. The placement decision may not be made solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience (34 CFR §300.116 and *Analysis of Comments and Changes, Federal Register*, Vol. 71, No. 156, p.46588, August 14, 2006).

In order to ensure that each student's IEP is implemented in the LRE, the public agency must ensure that a continuum of alternative educational placements is available to meet the needs of students with disabilities for special education and related services. This continuum includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (34 CFR §300.115, *Analysis of Comments and Changes to the IDEA, Federal Register*, Vol. 71, No. 156, p. 46587, August 14, 2006).

The United States Department of Education, Office of Special Education Programs (OSEP) has explained that the term "educational placement" refers to points along the continuum of placement options, and that the term "location" refers to the physical surrounding, such as the classroom in which a student with a disability receives special education instruction. The OSEP indicated that a public agency may have two or more equally appropriate locations that can meet the student's needs, and that school administrators should have the flexibility to assign the student to a particular school or classroom so long as it is consistent with the IEP team's educational placement decision (*Analysis of Comments and Changes, Federal Register*, Vol. 71, No. 156, p.46588, August 14, 2006).

Educational Placement in the Home

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. In Maryland, an educational placement in the student's home is only appropriate if 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).

Additional restrictions apply when the educational placement is the home of a student with a disability (COMAR 13A.05.01.10). This is because, prior to the enactment of the COMAR, a significant number of students remained in their homes and received a minimum amount of education services when the school system was unable or unwilling to identify an appropriate day or residential placement needed for the student to receive a FAPE to meet his or her needs.

Extended School Year (ESY) Services

The public agency must ensure that an individualized extension of special education and related services beyond the regular school year is offered to each student with a disability who requires such services in order to receive a FAPE. These services are to be provided in accordance with the IEP, at no cost to the parents, and must meet the standards of the State Education Agency (34 CFR §300.106).

There is no requirement that ESY services be offered to each student with a disability, or that parents accept the ESY services that are offered. However, there is a legal obligation for the IEP team to consider each student's need for ESY services, and for the public agency to make those services available in accordance with the IEP team's decisions for those students who require the services in order to receive a FAPE. A public agency may not unilaterally limit the type, amount, or duration of ESY services (34 CFR §300.106, Md. Code Ann., Educ. §7-301, *Analysis of Comments and Changes to the IDEA*, Federal Register, Vol. 71, No. 156, p. 46582, August 14, 2006, and *Reusch v. Fountain*, 872 F.Supp. 1421 [D. Md. 1994]).

DISCUSSION/CONCLUSIONS:

Attempt to Provide ESY Services in the Home

Based on the Findings of Facts #17 - #19, the MSDE finds that while the BCPS represented to the complainant that the IEP team determined that the ESY services would be provided in the student's home, this is inconsistent with the documentation of the IEP team's decisions. Based on the Finding of Fact #18, the MSDE finds that the student's home is a more restrictive environment than the IEP team decided that the ESY service could be provided.

Based on the Findings of Facts #18 - #20, the MSDE finds that, while the school system had the authority to determine the location in which the ESY services would be provided, the BCPS' attempt to provide ESY services in the home constituted a unilateral decision on the part of the school system to provide those services in a different educational placement than that which the

IEP team determined based upon the availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience, and not on the student's IEP.

Based on the Finding of Fact #20, the MSDE finds that there is no documentation that the student had a physical or emotional condition that required the provision of ESY services in the home. Therefore, the MSDE also finds that, while the school system must have a continuum of educational placements available, including the home, the offer of ESY services in the student's home did not meet the established State standards for the provision of educational services in the home. For the reasons stated above, the MSDE finds that the BCPS' attempt to provide ESY services in the home did not constitute an offer of a FAPE.

Offer to Provide ESY Services in the Summer Program

Based on the Findings of Facts #18 and #21, the MSDE finds that because the summer program in which the student participated is not specifically designed for students with disabilities, there is no information or documentation that it would constitute placement in a special education setting, consistent with the IEP team's determination of the LRE in which the ESY services could be provided. In addition, based on the Finding of Fact #22, the MSDE finds that the complainant was unable to accept the ESY services in the summer program because they were not offered in that setting in a timely manner.

As a result, this office finds that the BCPS' proposal to provide the ESY services to the student in the summer program likewise did not offer the student a FAPE. Therefore, this office finds that a violation occurred with respect to this allegation, which resulted in a loss of a FAPE to the student during the summer of 2014.

CORRECTIVE ACTIONS/TIMELINES:

Student-Specific

The MSDE requires the BCPS to provide documentation by the start of the 2014-2015 school year that the IEP team has considered the results of assessments and reviewed and revised the IEP, consistent with the data, to ensure that it addresses all of the student's social, emotional, and behavioral needs.

The MSDE requires the BCPS to provide documentation by November 1, 2014 that the IEP team has determined the services or other remedy to be provided for the loss of services to address the student's lack of regular school attendance during the 2013-2014 school year.

The MSDE also requires the BCPS to provide documentation by November 1, 2014 that the IEP team has determined the services or other remedy to be provided for the delay in ensuring that the student's remaining social, emotional, and behavioral needs were addressed from

April 16, 2014, the date that the IEP team should have completed the review and revision of the IEP based on the results of the FBA, until the end of the 2013-2014 school year.

Similarly-Situated Students/System-Based

The MSDE requires the BCPS to provide documentation by February 1, 2015 of the steps taken to identify all students with disabilities who were offered or provided with ESY services in an educational placement other than that required by the student's IEP. For each student identified, the school system must provide documentation that the IEP team has convened and determined the services to be provided within a year of the date of this Letter of Findings in order to remediate the violation.

The MSDE also requires the BCPS to provide documentation by February 1, 2015 that it has informed the school system staff responsible for determining the location of ESY services that the location must be consistent with the educational placement that is required by the IEP and with the established State standards.

Documentation of all corrective action taken is to be submitted to this office to: Attention: Chief, Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE.

TECHNICAL ASSISTANCE:

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

Please be advised that the BCPS and the complainant 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 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, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The student's mother 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 FAPE for the student, including issues

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Dr. Kim Hoffmann

August 1, 2014

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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:tw

c : Gregory E. Thornton
Charles Brooks
Darnell Henderson
XXXXXXX
Pat Halle
Dori Wilson
Anita Mandis
Tyra Williams