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State Superintendent of Schools

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February 14, 2011

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Ms. Ann-Marie Spakowski  
Director of Special Education  
Harford County Public Schools  
102 South Hickory Avenue  
Bel Air, Maryland 21014

RE: XXXXX  
Reference: #11-042

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 December 21, 2010, MSDE received a complaint from Ms. XXXXXXXXXXXX, hereafter, “the complainant,” on behalf of her son. In that correspondence, the complainant alleged that the Harford County Public Schools (HCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student. MSDE investigated the following allegations:

1. HCPS has not ensured that the student’s Individualized Education Program (IEP) has been implemented since the start of the 2010-2011 school year, in accordance with 34 CFR §300.101. Specifically that:
  - a. School staff at XXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX) did not ensure that the student received the behavioral supports in all classes from the start of the 2010-2011 school year until October 29, 2010, when the student was disciplinarily removed from XXXXXXXX; and

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- b. School staff at the XXXXXXXXXXXXXXX did not ensure that the student received counseling, special education instruction, or behavioral supports in accordance with the IEP from November 15, 2010 until December 16, 2010.<sup>1</sup>
2. HCPS has not followed proper procedures when disciplinarily removing the student from school during the 2010-2011 school year, in accordance with 34 CFR §§300.101 and .530-.536; and
3. HCPS did not follow proper procedures when determining that the student would receive special education services in his home from January 3, 2011 until January 18, 2011,<sup>2</sup> in accordance with COMAR 13A.05.01.10C(6).

#### **INVESTIGATIVE PROCEDURES:**

1. Ms. Kathy Stump, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On December 22, 2010, MSDE sent a copy of the complaint, via facsimile, to Ms. Ann-Marie Spakowski, Director of Special Education, HCPS.
3. On December 28, 2010, Ms. Stump spoke with the complainant by telephone and clarified the allegations to be investigated.
4. On December 28, 2010, 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. Spakowski of the allegations and requested that her office review the alleged violations.
5. On January 13, 2011, Ms. Stump reviewed the student's education record at the HCPS Central Office. Ms. Eileen Watson, Coordinator of Compliance, HCPS, was present at the record review.
6. On January 21, 2011, Ms. Stump and Mrs. Martha J. Arthur, Education Program Specialist, MSDE, conducted a site visit at XXXXXX to review the student's education record, and interviewed the following HCPS personnel:
  - a. Ms. XXXXXXXXXXX, Behavior Specialist, XXXXXXXX;
  - b. Ms. XXXXXXXXXXX, School Psychologist Intern, XXXXXXXX;

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<sup>1</sup>In correspondence to the complainant, dated December 28, 2010, this office originally identified the date as December 22, 2010. However, during the course of the investigation, it was determined that the student engaged in a physical altercation with another student on December 16, 2010 and did not return to the XXXXXXXX. See discussion in Allegation #2, below for further clarification.

<sup>2</sup> This office originally identified this allegation from December 2010. However, during the course of the investigation, it was determined that the student received the instruction at home from January 3, 2011 until January 18, 2011. See discussion in Allegation #3, below for further clarification.

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- c. Mr. XXXXXXXXXXXXXXX, Principal, XXXXXXXXX;
- d. Ms. XXXXXXXXX, School Psychologist, XXXXXXXXX;
- e. Ms. XXXXXXXXX, Principal, XXXXXXXXX; and
- f. Mr. XXXXXXXXX, Special Education Teacher, XXXXXXXXX.

Ms. Watson attended the site visit as a representative of HCPS and to provide information on HCPS policies and procedures, as needed.

7. On February 7, 2011, MSDE received additional documentation from the student's education record from HCPS personnel.
8. MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings (LOF), which includes:
  - a. Correspondence and attachments from complainant to MSDE, received on December 21, 2010;
  - b. Behavior Intervention Plan, dated October 25, 2009;
  - c. IEP, dated May 12, 2010;
  - d. IEP, dated September 30, 2010;
  - e. IEP, dated October 21, 2010;
  - f. Correspondence from XXXXXXXXXXXX personnel to the complainant, dated November 3, 2010;
  - g. HCPS *Manifestation Determination* worksheet, dated November 9, 2010;
  - h. Correspondence from XXXXXXXXXXXX personnel to the complainant, dated November 9, 2010;
  - i. IEP, dated November 9, 2010;
  - j. IEP team meeting sign-in sheet and team summary, dated December 9, 2010;
  - k. Behavior Intervention Plan, dated December 9, 2010;
  - l. IEP team meeting sign-in sheet and team summary, dated December 22, 2010;
  - m. HCPS *Home and Hospital Teacher Time Report*, dated January 7, 2011;
  - n. E-mail correspondence from the complainant to HCPS personnel, dated January 14, 2011;
  - o. XXXXXX MS counselor's service provider log for the 2010-2011 school year;
  - p. AEP counselor's service provider log for the 2010-2011 school year;
  - q. Student's discipline record for the 2010-2011 school year; and
  - r. HCPS *Classroom Support Program* handbook, undated.

### **BACKGROUND:**

The student is twelve (12) years old, is identified as a student with an emotional disability under IDEA, and receives special education services. During the 2010-2011 school year, the student has been in the following placements:

- The student attended XXXXXXXXXXXX from the start of the 2010-2011 school year until Friday, October 29, 2010, when he was disciplinarily removed from school.

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- From November 3, 2010<sup>3</sup> until November 14, 2010, the student did not receive educational services.
- From November 15, 2010 until December 16, 2010, the student attended the AEP, which is the location where the IEP team determined the student would receive his services during his disciplinary removal.
- From December 17, 2010 until December 23, 2010, the student did not receive educational services because he had been disciplinarily removed from the AEP.
- From January 3, 2011<sup>4</sup> until January 18, 2011, the student received instruction at home while disciplinarily removed from school.
- Since January 19, 2011, the student has been attending XXXXXXXXXXXX.

During the period of time addressed by this investigation, the complainant participated in the education decision-making process, and was provided with written notice of IEP team decisions and notice of the procedural safeguards (Docs. a, b-j, and l-n).

**FINDINGS OF FACT:**

1. The IEP in effect since the start of the 2010-2011 school year requires that the student be provided with the following services, among others:
  - a. Thirty (30) half-hour sessions per year of individual and group counseling sessions. There is no documentation regarding at what intervals during the school year that these thirty (30) sessions are to be provided;
  - b. Supplementary aids and services, including adult assistance “for specific settings and situations and during times of transition” throughout the school day. The IEP does not specify the “specific settings and situations” in which the student requires adult assistance; and
  - c. Implementation of a behavioral intervention plan (BIP) that requires, among other supports, giving the student advanced notice of changes in his daily routine when possible (Docs. b-e and i).
2. The IEP in effect since the start of the 2010-2011 school year also states that the least restrictive environment (LRE) in which the student’s IEP can be implemented is “the

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<sup>3</sup> November 3, 2010 was the first day of school following the October 29, 2010 disciplinary removal (review of MSDE *Public School Openings and Closings* calendar for the 2010-2011 school year).

<sup>4</sup> HCPS was closed for students between Friday, December 24, 2010 and Friday, December 31, 2010 (review of MSDE *Public School Openings and Closings* calendar for the 2010-2011 school year).

general education classroom setting with the support of the Classroom Support Program (CSP).” The IEP states that the student will receive “classroom instruction for certain classes within the CSP classroom,” which is a separate special education classroom,<sup>5</sup> but does not specify in which classes the student will be in the CSP classroom (Docs. b-e and i).

3. On October 29, 2010, the student was involved in a physical altercation with another student during one of his classes in which there was a substitute teacher. School staff acknowledge that the student was not given advanced notice of the fact that a substitute teacher was in the classroom that day. However, school staff report that they do not consider a substitute teacher a “change in routine.” Rather, they indicate that a “change in routine” is something like a field trip or a school assembly or a fire drill (Docs. f-h and q).
4. As a result of the physical altercation on October 29, 2010, the student was suspended from XXXXXXXX MS for ten (10) school days, with a recommendation to the Superintendent for a long-term suspension (Docs. f-h and q).
5. On November 9, 2010, the IEP team at XXXXXXXX convened and determined that the behavior that led to the suspension was a manifestation of the student’s disability. However, the principal removed the student to an Interim Alternative Educational Setting (IAES) for forty-five (45) days because it was determined that the physical altercation inflicted “serious bodily injury” on another person. The team determined that the location of the IAES would be the XXXXXXXX (Docs. g-i).
6. The HCPS *Manifestation Determination* worksheet indicates that the IEP team at XXXXXXXX determined that the student would receive the following services while at the IAES:
  - a. Fifteen (15) minutes per month of consultation between the student’s IEP case manager and his classroom teachers to review progress toward achieving the annual IEP goals; and
  - b. One (1) half-hour session per week of counseling services outside the general education setting.

The team determined that the LRE in which the student’s IEP could be implemented was the general education classroom (Doc. g).

7. At the November 9, 2010 meeting, the team discussed that the student’s BIP needed to be reviewed to ensure that it addresses the behavior that subjected the student to disciplinary

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<sup>5</sup> The CSP provides a continuum of services to students who have an emotional disability that significantly interferes with their educational program. The teachers who are assigned to the CSP are special education teachers. Services provided at the middle school level range from primarily separate special education classrooms to instruction in all general education classrooms with behavioral and instructional support (Doc. r).

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- removal. On December 9, 2010, the IEP team began a review of the BIP but did not meet again and complete the review until December 22, 2010 (Docs. g, j, k, and l).
8. There is documentation that the student began attending the XXXXXX on November 15, 2010 and that he received instruction in the general education classroom. There is no documentation that the student's case manager met with the student's teachers at the XXXXXX. Although there is documentation that the student received three (3) half-hour counseling sessions while attending the XXXXXX, the documentation does not indicate that the services were provided weekly, consistent with the team's determinations at the November 9, 2010 meeting (Doc. p and review of education record).
  9. On December 16, 2010, the student was involved in a physical altercation with another student during the student's lunchtime at the XXXXXX. As a result, the student was disciplinarily removed from the XXXXXX for ten (10) school days, with a recommendation to the Superintendent for a long-term suspension (Doc. q).
  10. There is no documentation that the student received services to enable him to progress in the general education curriculum or make progress toward achieving the annual goals between December 17, 2010 and December 23, 2010. There is no documentation that the IEP team convened to determine if the student's behavior was a manifestation of his disability or to review and revise the student's BIP, as appropriate. There is no documentation that school staff determined whether this removal was a pattern that constituted a change in placement (Interview with school staff and review of education record).
  11. On December 22, 2010, the IEP team completed its review of the student's BIP, which began on December 9, 2010. The documentation of the meeting indicates that the team agreed that the student would receive instruction at home for the remainder of his forty-five (45) day removal to the IAES that resulted from the October 29, 2010 incident (Docs. k and l).
  12. On December 22, 2010, the team also determined that the student required ten (10) hours of instruction in his academic subjects and a continuation of his counseling services while disciplinarily removed to his home. However, there is no documentation of receipt of verification from a physician, psychologist, or psychiatrist that the student was unable to attend school due to a physical or emotional condition (Docs. l, o, and interview with school staff).
  13. There is documentation that the student returned to XXXXXXXX on January 19, 2011. Since that date, school staff report that the student has been receiving all of his instruction in a separate special education classroom. School staff further report that this is part of a plan to transition him back from home and hospital teaching services to a school-based setting, but there is no documentation that the IEP team developed such a plan. An IEP team meeting to review the student's program and placement is scheduled for February 15, 2011 (Doc. o and interview with HCPS personnel).

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## **DISCUSSION/CONCLUSIONS:**

### **Preliminary violation:      IEP written clearly**

Each student's IEP must include information about the amount of services that will be provided to the student including the anticipated frequency, location, and duration of related services (34 CFR §300.320). In order to ensure that the student receives the services required, the IEP must be written in a manner that is clear to all who are involved in its development and implementation (*Analysis of Comments and Changes, Federal Register*, Vol. 64, No. 48, p.12479, March 12, 1999).<sup>6</sup>

In August 2010, MSDE issued guidance to local school systems explaining that IDEA requires that each IEP include the anticipated frequency, location, and duration of services to be provided (34 CFR §300.320(a)(7)). Frequency of service provision typically should be "weekly" or "monthly" so that families and service providers have a clear understanding of how often a student will receive the service. Frequencies other than "monthly" or "weekly" may be used only when needed to meet the unique needs of the student. The basis for using a frequency other than "monthly" or "weekly" must be clearly documented on the IEP. Lack of staff, administrative convenience, and other non-therapeutic reasons are insufficient to support a "yearly" frequency MSDE *Technical Assistance Bulletin #21*, August 2010).

Based on Findings of Fact #1 and 2, MSDE finds that the IEP is not written clearly with regard to the following:

- An explanation on or description of the specific settings and situations in which the student will be provided with adult assistance;
- The areas in which instruction will be provided in general education and separate special education classroom; and
- The intervals during which the thirty (30) sessions of counseling are to be provided. .

Therefore, MSDE finds that violations have occurred regarding the lack of clarity of the IEP document.

### **Allegation #1:      IEP Implementation**

In this case, the complainant alleges that the student was not provided with:

- Behavioral supports in all classes from the start of the 2010-2011 school year until October 29, 2010, when he was disciplinarily removed from XXXXXXXX. Specifically, the complainant alleges that the student was not provided with advanced notice of the

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<sup>6</sup> In the 2004 reauthorization of the IDEA, no changes were made to this requirement.

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presence of a substitute in the class in which the behavioral incident occurred or the support of adult assistance on that day; and

- Counseling, special education instruction, or behavioral supports at the XXXXXX between November 15, 2010 and December 22, 2010, when he was disciplinarily removed from that school. Specifically, the complainant alleges that:
  - The student was not provided with adult assistance on the day in which the behavioral incident occurred, and
  - The student was not educated with his peers because no other student at the AEP was involved in the same “advanced curriculum” as the student (Doc. a and interview with complainant).

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).

#### Behavioral Supports at XXXXXXXX MS

Based on Findings of Fact #1-3, MSDE finds that because the IEP does not clearly state when adult assistance is to be provided, HCPS did not ensure that services were provided in accordance with the IEP team’s decisions. Therefore, MSDE finds a violation regarding this aspect of the allegation.

#### XXXXXX

Based on Finding of Fact #6, MSDE finds that because the student was not required to be provided with adult assistance in the XXXXXX, no violation occurred with respect to this aspect of the allegation. Based on those same Findings, MSDE further finds that because the student was not required to be provided with instruction with students participating in an “advanced curriculum” in the XXXXXXXX, no violation occurred with respect to this aspect of the allegation.

However, based on Findings of Fact #6-8 MSDE finds that there is no documentation that the student received the special education instruction or the related services while at the XXXX, consistent with the decisions made by the IEP team at the November 9, 2010 meeting. Therefore, MSDE finds a violation regarding this aspect of the allegation.

#### Allegation #2:                      Disciplinary Removal

A student with a disability may be removed from his or her 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



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- The student has been subjected to a series of removals that constitute a pattern because they total more than ten (10) school days in a school year and the student's behavior is substantially similar to the behavior in previous incidents that resulted in the removals (34 CFR §§300.530 and .536).

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 (34 CFR §300.350).

If the team determines that the behavior was a manifestation of the student's disability, it must either conduct a functional behavioral assessment and implement a BIP or review the BIP and modify it, as necessary, to address the behavior. Additionally, the team must return the student to the educational placement from which the student was removed unless:

- The parent and the public agency agree to a change in placement as part of the modification of the BIP; or
- School personnel remove the student to an IAES for not more than forty-five (45) school days without regard to whether the behavior is determined to be a manifestation of the student's disability if the student does one of the following at school, on school premises, or at a school function:
  - Carries or possesses a weapon;
  - Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled dangerous substance; or
  - Inflicts serious bodily injury on another person (34 CFR §300.530 and COMAR 13A.08.03.08).

If the behavior is determined not to be 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. However, the student must continue to receive educational services, determined by the IEP team, to enable the student to progress in the general curriculum and advance toward achieving the goals of the student's IEP, although those services may be provided in an alternative setting. Additionally, 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).

#### Disciplinary removal from XXXXXXXX

Based on Findings of Fact #4-6, MSDE finds a manifestation determination was made within the required timelines. However, based on Findings of Fact #7 and 11, MSDE finds that the BIP

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was not reviewed and revised, as appropriate, within the required timelines. Therefore, MSDE finds a violation with respect to this aspect of the allegation.

Disciplinary removal from the XXXXXX

Based on Finding of Fact #8, MSDE finds that the services provided to the student on the eleventh (11<sup>th</sup>) day of disciplinary removal were not provided in accordance with the IEP team's decisions. Further, based on Findings of Fact #9 and 10, MSDE finds that there is no documentation that the IEP team convened to determine if the student's behavior was a manifestation of his disability or review and revise, as appropriate, the student's BIP as a result of the December 16, 2010 disciplinary removal from the XXXXX. Additionally, there is no documentation that the student received services between December 17, 2010 and December 23, 2010. Therefore, MSDE finds violations regarding this aspect of the allegation.

**Allegation #3:**                      **Provision of Services in the Student's Home While on Disciplinary Removal**

Under Maryland law, the instructional setting for the provision of educational services to a student who has been disciplinarily removed from school in accordance with IDEA *may not* be the student's home, even if the public agency and the student's parent agree to a change in placement as part of the student's BIP (13A.05.01.10C(6)).

Only public school students who are unable to participate in their school of enrollment due to a physical or emotional condition may receive instruction at home or in the hospital (COMAR 13A.03.05.01 and 13A.05.01.10C(5)). A physician, psychiatrist, or psychologist must verify the physical or emotional condition and verify that the current condition prevents the student from participating in the student's school of enrollment (COMAR 13A.03.05.04).

Based on Finding of Fact #12, MSDE finds that the student was provided with instruction in his home from January 3, 2011 until January 18, 2011 as an IAES setting without documentation of verification from a physician, psychologist, or psychiatrist that the student was unable to attend school due to a medical or emotional condition. Therefore, MSDE finds a violation regarding this allegation.

**Additional violation:**                      **IEP implementation in the placement required by the IEP**

The public agency is required to ensure that the student is provided with the special education and related services in the placement required by the IEP (34 CFR §§300.101). Based on Finding of Fact #13, MSDE finds that since the student has returned to XXXXXXXX, the student is not receiving services in the placement required by the IEP. Therefore, MSDE finds that a violation has occurred.

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## **CORRECTIVE ACTIONS/TIMELINES:**

### **Student-specific**

MSDE requires HCPS to provide documentation by March 15, 2011 that immediate steps have been taken to ensure that the student is provided with special education services in the placement required by the IEP. In addition, MSDE requires HCPS to provide documentation by April 15, 2011 that an IEP team has convened and done the following:

1. Revised the IEP to ensure that it is clearly written; and
2. Determined the nature and amount of *compensatory services*<sup>7</sup> necessary to redress the violations identified in the LOF.

HCPS 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, in accordance with 34 CFR §300.503. If the complainant disagrees with the IEP team's determinations, she maintains the right to request mediation or file a due process complaint, in accordance with IDEA.

### **School-based**

MSDE requires HCPS to provide documentation by May 15, 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 XXXXXXXXX and the XXXXXXXX.

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 Complaint Investigation and Due Process Branch 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 United States Department of Education, Office of Special Education Programs Memorandum #09-02. 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 HCPS.

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<sup>7</sup> 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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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.

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 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 : Robert M. Tomback  
Eileen Watson  
XXXXXXXXXXXX  
XXXXXXXXXX  
Martha Arthur  
Kathy Stump