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State Superintendent of Schools

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July 9, 2012

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Mr. Daniel Martz
Director of Special Education and
Psychological Services
Frederick County Public Schools
191 South East Street
Frederick, Maryland 21701

RE: XXXXX
Reference: # 12-087

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 our investigation.

ALLEGATION:

On May 10, 2012, the MSDE received correspondence from Mr. XXXXXXXXXXXX, hereafter “the complainant,” filed on behalf of his son, the above-referenced student. In that correspondence, the complainant alleged that the Frederick County Public Schools (FCPS) 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 allegation that the FCPS did not follow proper procedures when disciplinarily removing the student from school on May 12, 2011, in accordance with 34 CFR §§ 300.530-.536 and COMAR 13A.08.03.10.

INVESTIGATIVE PROCEDURES:

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the allegation in the complaint.
2. On May 11, 2012, a copy of the complaint was provided by facsimile to Mr. Daniel Martz, Director of Special Education and Psychological Services, FCPS.

XXX

Mr. Daniel Martz

July 9, 2012

Page 2

3. On May 15 and 16, 2012, Ms. Williams conducted telephone interviews with the complainant to clarify the allegation to be investigated.
4. On May 31, 2012, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegation subject to this investigation. On that same date, the MSDE also notified the FCPS of the allegation to be investigated and requested that the FCPS review the alleged violations.
5. On June 20, 2012, Ms. Williams and Ms. Kathy Stump, Education Program Specialist, MSDE, conducted a site visit at the FCPS to review the student's educational record. Mr. Martz and Ms. Linda Chambers, Supervisor of Special Education Compliance, FCPS, were present at the site visit to provided information on the FCPS policies and procedures, as needed.
6. On June 21, 2012, the FCPS sent electronic correspondence to the MSDE with documentation to be considered during the investigation.
7. On July 3, 2012, Ms. Williams conducted a telephone interview with Ms. Chambers and requested additional information.
8. On July 6, 2012, the FCPS sent electronic correspondence to the MSDE with documentation to be considered during the investigation.
9. On July 6, 2012, Ms. Williams conducted a telephone interview with the complainant.
10. Documentation provided by the parties was reviewed. The documents referenced in this Letter of Findings include:
 - a. Correspondence from the complainant to the MSDE, received May 10, 2012;
 - b. FCPS Threats of Harm by Students Policy, dated May 10, 2006;
 - c. FCPS Attendance Report, dated September 22, 2010 through June 14, 2011;
 - d. FCPS XXXXXX Attendance Form, dated March 18, 2011 through June 15, 2011;
 - e. FCPS Section 504 Accommodations Plan, dated April 4, 2011;
 - f. Electronic correspondence from the complainant to the FCPS, requesting an Individualized Education Program (IEP) screening meeting, dated April 11, 2011;
 - g. Written referral for an evaluation under the IDEA;
 - h. FCPS IEP meeting notice, dated May 9, 2011;
 - i. Correspondence between the FCPS staff, dated May 11, 2011;
 - j. Correspondence from the FCPS to the complainant, dated May 11, 2011;
 - k. FCPS Disciplinary Incident Summary, dated May 11, 2011;
 - l. FCPS Behavior Intervention Plan, dated May 16, 2011, reviewed and revised on June 23, 2011 and July 12, 2011;
 - m. FCPS Student Threat Assessment, dated May 19, 2011;
 - n. Correspondence from the FCPS to the complainant, dated May 24, 2011;
 - o. FCPS IEP meeting notice, dated May 27, 2011;

XXX

Mr. Daniel Martz

July 9, 2012

Page 3

- p. Electronic correspondence from the complainant to the FCPS, dated May 30, 2011;
- q. FCPS Manifestation Determination Review Form, dated June 1, 2011;
- r. FCPS IEP team meeting notes, dated June 1, 2011;
- s. FCPS IEP team meeting notes, dated June 23, 2011; and
- t. FCPS IEP team meeting notes, dated August 17, 2011.

BACKGROUND:

The student is eighteen (18) years old. During the 2010-2011 school year he attended XXXXX XXXXXXXX. During the 2011-2012 school year, the student attended XXXXXXXXXXXXXXXX, as a result of a change in his educational placement made by the IEP team. The student graduated at the end of the 2011-2012 school year with a Maryland High School Diploma.

On June 23, 2011 the student was identified as a student with multiple disabilities based upon Autism and Other Health Impairment related to Attention Deficit Hyperactivity Disorder (ADHD). Prior to being identified as a student with a disability under the IDEA, the student was identified as a student with a disability under Section 504 of the Rehabilitation Act of 1974. He was identified based on ADHD and Generalized Anxiety Disorder (GAD) and had a Section 504 Accommodations Plan (504 Plan).

During the time period covered by this investigation, the complainant participated in the education decision-making process and was provided with notice of the procedural safeguards (Docs. a, r, s, and t).

FINDINGS OF FACTS:

1. On April 11, 2011, the student's mother made a written referral for an evaluation under the IDEA based on her concerns about the student's work refusal and inattention (Docs. a, f, and g).
2. On May 9, 2011, the FCPS sent a meeting notice to the complainant, scheduling an IEP meeting on June 1, 2011. The purpose of this meeting was to review the written referral, existing data, assessment results, instructional interventions, information from the parents and if appropriate, to determine the need for additional data (Doc. h).
3. On May 11, 2011, the student was suspended for ten (10) school days, from May 12, 2011 through May 25, 2011, for making bomb threats. At that time, school staff also requested that the student be expelled (Docs. c, d, i, j, and k).
4. On May 24, 2011, the FCPS issued a letter to the complainant, informing him that the suspension was being extended another fourteen (14) school days and notifying the complainant that during the suspension period, the student would be provided with educational services at the XXXXXXXXXXXX. The letter indicates that the FCPS determined the amount of instruction to be provided (Doc. n).

XXX

Mr. Daniel Martz

July 9, 2012

Page 4

5. On June 1, 2011, the IEP team convened to conduct a manifestation determination review and to begin the evaluation process. The IEP team determined that the student's behavior was not a manifestation of the student's suspected disability because the behavior had no relationship to the student's inattention, ADHD, and anxiety and because the behavior was not a result the FCPS' failure to implement an IEP since the student did not yet have an IEP (Docs. o, p, and q).
6. The IEP team documented that they considered the data listed below when making the decision that the student's behavior was not a manifestation of his disability.
 - a. Information from the student's parents that the student expressed concerns about his learning ability and his capability to function. The parents reported that the student has struggled academically and socially in school, and that his medications "flatten him," so his ADHD medication was discontinued.
 - b. The student's Section 504 Plan that addressed anxiety due to ADHD and Generalized Anxiety Disorder.
 - c. Information from the student's teachers that increased anxiety appeared to be the student's greatest barrier to learning and that the student exhibited significant academic problems, avoidance behaviors in the classroom, and often "return[ed] a blank stare when asked if he need[ed] help." Teachers also reported that the student struggled with knowing what to do next or where to transition during nonacademic activities.
 - d. The results of a threat assessment, conducted by the school psychologist as part of the FCPS student safety procedures, following the bomb threat incident. The assessment indicated that the student displayed increased anxiety and work avoidance. The report also indicates that, because of the student's secretive behavior of repeatedly leaving threatening notes around the school threatening to detonate a bomb, there was cause for alarm and suspicion that the behavior would likely be repeated, but that there was no indication that the student would execute the bomb threats. Therefore, while the student was determined to pose a low risk to the safety of others, he also requires close supervision to monitor his behavior at school. The report contains a recommendation that "when [the student] shuts down, he should access the office of student support, library or guidance where he may concentrate better, decrease anxious feelings and access adult support" (Docs. b, e, q and r).
7. There is no documentation that the IEP team determined the amount and nature of services to be provided to the student during the disciplinary removal period (Review of the educational record).
8. There is no documentation that a Functional Behavior Assessment (FBA) was conducted to address the student's behavior that resulted in the disciplinary removal and no documentation that the IEP team decided whether a FBA was required. The documentation of the team's manifestation determination states that the IEP team decided

XXX

Mr. Daniel Martz

July 9, 2012

Page 5

a Behavioral Intervention Plan (BIP) was required to address the behaviors that resulted in the removal so that it does not recur. However, there is no documentation that a BIP was developed for that purpose (Review of the student's educational record and interview with the FCPS staff).

DISCUSSION/CONCLUSIONS:

Application of IDEA Protections

The IDEA and COMAR provide protections to students with disabilities who are disciplinarily removed from school in excess of ten (10) days during the school year. A student who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a code of student conduct may assert the protections provided to students with disabilities if the public agency had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred (34 CFR §§300.530 -.546 and COMAR 13A.08.03.10).

The public agency must be deemed to have knowledge that a student is a student with a disability if, before the behavior that precipitated the disciplinary action occurred, the parent expressed concern in writing to supervisory or administrative personnel of the public agency or a teacher of the student that the student is in need of special education services (34 CFR §300.534 and COMAR 13A.08.03.10).

Based on the Finding of Fact # 1, the MSDE finds there was a pending evaluation for eligibility under the IDEA at the time of the disciplinary removal. Therefore, the school system was required to provide the student with the IDEA disciplinary protections.

Manifestation Determination

A student with a disability may be removed from the student's current placement for up to ten (10) consecutive school days for each incident of misconduct in a school year if the cumulative effect of the removals does not constitute a change in placement (34 CFR §300.530). A change in placement occurs if the removal is for more than ten (10) consecutive school days or a series of removals that constitutes a pattern of removal that accumulates to more than ten (10) school days in a school year (34 CFR §§300.536 and COMAR 13A.08.03.05).

Based on the Findings of Facts #3 and #4, the MSDE finds that the disciplinary removal constituted a change in the student's placement, because it was in excess of ten (10) consecutive school days. The IEP team must meet 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. At the meeting, the IEP team must determine whether the student's behavior that resulted in a disciplinary removal was a manifestation of the student's disability and must determine the services to be provided during the removal to ensure the provision of a Free Appropriate Public Education (FAPE) (COMAR 13A.08.03.08).

XXX

Mr. Daniel Martz

July 9, 2012

Page 6

When determining whether the behavior was a manifestation of the student's disability, the IEP team must review all relevant information in the student's file, any teacher observations, any relevant information supplied by the parents, and the student's IEP. The IEP team must determine if the behavior was caused by or had a direct and substantial relationship to the student's disability or if it was a direct result of the public agency's failure to implement the student's IEP (COMAR 13A.08.03.08).

The United States Department of Education, Office of Special Education Programs (OSEP), requires that, during the investigation of an allegation that an IEP team did not follow proper procedures under the IDEA, the State Education Agency must review the procedures used by a school system to reach the determinations made. Additionally, the State Educational Agency must review the evaluative data to determine if decisions made by the IEP team are consistent with the data (OSEP Letter #00-20, July 17, 2000 and *Analysis of Comments and Changes to IDEA*, Federal Register, Vol. 71, No. 156, p 46601, August 14, 2006).

Based on the Finding of Fact #5, the MSDE finds that the IEP team convened within the required timelines to conduct the manifestation determination and determined that the student's behavior was not a manifestation of his disability. However, the MSDE finds that based on the Findings of Facts #5 and #6, the IEP team's manifestation determination was not consistent with the data and that a violation occurred with respect to this aspect of the allegation.

Provision of Services

If the team determines that the behavior that resulted in a disciplinary removal from school was a manifestation of the student's disability, it must return the student to the educational placement from which the student was removed. However, if it is determined that the behavior was not a manifestation of the student's disability, the public agency may apply discipline procedures to students with disabilities in the same manner as would be applied to students without disabilities (34 CFR §300.530 and COMAR 13A.08.03.08).

When the IEP team determines the behavior is not a manifestation of the student's disability, the IEP team must determine the extent to which services are necessary during the period of disciplinary removal to enable the student to appropriately progress in the general curriculum and advance toward achieving the goals of the student's IEP (34 CFR §300.530 and COMAR 13A.08.03.03).

Based on the Finding of Fact # 7, the MSDE finds there is no documentation that the IEP team determined the educational services needed to enable the student to progress in the general education curriculum. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP)

In addition, when the student's behavior is not found to be a manifestation of the disability, the student must receive, as appropriate, a FBA and a BIP that are designed to address the behavior that precipitated the violation so that it does not recur (34 CFR §300.530 and COMAR 13A.08.03.03). The IEP team must meet within ten (10) business days of the removal of the

XXX
Mr. Daniel Martz
July 9, 2012
Page 7

student to develop an assessment plan if the IEP team has not conducted a FBA and implemented a BIP to address the behavior before the behavior occurred that resulted in the student's change of placement (COMAR 13A.08.03.07).

Based on the Finding of Fact # 8, the MSDE finds there is no documentation that the team determined if a FBA was necessary. Based on the Finding of Fact # 8, the IEP team decided that the student required a BIP, but there is no documentation that one was developed. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

CORRECTIVE ACTION/TIMELINE:

The MSDE requires the FCPS to convene an IEP team to determine the amount and nature of compensatory services¹ necessary to remedy the loss of appropriate services following the student's disciplinary removal during the 2010 – 2011 school year. When making the determination, the team may consider alternative methods to redress the loss services to assist the student with transition from high school to post-school activities.

The FCPS must provide the complainant 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 complainant disagrees with the IEP team's determinations, he maintains the right to request mediation or file a due process complaint, in accordance with the IDEA.

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 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 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.

¹ 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 even when the student is no longer eligible for an IEP under the IDEA (34 CFR §300.151 and *OSEP Letter to Riffel*, August 22, 2000).

XXX

Mr. Daniel Martz

July 9, 2012

Page 8

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The complainant and the school system maintain the right to request mediation or to file a due process complaint, if they disagree with the identification, evaluation, placement, or provision of a FAPE for the student, including issues subject to a State complaint investigation, consistent with the IDEA. 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

cc: Theresa R. Alban
Linda Chambers
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Anita Mandis
Martha J. Arthur
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