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June 28, 2011

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RE: XXXXX
Reference: 11-089

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 our investigation.

ALLEGATIONS:

On May 2, 2011, MSDE received correspondence from Pamela S. Foresman, Esq., Maryland Disability Law Center, hereafter "the complainant," filed 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) and related State requirements with respect to the above-referenced student. This office investigated the following allegations:

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1. BCPS has not ensured that the student's behavior intervention plan has addressed the student's behavioral needs since April 2010, in accordance with COMAR 13A.08.04.02;
2. BCPS has not ensured that the student's behavior intervention plan has been implemented since the start of the 2010-2011 school year, in accordance with 34 CFR §§300.101 and .323; and
3. BCPS did not follow proper procedures when using restraint on the student on March 31, 2011¹, in accordance with COMAR 13A.08.04.02, .03, .05, and .06C.

INVESTIGATIVE PROCEDURES:

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On May 2, 2011, a copy of the complaint was provided by facsimile to Dr. Kim Lewis, former Executive Director of Special Education, BCPS.
3. On May 5, 2011, Ms. Williams, Education Program Specialist, MSDE, contacted the complainant by telephone and clarified the allegations to be investigated.
4. On May 7, 2011, MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to this investigation. MSDE also notified BCPS of the allegations to be investigated and requested that BCPS review the alleged violations.
5. On May 18, 2011, Ms. Williams and Ms. Anita Mandis, Section Chief, Complaint Investigation Section, MSDE, conducted a site visit at XX to review the student's education record, and interviewed the following school personnel:
 - a. Ms. XXXXXXXXXXXX, Principal;
 - b. Ms. XXXXXXXXXXXX, Individualized Education Program (IEP) Chairperson; and
 - c. Mr. XXXXXXXXXXXXXXXX, Assistant Principal.

Ms. Tiffany Puckett, Associate Counsel, Office of Legal Counsel, BCPS, attended the site visit as a representative of BCPS and to provide information on BCPS policies and procedures, as needed.

¹ While MSDE identified the allegation regarding restraint as occurring in April 2011, during the course of the investigation, MSDE staff determined the incident actually occurred on March 31, 2011.

6. On May 31, 2011, Ms. Williams and Ms. Mandis conducted a telephone interview with Mr. XXXXXXXXXXXX, Temporary Support Assistant, BCPS, assigned to the student at XXXXXXXXXXXXXXXXXXXXXXXXXXXX, about the allegations in the complaint.
7. Documentation provided by the parties was reviewed. The documents referenced in this Letter of Findings include:
 - a. Section 504 Eligibility Determination, dated April 6, 2010;
 - b. IEP, dated April 29, 2010;
 - c. Student Log of Disciplinary Actions, for the 2009-2010 and 2010-2011 school years;
 - d. School Social Worker Student Encounter Log Report, dated March 30 and 31, 2011;
 - e. School Social Worker Report, dated February 17, 2011;
 - f. School Social Worker Report, dated March 25, 2011;
 - g. School Social Worker counseling notes, dated March 31, 2011;
 - h. Functional Behavior Assessment, dated May 5, 2011;
 - i. Behavior Intervention Plan, dated May 5, 2011;
 - j. IEP, dated May 11, 2011;
 - k. Student Log of Disciplinary Actions for the 2010-2011 school year; and
 - l. School Calendar for 2010 through 2011.

BACKGROUND:

The student is fifteen (15) years old and has attended XXXXXXXXXXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX) since the start of the 2010-2011 school year. He is identified as a student with other health impairment (OHI) related to Attention Deficit Hyperactivity Disorder (ADHD) and receives special education and related services under IDEA (Doc. j).

During the 2009-2010 school year, the student attended XXXXXXXXXXXXXXXXXXXX. On April 6, 2010 he was identified as a student with an “emotional or mental illness” under Section 504 of the Rehabilitation Act and provided a 504 Plan.

Subsequently, on April 29, 2010, he was identified as a student with a disability under IDEA and an IEP was developed. During the time period covered by this investigation, the complainant was provided with the opportunity to participate in the education decision-making process and was provided with notice of the procedural safeguards (Docs. b and j).

ALLEGATIONS #1 AND #2: DEVELOPMENT AND IMPLEMENTATION OF A BEHAVIOR INTERVENTION PLAN THAT ADDRESSES THE STUDENT’S BEHAVIORAL NEEDS SINCE APRIL 2010

FINDINGS OF FACT:

2009 – 2010 School Year

1. When developing the initial IEP on April 29, 2010, the IEP team considered the following information regarding the student's behavioral needs:
 - a. The student's 504 Plan that required the provision of a self-monitoring checklist to remind the student of behavioral expectations, daily feedback from teachers, redirection, additional time to complete work, and the ability to take breaks in order for the student to calm himself when upset. The 504 Plan indicated that an Functional Behavior Assessment (FBA) and Behavioral Intervention Plan (BIP) would be developed;
 - b. Teacher reports that the student demonstrates lack of self-control that impacts his ability to learn, is easily distracted, has been involved in altercations with his classmates, and has demonstrated only "minimal positive responses" to the supports provided through the 504 Plan and BIP; and
 - c. A report of a psycho-educational assessment conducted at XXXXXXXXXXXX XXXXXXXXXXXX, which indicates that the student is diagnosed with ADHD that negatively impacts his decision-making and problem-solving skills (Doc. b).
2. On April 29, 2010, the IEP team developed an annual goal for the student to improve behavioral self-management skills. The team decided that the student would be provided with the services of a temporary support assistant² (TSA) who would assist him in developing appropriate behaviors in the school environment. The IEP team did not determine that a BIP was needed in order to assist the student in achieving the behavioral goal (Doc. b).
3. The student's discipline record for the 2009-2010 school year indicates that the student was disciplinarily removed from school for incidents involving physical and verbal attacks on others on November 9, 2009, November 12, 2009, and January 11, 2010. The record does not indicate the number of days the student was disciplinarily removed from school for each incident (Doc. c).

2010 – 2011 School Year

4. On December 10, 2010, the student was disciplinarily removed from school for five (5) days for a physical attack on a peer (Doc. k).

² A Temporary Support Assistant provides additional adult assistance to students who require these services in order to access instruction, as required by the IEP.

5. On January 21, 2011, a report was made of the student's progress toward achievement of the behavioral goal. The report indicates that the student was not making sufficient progress to achieve the goal, and states that "the IEP team needs to meet to address insufficient progress" (Doc. b).
6. There is no documentation that the team met to address the lack of expected progress reported in January 2011 (Review of the education record).
7. On February 9, 2011, the student was disciplinarily removed from school for three (3) days for disrupting the class (Doc. k).
8. Reports issued on February 17, 2011, and March 25, 2011, by the school social worker state that the student has a "one-on-one aide" that assists with re-directing behavior and making appropriate decisions to avoid conflict, and that the student carries a daily behavior sheet to track and monitor behaviors and academic expectations. The reports state that, despite these supports, the student continues to be easily provoked, is unable to control impulses, and is easily offended. The reports indicate that the student exhibits severe mood changes that are often an immediate indicator that conflict or escalation will occur, and that he has been involved in many behavioral incidents during the year (Doc. e and f).
9. On March 30, 2011, another report was made of the student's progress toward achievement of the behavioral goal. This report indicates that the student was making "some progress" toward the goal (Doc. b).
10. On May 11, 2011, the IEP team reviewed the student's program and progress. Based on teacher reports that the student continued to demonstrate interfering behaviors, the IEP team developed a BIP that required that the student be provided with the following additional supports:
 - a. Prompts from the TSA for the student to excuse himself from the classroom when the TSA observes the student "brooding;"
 - b. Assistance from the social worker regarding how the student could identify behavior triggers and develop anger management strategies; and
 - c. Opportunities for the student to participate in incentive-based activities with peers (Doc. j).

DISCUSSION/CONCLUSIONS:

Allegation #1

BIP Development

IDEA and Code of Maryland Regulations (COMAR) provide protections, such as development of a BIP, to students with disabilities who are removed from school in excess of ten (10) school days. Within ten (10) school days of the date in which the decision is made to change the placement of a student because of a violation of a code of student conduct, the IEP team must convene to determine whether the student's behavior was a manifestation of the student's disability. If the behavior is determined to be a manifestation of the student's disability, the student must receive, as appropriate, a functional behavioral assessment and behavior intervention services that are designed to address the behavior violation so that it does not recur (34 CFR 300.530 and COMAR 13A.08.03.08).

In order to ensure that students are provided with disciplinary removal protections and other special education services in accordance with the requirements of IDEA, each public agency must accurately record information, including student attendance and disciplinary removals, as specified in the Maryland Student Records System Manual (COMAR 13A.08.02.04).

Based on Finding of Fact #3, MSDE finds that BCPS did not ensure that the student's discipline record was properly maintained during the 2009-2010 school year, because it does not include information about the number of days the student was disciplinarily removed from school. Therefore, MSDE finds that a violation occurred with respect to maintenance of the record.

By not maintaining the disciplinary record, the school did not ensure that if the student experienced removals that constituted a change in placement, he would have received protections such as a BIP, from April 29, 2010, when the IEP was developed, through May 11, 2011, when a BIP was developed. As a result of the findings, MSDE determines that a violation occurred, from April 29, 2010 through May 11, 2011.

IEP Development

The IEP must include a statement of the student's present levels of academic achievement and functional performance, and must include annual goals and services designed to address the student's identified needs. When determining the levels of academic achievement and functional performance, the team must consider the evaluative data, including assessment reports, information from the student's teachers, and the parent's concerns. The team must also consider, in the case of a student whose behavior impedes his learning or that of others, strategies, including positive behavioral interventions and supports, to address that behavior (34 CFR §300.320 and .324).

The public agency must ensure that the IEP team reviews the program at least annually to determine whether the annual goals are being achieved. Additionally, the public agency must

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ensure that the team reviews and revises, as appropriate, the IEP to address lack of expected progress toward achievement of the annual goals (34 CFR §300.324).

Based on Finding of Fact #1, MSDE finds that the IEP team considered information about the student's behavioral needs and developed an IEP that addressed the identified needs on April 29, 2010. However, based on Findings of Fact #5, #6, and #8-#10, MSDE finds that BCPS did not ensure that the IEP team reviewed the program to address the student's lack of expected progress toward achievement of the behavioral goal between January 21, 2011 and May 11, 2011. Therefore, this office finds that the school system did not ensure that the student's program addressed his behavioral needs during this time period, and that a violation occurred.

Allegation #2

In this case, the complainant alleges that the student was not provided with the supports required by a BIP prior to May 11, 2011 (Doc. b). As stated above, based on Finding of Fact #2, MSDE finds that, while the student had a BIP as part of his 504 Plan, he did not have a BIP as part of his IEP until May 11, 2011. Therefore, this office does not find that a violation occurred with respect to implementation of a BIP during this time period.

ALLEGATION #3: USE OF RESTRAINT ON MARCH 31, 2011

FINDINGS OF FACT:

11. The student's IEP does not include the use of restraint as a behavioral intervention (Docs. b and j).
12. The TSA reports that, on March 31, 2011, the student left class and the TSA followed the student into the hall. The TSA further reports that he then touched the student's arm in an attempt to re-direct him to a room where counseling could be provided. The TSA states that the student pushed away from him and then "charged at" him, requiring the TSA to push the student off of him. Further, the TSA indicates that the student approached him again and that the TSA had to hold the student down on the ground until he could calm down enough to be escorted to the school social worker to receive counseling (Telephone interview with school staff).
13. While the TSA reports that, following this incident, he submitted an incident report that documented the event and the actions taken to de-escalate the situation, school administrative staff report that they did not maintain the documents from the TSA. They further report that they do not believe that the TSA's actions constituted the use of restraint. The only documentation that an incident occurred are notes regarding the counseling session from the social worker's meeting with the student on March 31, 2011, which does not indicate the use of restraint (Doc. g).

14. The TSA reports that he was last trained in restraint procedures five (5) years ago (Telephone interview with school staff).

DISCUSSION/CONCLUSIONS:

Legal Requirements:

Physical Restraint

Physical restraint means the use of physical force, without the use of any device or material, that restricts the free movement of all or a portion of a student's body. Physical restraint does not include briefly holding a student to calm or comfort the student, holding a student's hand or arm to escort the student safely from one area to another, moving a disruptive student who is unwilling to leave the area if other methods such as counseling have been unsuccessful, or intervening in a fight (COMAR 13A.08.04.02B(11)).

Documentation of the Use of Restraint

Every time a student is restrained, school personnel must document:

- The other less intrusive interventions that have failed, or been determined inappropriate;
- The precipitating event immediately preceding the behavior that prompted the use of restraint;
- The behavior that prompted the use of restraint;
- The names of the school personnel who observed the behavior that prompted the use of restraint; and
- The names and signatures of the staff members implementing and monitoring the use of restraint (COMAR 13A.08.04.05A(3)(a)).

The documentation must include a description of the restraint event, including the type of restraint, the length of time in restraint, the student's behavior and reaction during the restraint, and the name and signature of the administrator informed of the use of restraint (COMAR 13A.08.04.05A(3)).

Requirement of the IEP Team to Meet Following the Use of Restraint

If restraint is used for a student with a disability, and the student's IEP or BIP does not include the use of restraint, the IEP team must meet within ten (10) business days of the incident. The IEP team shall consider the need for an FBA, appropriate behavioral interventions, and a BIP (COMAR 13A.08.04.05C(2)(a-c)).

Training and Professional Development

Effective October 2009, additional restraint requirements were implemented and each public agency must provide professional development and training to designated school personnel on the appropriate implementation of the policies and procedures related to the use of restraint. The professional development and training must include current professionally accepted practices and standards regarding positive behavioral intervention strategies and supports, FBA and BIP planning, exclusion, restraint and seclusion (COMAR 13A.08.04.06C(1)).

The training in current professionally accepted practices and standards regarding positive behavior interventions strategies and supports must include methods for identifying and defusing potentially dangerous behavior, FBA and BIP planning, exclusion, restraint and alternatives to restraint, seclusion, and symptoms of physical distress and positional asphyxia (COMAR 13A.08.04.06C(4)).

Legal Analysis:

Allegation #3

In this case, based on Finding of Fact #13, MSDE finds that, on March 31, 2011, a behavioral incident occurred during which the student was restrained. Based on Finding of Fact #13, MSDE finds that there is no documentation of the use of physical restraint of the student when this incident occurred. Additionally, based on Finding of Fact #13, MSDE finds that there is no documentation that an IEP team was convened following this incident.

MSDE also finds, based on Finding of Fact #14, that school staff have not been trained in the appropriate use of restraint in accordance with the regulations. Based upon all of these findings, MSDE finds violations with regard to this allegation.

CORRECTIVE ACTIONS/TIMELINES:

Student-Specific:

MSDE requires BCPS to provide documentation by the start of the 2011-2012 school year that the IEP team has convened and determined the amount and nature of *compensatory services*³ or other remedy necessary to redress the violations found in this LOF. BCPS must provide the complainant with proper written notice of the team's determinations. If the complainant disagrees with the decisions, she maintains the right to request mediation and to file a due process complaint to resolve the dispute consistent with IDEA.

³ Compensatory services, for the purposes of this letter, mean the determination by the IEP team as to how to remediate the denial of appropriate services to the student (34 CFR §300.151).

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School-Based:

MSDE requires BCPS to provide documentation by the start of the 2011-2012 school year of the steps taken to determine if the procedural violations identified through this complaint investigation are unique to this case or if they represent a pattern of noncompliance at BDJ Academy. If it is determined that a pattern of noncompliance exists, the documentation must describe the actions taken to ensure that staff properly implement the requirements of IDEA and COMAR, and provide a description of how BCPS will evaluate the effectiveness of the steps taken and monitor to ensure that the violations do not recur.

Specifically, the school system is required to conduct a review of student records, data, or other relevant information to determine if the regulatory requirements are being implemented and must provide documentation of the results of this review to MSDE. If the school system reports compliance with the requirements, MSDE staff will verify compliance with the determinations found in the initial report.

If the school system determines that the regulatory requirements are not being implemented, the school system must identify the actions that will be taken to ensure that the violations do not recur. The school system must submit a follow-up report to document correction within ninety (90) days of the initial date that the school system determines non-compliance. Upon receipt of this report, MSDE will re-verify the data to ensure continued compliance with the regulatory requirements, consistent with the requirements.

System-Based:

By copy of this LOF, the MSDE Office of Quality Assurance and Monitoring is being informed of the violations identified through this investigation for use in its monitoring for continuous improvement activities.

All Corrective Actions:

Documentation of completion of all corrective actions is to be submitted to this office to the attention of: 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.

Please be advised that both parties 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 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

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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. 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 LOF.

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The student's parents 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 (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/tw

cc: Andrés Alonso
Nancy Ruley
Erin Leff
XXXXXXXXXX
XXXXXXX
Carol Ann Heath
Dori Wilson
Tyra Williams