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July 13, 2011

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RE: XXXXX
Reference: #11-096

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 May 24, 2011, MSDE received a complaint from Maureen van Stone, Esq. and Rachel E. Stafford, Esq., hereafter, “the complainants,” on behalf of the above-referenced student. On June 15, 2011, MSDE received an amended complaint from the complainants containing additional allegations 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. MSDE investigated the following allegations:

1. BCPS did not ensure that the student’s “toileting protocol” was implemented as required by the Individualized Education Program (IEP) during the 2010-2011 school year, in accordance with 34 CFR §300.101;
2. BCPS did not provide the student’s mother with a copy of the IEP document within five (5) business days after the IEP team meeting of October 7, 2010, in accordance with Md. Code, Ann., Educ. §8-405(d) (2010) and COMAR 13A.05.01.07;

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3. BCPS did not provide the student's mother with a copy of each assessment, report, data chart, draft IEP or other document the IEP team planned to discuss at least five (5) business days before the IEP team meeting of May 24, 2011, in accordance with Md. Code, Ann., Educ. §8-405(d) (2010) and COMAR 13A.05.01.07;
4. BCPS did not ensure that the student's mother was afforded the opportunity to participate in the May 24, 2011 IEP team meeting, in accordance with 34 CFR §300.322; and
5. BCPS did not ensure that the IEP team considered the use of positive behavioral interventions and supports to address the behaviors that interfere with the student's learning when they reviewed and revised her program on May 24, 2011, in accordance with 34 CFR §300.324.

INVESTIGATIVE PROCEDURES:

1. Ms. Kathy Stump, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On May 31, 2011, MSDE sent a copy of the May 24, 2011 complaint, via facsimile, to Dr. Kim Lewis, former Executive Director of Special Education, BCPS; and Ms. Nancy Ruley, Associate Counsel, BCPS.
3. On June 1, 2011, Ms. Stump spoke with Ms. van Stone by telephone and clarified the allegations to be investigated.
4. On June 7, 2011, MSDE sent correspondence to the complainants that acknowledged receipt of the complaint and identified the allegations subject to this investigation. On the same date, MSDE notified Dr. Lewis of the allegations and requested that her office review the alleged violations.
5. On June 15, 2011, MSDE received an amended complaint from the complainants, containing additional allegations of violations of IDEA.
6. On June 16, 2011, MSDE sent a copy of the June 15, 2011 complaint, via electronic mail (e-mail), to Ms. Tiffany Puckett, Associate Counsel, BCPS and notified BCPS of the additional allegations.
7. On June 17, 2011, Ms. Stump and Ms. Tyra Williams, Education Program Specialist, MSDE, conducted a site visit at XXXXXXXXXXXXXXX (XXXXXXXX) to review the student's education record, and interviewed the following school staff:
 - a. Ms. XXXXXXXXXXX, Assistant Principal;
 - b. Ms. XXXXXXXXXXX, IEP Team Chairperson;
 - c. Ms. XXXXXXXXXXX, Paraeducator;

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- d. Ms. XXXXXXXXXXX, Team Support Paraprofessional;
- e. Mr. XXXXXXXXXXX, Principal; and
- f. Mr. XXXXXXXX, Speech-Language Pathologist.

Ms. Puckett and Ms. Marion Masseaux, Educational Assistant, Office of Legal Counsel, BCPS, attended the site visit as representatives of BCPS and to provide information on BCPS policies and procedures, as needed.

- 8. On June 21, 2011, BCPS provided MSDE with additional documentation from the student's education record, via facsimile.
- 9. On June 24, 2011, MSDE sent correspondence to the complainants that acknowledged receipt of the amended complaint and identified the additional allegations subject to this investigation.
- 10. On July 1, 2011, BCPS provided MSDE with additional documentation related to the allegations, via e-mail. On that same date, the complainants provided MSDE with additional documentation related to the allegations via facsimile.
- 11. MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings (LOF), which includes:
 - a. Correspondence and attachments from the complainants to MSDE, received on May 24, 2011;
 - b. Correspondence and attachments from the complainants to MSDE, received on June 15, 2011;
 - c. IEP, dated August 27, 2010;
 - d. IEP, dated October 7, 2010;
 - e. IEP, dated December 13, 2010;
 - f. Invitation to the May 24, 2011 IEP team meeting, dated May 6, 2011;
 - g. BCPS XXXXXXXXXXXXXXXXXXXXXXXXXXXX #004 *Special Education Progress Report*, dated May 14, 2011;
 - h. BCPS *Notice of Documents Provided to Parent for Review at an IEP Team Meeting* form, dated May 18, 2011;
 - i. IEP, dated May 24, 2011;
 - j. IEP progress reports for the 2010-2011 school year;
 - k. Occupational therapist service provider log for the 2010-2011 school year; and
 - l. BCPS Parent Contact Log for the 2010-2011 school year.

BACKGROUND:

The student is six (6) years old and is identified as a student with an intellectual disability under IDEA. She attends XXXXXXXX where she receives special education and related services.

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During the period of time addressed by this investigation, the student's mother was provided with written notice of the procedural safeguards (Docs. a-e, i, and l).

ALLEGATION #1: IMPLEMENTATION OF THE "TOILETING PROTOCOL"
DURING THE 2010-2011 SCHOOL YEAR

Findings of Fact:

1. The IEP in effect at the start of the 2010-2011 school year documents that the student has identified needs in the areas of fine motor skills and self-care, among others. The report of the student's current level of functioning in these areas indicates that the student can close buttons and zippers, but is unable to open them, that she "demonstrates inconsistent performance with clothing management during toileting," that she requires assistance to "open pant fasteners and pull her pants down," and that she is "inconsistent with staying dry during the school day" (Docs. c-e).
2. In order to address these needs, the IEP team developed an annual goal related to self-care. The short-term objectives within the goal are designed to assist the student in improving her ability to manipulate zippers, snaps, buttons, and buckles in order to increase her independence with clothing management. The short-term objectives also require the student to use a "toileting schedule" designed to assist her with indicating the need to use the restroom (Docs. c-e).
3. In order to assist the student in achieving the annual goal, the team determined that the student required weekly occupational therapy (OT) services to be provided by the occupational therapist and daily "assistance during toileting," to be provided by the classroom teacher or other school staff (Docs. c-e).
4. The occupational therapist's service provider log documents that the student received weekly OT services in accordance with the IEP. The IEP progress reports for the 2010-2011 school year indicate that the student achieved the annual goal related to self-care by the end of the 2010-2011 school year (Docs. j and k).
5. On May 24, 2011, the IEP team convened to review the student's program. The documentation of that meeting indicates that the team reviewed the student's progress toward achieving the annual goals related to fine motor skills and self-care and determined that although the student still has needs in these areas, she now is able to:

Independently and correctly don and doff her jacket, manipulate buttons, snaps, and zippers during the school hours. She is able to indicate and use the toilet as required. When given verbal and physical cues she is able to follow directions to manage clothing in preparation for toileting (Doc. i).

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6. Based on its review, the team revised the annual goal related to self-care to reflect the progress. The goal contains short-term objectives designed to assist the student with “transferring her acquired skills” in order to continue improving her ability to manage her clothing with “minimal assistance.” In order to assist the student in achieving the revised goal, the team determined that the student continues to require weekly OT services and daily “assistance during toileting” in the classroom (Doc. i).

Discussion/Conclusions:

The public agency is required to ensure that the student is provided with the special education and related services required by the IEP (34 CFR §300.101). Based on Findings of Fact #1-6, MSDE finds that school staff have addressed the IEP goal for the student to improve self-care, which requires that the student be provided with a “toileting schedule” and assistance during toileting. Therefore, MSDE finds no violation regarding this allegation.

In this case, the complainants allege that the student routinely returns home with a wet diaper (Doc. a). If the student’s mother believes that the IEP does not address the student’s toileting needs, she maintains the right to request an IEP team meeting to address her continuing concerns.

ALLEGATION #2: PROVISION OF THE IEP WITHIN FIVE (5) BUSINESS DAYS AFTER THE OCTOBER 7, 2010 IEP TEAM MEETING

Finding of Fact:

7. School staff assert that the completed IEP was sent to the student’s mother within five (5) business days after the October 7, 2010 IEP team meeting. However, there is no documentation to support this assertion by school staff (Interview with school staff and review of education record).

Discussion/Conclusions:

The public agency must provide the parent of a student with a disability a copy of the completed IEP no later than five (5) business days after the IEP team meeting (Md. Code, Ann., Educ. §8-405(d) (2010) and COMAR 13A.05.01.07). Based on Finding of Fact #7, MSDE finds that there is no documentation that school staff sent a copy of the completed IEP to the student’s mother within five (5) business days after the October 7, 2010 IEP team meeting. Therefore, MSDE finds a violation regarding this allegation.

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**ALLEGATIONS #3-4: PROVISION OF DOCUMENTS WITHIN FIVE (5)
BUSINESS DAYS OF AND PARENTAL PARTICIPATION
IN THE MAY 24, 2011 IEP TEAM MEETING**

Findings of Fact:

8. On May 6, 2011, school staff sent an invitation to the student's mother to attend an IEP team meeting on May 24, 2011. The invitation indicates the date, time, place, and purpose of the meeting (Doc. f).
9. On May 18, 2011, school staff sent the student's mother a copy of the special educator's progress notes, the occupational therapist's progress notes, and the speech-language pathologist's progress notes, which are the documents that were considered at the May 24, 2011 IEP team meeting (Doc. h).
10. On May 24, 2011, MSDE received correspondence from the complainants, which was sent to both MSDE and BCPS. In that correspondence, the complainants indicated that the May 24, 2011 IEP team meeting would need to be rescheduled so that they could attend the meeting. However, there is no documentation that this information was provided to school staff prior to the meeting (Doc. a).
11. School staff proceeded with the May 24, 2011 IEP team meeting. The communication log for the 2010-2011 school year and the IEP team meeting notes document that school staff attempted to contact the student's mother by telephone prior to and during the May 24, 2011 IEP team meeting, but they were unsuccessful in reaching her (Docs. i and l).

Discussion/Conclusions:

Allegation #3: Provision of copies of documents to be considered at the May 24, 2011 IEP team meeting five (5) business days before the meeting

The public agency must provide the parent of a student with a disability a copy of each assessment, report, data chart, draft IEP, or other document the IEP team plans to discuss at an IEP team meeting at least five (5) business days before the scheduled meeting (Md. Code, Ann., Educ. §8-405(d) (2010) and COMAR 13A.05.01.07). Based on Finding of Fact #9, MSDE finds that there is documentation that school staff sent copies of the reports that were discussed at the May 24, 2011 IEP team meeting to the student's mother on May 18, 2011, three (3) business days prior to the meeting. Therefore, MSDE finds a violation regarding this allegation.

Allegation #4: Parental Participation at the May 24, 2011 IEP Team Meeting

In accordance with IDEA, the school system is required to take steps to ensure parents have the opportunity to participate in IEP team meetings, which include notifying parents of a meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at

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a mutually convenient place and time. In Maryland, to ensure parent participation, the school system must provide parents with written notice at least ten (10) days in advance of the meeting (COMAR 13A.05.01.07(D)). If the parent is unable to attend an IEP team meeting but wishes to participate, the public agency must use other methods to ensure parent participation, including conference calls (34 CFR §300.322).

Although school staff have an obligation to attempt to find a convenient date for parents when informed that parents are unavailable on a date proposed by school staff, there is no separate requirement for school staff to contact the parents' legal counsel or other invitees to obtain a mutually agreed upon date that is convenient for all. In fact, the United States Department of Education, Office of Special Education Programs (OSEP) has "strongly discouraged" the attendance of attorneys at IEP team meetings as the presence of legal counsel could contribute to a potentially adversarial atmosphere at the meeting. The OSEP further stated that while attendance of attorneys is not prohibited, it would not necessarily be in the best interest of the student for attorneys to attend even when they possess knowledge or special expertise regarding the student. The involvement of legal counsel can impact the ability to obtain a date in which all of the parents' invitees and school personnel can be available (*Analysis of Comments and Changes, Federal Register*, Vol. 64, No. 48, p. 12478, March 12, 1999).

Based on Finding of Fact #8, MSDE finds that there is documentation that the student's mother was provided with written notice of the May 24, 2011 IEP team meeting more than ten (10) days prior to the IEP team meeting. Additionally, based on Finding of Fact #11, MSDE finds that school staff attempted to reach the complainant by telephone both before and during the May 24, 2011 IEP team meeting. Further, based on Finding of Fact #10, MSDE finds that there is no documentation that school staff were notified of the unavailability of the complainants prior to the May 24, 2011 meeting, and that BCPS was not required to reschedule the meeting to a date that was convenient for the complainants. Therefore, MSDE finds no violation regarding this allegation.

ALLEGATION #5:

CONSIDERATION OF POSITIVE BEHAVIORAL INTERVENTIONS AT THE MAY 24, 2011 IEP TEAM MEETING

Finding of Fact:

12. On May 24, 2011, the IEP team convened to review the student's program and progress. Documentation of the meeting indicates that the "special educator discussed progress." While the student's education record contains a copy of a May 14, 2011 teacher report that the student "throws frequent tantrums with ear piercing screams when she wants to be defiant," there is no documentation that the team discussed that behavior or considered whether it interferes with the student's learning or that of others (Docs. g and i).

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Discussion/Conclusions:

In developing each student's IEP, the public agency must ensure that the IEP team considers the strengths of the student, the concerns of the parents for enhancing the education of the student, the results of the most recent evaluation, and the academic, developmental, and functional needs of the student. In the case of a student whose behavior impedes the student's learning or that of others, the team must consider the use of positive behavioral interventions and supports and other strategies, to address that behavior (34 CFR §300.324).

Based on Finding of Fact #12, MSDE finds that there is no documentation that the IEP team considered whether the behavior reported by the teacher interferes with learning and whether the student requires positive behavior interventions to address the behavior. Therefore, MSDE finds a violation regarding this allegation.

CORRECTIVE ACTIONS/TIMELINES:

Student-specific

MSDE requires BCPS to provide documentation by August 15, 2011, that the student's mother has been provided with a copy of the October 7, 2010 IEP. In addition, MSDE requires BCPS to provide documentation by the start of the 2011-2012 school year that an IEP team meeting has convened and completed the following:

1. Considered the report of the student's teacher that the student "throws frequent tantrums," determined whether that behavior interferes with the student's learning, and revised the student's IEP, if appropriate; and
2. If the team revises the student's program to address the behavior, it must also determine the nature and amount of *compensatory services*¹ or other remedy necessary to redress the delay in implementing a program that addresses the interfering behaviors from May 24, 2011 until the program is revised.

BCPS must provide the student's mother 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 student's mother disagrees with the IEP team's determinations, she maintains the right to request mediation or file a due process complaint, in accordance with IDEA.

¹ For the purpose of this letter, these are services, as determined by the IEP team, needed 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 September 30, 2011, of the steps it has taken to determine if the violations identified in the LOF are unique to this case or if they represent a pattern of noncompliance at XXXXXX.

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 of OSEP. Additionally, the findings in the LOF will be shared with MSDE's Office of Quality Assurance and Monitoring for Continuous Improvement for its consideration during present or future monitoring of 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.

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 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.

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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 free appropriate public education 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:ks

cc : Andrés Alonso
Tiffany Puckett
Erin Leff
XXXXXXXX
Dori Wilson
Martha Arthur
Kathy Stump