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June 6, 2011

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

RE: XXXXX  
Reference: #11-080

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 April 11, 2011, MSDE received a complaint from Selene A. Almazan, Esq., hereafter, "the complainant," on behalf of the above-referenced student. 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 follow proper procedures when responding to a request by the student's parents for an Individualized Education Program (IEP) team meeting in February 2011, in accordance with 34 CFR §§300.324 and .503; and
2. MCPS did not follow proper procedures when using physical restraint with the student in March 2011, in accordance with COMAR 13A.08.04.05.

**INVESTIGATIVE PROCEDURES:**

1. Ms. Kathy Stump, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On April 12, 2011, MSDE sent a copy of the complaint, via facsimile, to Ms. Gwendolyn Mason, Director of Special Education Services, MCPS; Ms. Mary Lee Phelps, Acting Director of Special Education Operations, MCPS; and Ms. Alison Steinfelds, Supervisor, Equity Assurance and Compliance Office, MCPS.
3. On April 18, 2011, Ms. Stump attempted unsuccessfully to speak with the complainant by telephone to clarify the allegations to be investigated.
4. On April 19, 2011, MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to this investigation. On the same date, MSDE notified Ms. Phelps of the allegations and requested that her office review the alleged violations.
5. On April 20, and 26, 2011, and May 2, 5, and 6, 2011, MCPS provided MSDE with information and documentation related to the allegations, via electronic mail (e-mail).
6. On April 21, 2011, Ms. Stump spoke with the complainant by telephone and requested that she provide MSDE with a written confirmation from the student's parent that states that MSDE may release information about the student to the complainant. On that same date, the student's parents provided the written confirmation to MSDE, via e-mail.
7. On April 26, 2011, the complainant provided MSDE with documentation related to the allegations, via e-mail.
8. On May 4, 2011, MSDE received a written response to the complaint from MCPS.
9. On May 12, 2011, Ms. Stump and Mrs. Martha J. Arthur, Education Program Specialist, MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX) to review the student's education record, and interviewed the following MCPS personnel:
  - a. Ms. XXXXXXXX, Principal, XXXXXXXX;
  - b. Ms. Joanne Hoffman, Special Education Supervisor, MCPS;
  - c. Ms. XXXXXXXXXXXX, Classroom Teacher, XXXXXXXX; and
  - d. Ms. XXXXXXXX, Resource Teacher, XXXXXXXXXXXX.

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

10. On May 17, 23, 24, and 25, 2011, MCPS provided MSDE with additional documentation related to the allegations, via e-mail.
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 complainant to MSDE, received on April 11, 2011;
  - b. Behavioral Intervention Plan, dated January 4, 2010;
  - c. IEP, dated May 25, 2010;
  - d. E-mail correspondence between the student's mother and school staff, dated February 24, 2011;
  - e. Classroom Observation forms, dated March 10, 15, 18, and 21, 2011;
  - f. MCPS *Documentation of Physical Interventions or Seclusion*, dated March 22, 2011;
  - g. MCPS *Additional Comments on Student's Health* form, dated March 22, 2011;
  - h. Correspondence from school staff to the student's parents, dated March 23, 2011;
  - i. MCPS invitation to attend an IEP team meeting on April 12, 2011;
  - j. IEP, dated April 12, 2011;
  - k. Behavior Intervention Plan, dated April 12, 2011;
  - l. Speech-Language Pathology consultation report, dated April 27, 2011;
  - m. MCPS Behavioral and Educational Support Team consultation report, dated May 5, 2011; and
  - n. IEP and meeting summary, dated May 17, 2011.

### **BACKGROUND:**

The student is seven (7) years old and is identified as a student with an other health impairment related to a diagnosis of Down's Syndrome under IDEA. The student attends XXXXXXXXXX, where he receives special education and related services. During the period of time addressed by this investigation, the student's parents participated in the education decision-making process, and were provided with written notice of IEP team decisions and notice of the procedural safeguards (Docs. a, b, c, j, k, and n).

### **ALLEGATION #1:**

### **RESPONDING TO THE REQUEST OF THE STUDENT'S PARENTS FOR AN IEP TEAM MEETING IN FEBRUARY 2011**

### **Findings of Fact:**

1. On February 24, 2011, the student's mother sent e-mail correspondence to school staff requesting that a functional behavioral assessment (FBA) be conducted (Doc. d).

2. On the same date, school staff responded to the e-mail request by indicating that the request would be forwarded to the student's special education case manager (Doc. d).
3. On April 12, 2011, the IEP team convened. At the meeting, the team determined that the concerns of the parents could be addressed by revising the IEP and behavior intervention plan (BIP) without conducting an updated FBA (Docs. j and k).

**Discussion/Conclusions:**

The parent of a student with a disability may, at any time, request that an IEP team meeting be convened to review a student's program, determine the appropriate services, discuss the provision of services, and consider the concerns of the parent for enhancing the student's education. If the parent requests a meeting, the public agency must either convene an IEP team meeting or provide the parent with written notice to explain why the agency has determined that conducting the meeting is not necessary to ensure the provision of free appropriate public education (FAPE) (34 CFR §§300.324 and .503).

Based on Finding of Fact #1-3, MSDE finds that the IEP team met and addressed the concerns of the student's parents regarding the student's behavior. Therefore, MSDE finds that the school responded reasonably and that no violation occurred regarding this allegation.

**ALLEGATION #2:                    USE OF PHYSICAL RESTRAINT IN MARCH 2011**

**Findings of Fact:**

4. Neither the student's IEP nor BIP in effect in March 2011 include the use of physical restraint as a behavioral intervention (Docs. b and c).
5. On March 22, 2011, the student exhibited non-compliant behavior at recess. The documentation indicates that at lunch he became angry and that the following occurred:

[the student] began punching and kicking staff. He dropped to the floor and continue[d] to kick and punch the staff. The staff ignored this to try to extinguish the attention seeking behavior but he began hitting himself and the aggression towards staff escalated. Given that [the student] was a danger to himself and others, a floor restraint was performed. He was restrained by members of the crisis team for approximately 45 minutes. Throughout the entire incident, he was given verbal and picture cues every few minutes but he continued to be non-compliant (Doc. f).

6. The documentation of the restraint incident does not include a *description* of the type of restraint that was used, including whether the student was face-down or whether the student was in a position that would obstruct a staff member's view of his face, would

- restrict his ability to communicate distress, or would place pressure on the student's head, neck, or torso (Doc. f).
7. There is documentation that when the restraint incident was over, the school nurse examined the student and found no evidence of injury due to either the behavior that led to the restraint or the restraint itself (Doc. g).
  8. The MCPS *Documentation of Physical Interventions or Seclusions* form for the incident documents the following:
    - a. A list of other less intrusive interventions that failed or were determined inappropriate;
    - b. The precipitating event immediately preceding the behavior that prompted the use of restraint;
    - c. The behavior that prompted the use of restraint;
    - d. The names of the school personnel who observed the behavior that prompted the use of restraint;
    - e. The names and signatures of two (2) of the staff members implementing and monitoring the use of restraint;
    - f. The length of time of the restraint; and
    - g. The name of the administrator informed of the use of restraint (Doc. f).
  9. The MCPS *Documentation of Physical Interventions or Seclusions* form for the incident **does not** document the following:
    - a. The names or signatures of the remaining staff members who implemented and monitored the restraint;
    - b. A *description* of the type of restraint used;
    - c. A *description* of the student's behavior and reaction during the restraint; or
    - d. The *signature* of the administrator informed of the use of restraint (Doc. f).
  10. On March 23, 2011, school staff sent written correspondence to the student's parents informing them of the use of restraint with the student (Doc. h).
  11. There is no documentation that school staff were trained in the use of restraint consistent with the requirements (Review of education record).
  12. On April 12, 2011, the IEP team convened in order to review and revise the student's program, as appropriate. The documentation of the meeting indicates that the team considered data related to the student's behavior that had been collected through a series of classroom observations. Based upon its review, the IEP team added additional supports to the student's program (Docs. e, i, and j).

13. On April 27, 2011, a MCPS speech-language pathologist conducted a consultation with school staff. On May 5, 2011 a MCPS behavioral consultant conducted a consultation with school staff (Docs. l and m).
14. On May 17, 2011, the IEP team reconvened to review the student's program and progress and revise the student's program as appropriate. The documentation of the meeting indicates that the team considered the reports of the MCPS consultations and the student's progress toward achieving the annual IEP goals. Based on this review, the team revised the student's annual goals and increased the amount of special education instruction and assistive technology services that the student would receive. The team revised the program to require the provision of additional behavioral supports but did not determine that the program will include the use of restraint as a behavior intervention (Doc. n).

### **Discussion/Conclusions:**

#### Use of physical restraint

The use of physical restraint is prohibited in public agencies and nonpublic schools unless there is an emergency situation and physical restraint is necessary to protect a student or another person from imminent, serious physical harm after other less intrusive, nonphysical interventions have failed, or been determined inappropriate. Physical restraint is also permitted if the student's BIP or IEP describes specific behaviors and circumstances in which physical restraint may be used (COMAR 13A.08.04.05A(1)(a)).

Physical restraint shall be removed as soon as the student is calm and **may not** exceed thirty (30) minutes (COMAR 13A.08.04.05A(1)(d)). When utilizing physical restraint, school personnel may not place a student in a face-down position. School personnel may not place a student in any other position that will obstruct the student's airway or otherwise impair the student's ability to breathe. School personnel may not place a student in a position that will obstruct a staff member's view of the student's face, restrict the student's ability to communicate distress, or place pressure on the student's head, neck, or torso. School personnel may not straddle the student's torso (COMAR 13A.08.04.05A(1)(e)).

Based on Finding of Fact #4, MSDE finds that the student's IEP and BIP do not include the use of restraint. Based on Finding of Fact #5, MSDE finds that while there is documentation that the student "was a danger to himself and others," there is no documentation that the student or others needed to be protected from *imminent, serious physical harm*. Further, based on Findings of Fact #6 and 9, MSDE finds that because the documentation of the restraint incident does not describe the type of restraint used with the student, there is no documentation that school staff used restraint in accordance with the requirements. Additionally, based on Findings of Fact #4 and 5, MSDE finds that school staff continued to restrain the student past thirty (30) minutes because he "continued to be non-compliant." Therefore, MSDE finds a violation regarding this aspect of the allegation.

#### Documentation of the use of restraint

Each 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 shall 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)(b)). Each time restraint is used, the student's parent must be provided oral or written notification within twenty-four (24) hours, unless otherwise provided for in the student's BIP or IEP (COMAR 13A.08.04.05A(5)).

Based on Finding of Fact #10, MSDE finds that the student's parents were informed of the use of restraint within twenty-four (24) hours after the restraint incident occurred. However, based on Findings of Fact #8 and 9, MSDE finds that the documentation of the restraint incident does not include all of the required elements. Therefore, MSDE finds that the student's parents were not provided with proper notice of the incident and that a violation occurred regarding this aspect of the allegation.

#### Requirement to meet following the use of restraint

If restraint is used, and the student's IEP or BIP does not include the use of restraint, the IEP team shall meet within ten (10) business days of the incident to consider the need for conducting an FBA, developing appropriate behavioral interventions, and implementing a BIP. If the student already has a BIP, the team, at that meeting, must review and revise it, as appropriate, to ensure that it addresses the student's behavioral needs (COMAR 13A.08.04.05C(2)).

Based on Finding of Fact #12, MSDE finds that the IEP team convened on April 12, 2011 in order to review the student's program and revised it to include additional supports to address his behavioral needs. However, based on that same Finding, MSDE finds that the IEP team did not convene within ten (10) business days of March 22, 2011. Therefore, MSDE finds a violation regarding this aspect of the allegation.

#### Training of school personnel in the proper use of physical restraint

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 also include current professionally accepted practices and standards regarding positive behavioral intervention strategies and supports, functional behavioral assessment and behavior intervention planning, exclusion, restraint, and seclusion (COMAR 13A.08.04.06C(1)).

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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(3)). Professional development shall include a written examination and a physical demonstration of proficiency in the described skills and competencies (COMAR 13A.08.04.06C(4)).

Based on Finding of Fact #11, MSDE finds that there is no documentation that school staff have been trained consistent with the requirements. Therefore, MSDE finds a violation regarding this aspect of the allegation.

### **CORRECTIVE ACTIONS/TIMELINE:**

#### **Student-specific**

MCPS has provided MSDE with documentation that the IEP team has convened on two (2) occasions since the March 22, 2011 restraint incident to address the student's behavioral needs. At these meetings, the team reviewed the student's program, gathered additional data from MCPS consultants, and revised the student's program to include additional behavioral supports. Therefore, MSDE requires no additional student-specific corrective actions in order to redress the violations.

#### **Systemic**

MSDE requires MCPS to provide documentation to this office by the start of the 2011-2012 school year, that the school system's policies regarding the use of restraint address the violations identified in this complaint investigation and are consistent with the COMAR requirements. In addition, MCPS is required to provide this office with documentation that the procedures have been disseminated, that proper training has occurred, and that the policies are being implemented.

This information has been shared with the MSDE Office of Quality Assurance and Monitoring. The school system is required to address these violations in coordination with any findings of violations and ongoing actions that are required through the Monitoring for Continuous Improvement Process.

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.



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**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.

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 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:ks

cc : Jerry D. Weast  
Gwendolyn Mason  
Alison Steinfels  
XXXXXX  
Martha Arthur  
Kathy Stump