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September 1, 2011

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RE: XXXXXXXXX
Reference: #12-001

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 July 5, 2011¹, MSDE received a complaint from Ms. XXXXXXXXXXXX, hereafter, “the complainant,” on behalf of her son. In that correspondence, the complainant alleged 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. This office investigated the following allegations:

1. BCPS has not followed proper procedures when developing the student’s Individualized Education Program (IEP) since January 2011, in accordance with 34 CFR §300.324. Specifically,
 - a. BCPS has not ensured that the student’s needs have been identified;
 - b. BCPS has not ensured that the IEP addresses the student’s needs; and
 - c. BCPS has not ensured that the complainant’s input is considered when developing the IEP.

¹ On June 28, 2011, the complainant provided MSDE with correspondence containing allegations of violations of IDEA, which did not contain all of the necessary information to initiate a State complaint investigation. She was informed, in writing, that additional information was required. On July 5, 2011, the complainant provided the required information and a complaint investigation was initiated (34 CFR §300.153).

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 2

2. BCPS did not follow proper procedures when determining the student's need for extended school year (ESY) services for the summer of 2011, in accordance with 34 CFR §300.106 and COMAR 13A.05.01.08B(2);
3. BCPS did not provide the complainant with a copy of the IEP document within five (5) business days after the IEP team meeting on June 10, 2011, in accordance with Md. Code, Ann., Educ. §8-405(d) (2010) and COMAR 13A.05.01.07D(3); and
4. BCPS did not ensure that the complainant was provided with access to the student's education record, in accordance with 34 CFR §300.613.

INVESTIGATIVE PROCEDURES:

1. Ms. Koliwe Moyo, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On June 28, 2011, MSDE received correspondence from the complainant containing allegations of violations of IDEA.
3. On July 1, 2011, Ms. Dori Wilson, Branch Chief, Complaint Investigation and Due Process Branch, MSDE, spoke with the complainant by telephone and followed-up with correspondence to her, via electronic mail, indicating that additional information would be required in order to initiate the State complaint.
4. On July 5, 2011, MSDE received correspondence from the complainant that included the additional information required to initiate a State complaint investigation.
5. On July 13, 2011, Ms. Moyo spoke with the complainant by telephone and clarified the allegations to be investigated.
6. On July 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 sent a copy of the complaint and the identified allegations, via facsimile, to Dr. Kimberly Hoffman, Interim Executive Director, Special Education, BCPS; and Ms. Nancy Ruley, Associate Counsel, BCPS.
7. On July 26, 2011, Ms. Moyo reviewed the student's education record at BCPS' Central office. Ms. Tiffany Puckett, Associate Legal Counsel, BCPS, was present during the review to provide information on BCPS policies and procedures, as needed.
8. On August 8, 2011, Ms. Puckett provided Ms. Moyo with documentation from the student's education record.

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 3

9. On August 18, 2011, Ms. Moyo met with Ms. XXXXXXXXX, IEP Chairperson, XXXXXXXXXXXXXXXX School, who provided Ms. Moyo with the audio-recording of the June 1 and 10, 2011 IEP team meetings.

10. MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
 - a. Referral for evaluation, dated November 12, 2010;
 - b. Notice and Consent for Assessment form, dated November 17, 2010;
 - c. Educational Assessment Report, dated November 22, 2010;
 - d. IEP Team Meeting Notice, dated November 30, 2010;
 - e. Occupational Therapy Report, dated December 13, 2010;
 - f. Psychological Assessment Report, dated December 18, 2011;
 - g. Specific Learning Disability Team Report, dated January 7, 2011;
 - h. IEP, dated January 12, 2011;
 - i. Report of Progress, dated January 21, 2011;
 - j. Communication Log between the complainant and school staff from January 21, 2011 to June 10, 2011;
 - k. IEP Team Meeting Notice, dated March 1, 2011;
 - l. Special Education Teacher Report, dated March 4, 2011;
 - m. General Education Progress Report, dated March 7, 2011;
 - n. IEP, dated March 9, 2011;
 - o. Notice and Consent for Assessment form, dated March 9, 2011;
 - p. Request for Assessment Form, dated March 17, 2011;
 - q. Physical Therapy Assessment Report, dated March 25, 2011;
 - r. Report of Progress, dated March 30, 2011;
 - s. Speech/Language Assessment Report, dated April 9, 2011;
 - t. IEP Team Meeting Notice, dated April 28, 2011;
 - u. Electronic mail correspondence from the complainant to school staff, dated April 28, 2011;
 - v. Electronic mail correspondence from school staff to the complainant, dated May 2, 2011;
 - w. Special Education Teacher Report, dated May 2, 2011;
 - x. Psychological Assessment Report, dated May 5, 2011;
 - y. General Education Teacher Report, dated May 6, 2011;
 - z. IEP Progress Report, dated May 11, 2011;
 - aa. IEP Team Meeting Notice, dated May 25, 2011;
 - bb. Assessment Report, dated June 1, 2011;

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 4

- cc. Notice and Consent for Assessment form, dated June 10, 2010;
- dd. IEP, dated June 10, 2011;
- ee. Communication Log between school staff and the complainant from June 13, 2011 to June 17, 2011;
- ff. Correspondence and attachments from the complainant to MSDE, received July 25, 2011;
- gg. IEP Team Meeting Notice, dated July 25, 2011; and
- hh. Communication Log between the complainant and school staff from July 25, 2011 to August 12, 2011.

BACKGROUND:

The student is eight (8) years old. Since the start of the 2010-2011 school year, the student has attended XXXXXXXXXXXXXXXX School (XXXXXX), a BCPS school. Previously, he was parentally placed in a private school.

On January 12, 2011, the student was identified as a student with a specific learning disability under IDEA and he began receiving special education instruction and related services. On June 10, 2011, the student was identified as a student with autism under IDEA. The complainant has been provided with notice of the procedural safeguards (Docs. a, b, d, g, h, k, n-p, s, t, aa-dd and gg).

ALLEGATION #1

IDENTIFYING AND ADDRESSING THE STUDENT'S NEEDS

Findings of Facts:

November 17, 2010 IEP Team Meeting

1. On November 17, 2010, the IEP team, including the complainant, convened in response to a referral to the team that was made by the student's teacher. At the meeting, the teacher indicated that she had concerns regarding the student's fine and gross motor skills as well as his difficulty with completing his work and following directions, despite supports that were provided to him in the classroom (Docs a and b).
2. At the November 17, 2010 IEP team meeting, the team recommended that additional data be obtained to determine whether the student has a disability under IDEA. Based upon the IEP team's review, it recommended that educational, psychological, and occupational therapy assessments, as well as a classroom observation, be conducted. At the meeting, the complainant provided consent for these assessments to be conducted (Doc. b).

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 5

January 12, 2011 IEP Team Meeting

3. On January 12, 2011, the IEP team, including the complainant, re-convened to review the results of the assessments. According to the results of the educational assessment, the student demonstrates deficiencies in the area of reading fluency, but scores in the “average or above average” range in all other areas of reading. The assessment report also indicates that the student scores in the “low to low average” range in all areas of math and written language and demonstrates “significant weakness” in broad mathematics (Docs. c and h).
4. The report of the results of the psychological assessment states that the student’s cognitive abilities are in the “borderline” range. Additionally, the report indicates that there is a large discrepancy between the student’s verbal comprehension and his working memory, perceptual reasoning and processing speed. The report further notes that the student is “socially awkward” (Doc. f).
5. The school psychologist also notes in the psychological assessment report that while she was assessing the student, she noticed that he had difficulty alternating his feet while walking and demonstrated difficulty with expressive language skills. As a result, the psychological assessment report also contains a recommendation that social/emotional, speech/language, and physical therapy assessments be conducted (Docs. f and h).
6. The report of the classroom observation indicates that the student often requires his teacher’s attention and demonstrates a preference for one-to-one instruction. The observation report also indicates that the student becomes frustrated when he is unsuccessful in completing a task he perceives as challenging (Doc. f).
7. The results of the occupational therapy assessment indicate that the student has functional joint mobility, tone, strength, endurance, coordination and good reflexes. The report also indicates that the student demonstrates difficulty ascending and descending stairs and has a two (2) year delay in visual perceptual skill development. The report recommends that the student be provided with weekly occupational therapy services (Doc. e).
8. At the meeting, the complainant expressed concern that the student seems to have difficulty remaining focused and on task. The student’s teachers agreed with the complainant’s observations and stated that he also has difficulty working independently which results in incomplete assignments. The teachers also reported that while the student has been provided with supports in the classroom, such as a reduced workload and additional adult assistance, he continued to have difficulty with his class work (Doc. g).

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 6

9. Based upon the IEP team's review of the data, at the January 12, 2011 meeting, it identified the student as a student with a specific learning disability under IDEA. The team developed an IEP that requires that the student be provided with special education instruction in written language, reading, and math, and occupational therapy, as a related service. The IEP team also developed goals for the student to improve his reading comprehension, math problem solving, written language, and fine motor skills. The IEP includes supports, such as the use of visual cues, re-direction, graphic organizers, extended time, and frequent breaks (Docs. g and h).
10. At the January 12, 2011 meeting, the IEP team recommended that physical therapy, speech/language, and social/emotional assessments be conducted, and the complainant indicated that she would think about it first and inform school staff of her decision about whether to provide consent for these assessments to be conducted (Doc. h).

March 9, 2011 IEP Team Meeting

11. On March 9, 2011, the IEP team re-convened at the complainant's request in order for school-based members of the team to provide her with clarification about special education procedures and processes. Following this clarification, the complainant provided consent for the assessments to be conducted that had been recommended at the January 12, 2011 IEP team meeting (Docs. n-p).

June 1 and 10, 2011 IEP Team Meetings

12. On June 1 and 10, 2011², the IEP team reconvened and reviewed the results of the assessments. According to the results of the social/emotional assessment, the student's scores demonstrate that there is a "very likely probability of autism." The report recommends that the student be "engaged in teacher-directed activities" rather than independent activities and that he be provided with counseling to assist him with social interactions (Docs. x, bb, and dd).
13. The results of the physical therapy assessment indicate that the student demonstrates "functional strength, coordination and gross motor skills" and is able to "ambulate independently utilizing an age appropriate gait pattern." The report concludes that "educationally based physical therapy services" are not required (Doc. q).
14. The results of the speech/language assessment indicate that the student's "overall/core language skills fall in the average range of ability," but that his receptive language skills are "mildly deficient." The report recommends that the student be provided with speech/language therapy, as a related service (Doc. s).

² On June 1, 2011, the IEP team convened to review the results of the assessments, but the team was unable to complete its review on that day. On June 10, 2011, the IEP team re-convened and continued its meeting. These two (2) IEP meetings were audio-recorded by both parties and BCPS provided MSDE with the audio-recording that was reviewed (Docs., reports from school staff and the complainant and a review of the audio-recording).

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 7

15. A report of the student's progress towards achieving the IEP goals, dated March 30, 2011, indicates that that the student is making sufficient progress towards achieving all of his IEP goals with the provision of support (Doc. r).
16. Reports from the student's teachers indicate that the student continues to have difficulty focusing, and as a result, he is often unable to finish his assignments. His teachers also report that the student needs support to assist him with understanding his work and that he has difficulty reading non-verbal cues from his peers. The student's classroom teacher reports regression with regard to the student's social relationships since the start of the 2010-2011 school year (Docs. l, m and y and review of the audio-recording).
17. At the June meetings, the complainant expressed concern regarding the results of the assessments. In order to address her concerns, the team offered to re-asses the student and conduct additional educational and psychological assessments. While the complainant expressed concern that the student would be retained in the second (2nd) grade, the audio-recording of the meeting documents that school staff assured her that the student would not be retained (Doc. dd and review of the audio-recording).
18. A review of the audio-recording from the June 10, 2011 IEP team meeting, indicates that the complainant had been provided with a draft IEP and that she was concerned because she had no input to the development of the proposed IEP being considered. School staff clarified that the information in the proposed IEP reflected the recommendations of the school staff, but that the entire IEP team, including the complainant, would make the final revisions after considering all of the recommendations (Doc. ff and review of the audio-recording).
19. At the June meetings, the IEP team based on its review of the information and data, revised the IEP to include goals for the student to improve his speech/language and social/ emotional and behavioral skills. The team also determined that the student would be provided with speech therapy and counseling as related services, and increased the amount of special education instruction he would receive. The IEP was also revised to require that the school psychologist provide consultative services to the student's teachers. Additionally, the team agreed that the school psychologist would provide the complainant with updates regarding the student's progress (Doc. dd and review of the audio-recording).
20. On June 10, 2011, the complainant provided consent for BCPS staff to conduct psychological and educational assessments. The IEP team agreed to reconvene to review the results of the assessments once they were completed (Docs. cc, dd and review of the audio recording).
21. BCPS staff report that on August 22, 2011, the IEP team reconvened to review the results of the psychological and educational assessments recommended at the June 10, 2011 meeting. However, MSDE has not been provided with documentation of what occurred at the meeting (Doc. ff and report from school staff).

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 8

Discussion/Conclusions:

Considering the Parent's Input when Developing the IEP

The public agency must ensure, when determining the levels of academic achievement and functional performance, that the team considers, among other things, the concerns of the parent (34 CFR §300.324). If a public agency develops a draft IEP prior to the IEP team meeting, the public agency should provide the parent with a copy of its draft IEP document to provide the parent an opportunity to review the recommendations of the public agency prior to the IEP team meeting so that the parent will be able to engage in a full discussion of the proposals when the IEP team meeting is convened. Additionally, the public agency should inform the parent that the services proposed in the draft IEP are only preliminary recommendations that must be reviewed and discussed with the parent before the IEP is revised (*Analysis of Comments and Changes to IDEA, Federal Register*, Vol. 71, No. 156, p. 46678, August 14, 2006).

In this case, the complainant alleges that, while she was provided with the proposed IEP prior to the June 1, 2011 IEP team meeting, school staff did not consider her input when developing the proposed IEP. Based on Findings of Fact #18, MSDE finds that school staff explained to the complainant that the draft IEP contained recommendations from school staff and indicated that the IEP would not be revised without her input. Based on Findings of Facts #17-20, MSDE finds that during the IEP team meetings held on June 1 and 10, 2011, information from the complainant was considered when developing the student's IEP. Therefore, MSDE does not find that a violation occurred with regard to this aspect of the allegation.

Developing an IEP that Addresses the Student's Identified Needs

The public agency must ensure that each student is provided with an IEP that addresses all of the needs that arise from the student's disability. In order to identify those needs, the public agency must consider all functional, developmental, and academic information about a student. When determining the levels of academic achievement and functional performance, the team must consider information from evaluations conducted, concerns of the parents, and information from the student's teachers (34 CFR §300.324).

In this case, the complainant alleges that the IEP team did not follow proper procedures when developing the student's IEP because the team did not consider the complainant's input. Based on Findings of Facts #1-19, MSDE finds that the IEP team considered information from assessments, the student's teachers and the complainant and developed an IEP that addresses the needs consistent with the data.

Further, based on Findings of Facts #11-21, MSDE finds that school staff continued to meet, since the student's IEP was developed on January 12, 2011. Based on the same Findings of Facts, MSDE finds that at each meeting the IEP team determined the student's needs, considered information from the complainant, and revised the student's IEP, as necessary. Therefore, MSDE does not find that a violation occurred with regard to this aspect of the allegation.

ALLEGATION #2:

**PROPER PROCEDURES WHEN DETERMINING
THE PROVISION OF EXTENDED SCHOOL
SERVICES (ESY)**

Findings of Facts:

22. At the January 12, 2011 IEP team meeting, the team considered the student's need for ESY services. A review of the IEP indicates that the team reviewed the student's education record, reports from the complainant, reports from the student's teachers and the required ESY factors. Based on its review, the team decided that if the student is not provided with ESY services his educational program would not be significantly jeopardized (Doc. g).
23. A review of the IEP and the audio-recording from the IEP team meetings held on June 1 and 10, 2011, documents that the IEP team and the complainant reviewed the ESY determination made at the January 12, 2012 IEP team meeting and affirmed the previous determination that the student does not require the provision of ESY services (Docs. g, cc, and review of the audio recording).

Discussion/Conclusions:

ESY services are an individualized extension of specific services beyond the regular school year that are designed to meet specific goals included in the student's IEP (34 CFR §300.106 and COMAR 13A.05.01.03B(26)). At least annually, the IEP team must determine whether the student requires ESY services in order to ensure that the student is not deprived of a free appropriate public education (FAPE) by virtue of the normal break in the regular school year (Md. Ann. Code, Education Art. §8-405(b)). When determining whether ESY services are required for the provision of FAPE, the IEP team must consider all of the factors below.

1. Whether the student's IEP includes annual goals related to critical life skills;
2. Whether there is a likelihood of substantial regression of critical life skills caused by the normal school break and a failure to recover those lost skills in a reasonable time;
3. The student's degree of progress toward mastery of the annual IEP goals related to critical life skills;
4. The presence of emerging skills or breakthrough opportunities;
5. Interfering behaviors;
6. The nature and severity of the disability; and
7. Special circumstances (COMAR 13A.05.01.08B (2) (b)).

After considering the required factors, the IEP team must decide whether the benefits that a student receives from the education program during the regular school year will be *significantly jeopardized* if the student is not provided with ESY services (MM v. XXXXX XX (X.X.), 303 F3d. 523, 37 IDELR 183 (4th Cir. 2002)) (emphasis added). The school system must provide written notice to the parent of the team's decisions regarding the student's need for ESY services. This includes informing the parent of the decisions and providing the parent with an explanation of the basis for the decisions (34 CFR §300.503(b)).

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 10

There is no specific legal requirement as to when the ESY decision must be made. However, the IEP team meeting must be scheduled early enough in the school year to ensure that parents can meaningfully exercise their due process rights if they wish to challenge an ESY decision (COMAR 13A.05.01.07B). This means that the determination concerning ESY services must be made in such a manner that if a due process hearing is needed to resolve a disagreement, it can be conducted and a decision rendered early enough for the services to be provided.

In this case, the complainant alleges that school staff did not consider her input when determining whether the student required ESY services. She further alleges that the IEP team did not make the decision in time for her to pursue her due process rights to challenge the determination.

Based on Findings of Facts #22 and #23, MSDE finds that the IEP team considered all of the required factors and considered the complainant's concerns, when determining that the student did not require ESY services. Further, based on these same Findings of Facts, MSDE finds that there was sufficient time for the complainant to resolve, through due process, her disagreement with the team's January 2011 decision prior to the start of ESY services. Therefore, MSDE does not find that a violation occurred with regard to this allegation.

ALLEGATION: #3:

**PROVISION OF THE IEP WITHIN FIVE (5)
BUSINESS DAYS AFTER THE IEP TEAM
MEETING**

Finding of Fact:

24. An excerpt from a BCPS communication log in the student's education record documents that the June 10, 2011 IEP was provided to the complainant on June 13, 2011 (Doc. dd).
25. An excerpt from a BCPS communication log in the student's education record also documents that a second copy of the June 10, 2011 IEP was mailed to the parent on June 17, 2011, after the complainant reported that she did not receive the IEP document sent on June 13, 2011 (Doc. dd).

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). In this case, the complainant alleges that following the June 10, 2011 IEP team meeting, school staff did not provide her with the student's IEP within five (5) business days of the meeting.

Based on Findings of Fact #24, MSDE finds that there is documentation that school staff did provide the complainant with a copy of the completed IEP within five (5) business days after the IEP team meeting. Further, based on Findings of Fact #25, MSDE finds that there is also documentation that BCPS mailed a second copy to the complainant on June 17, 2011, after she reported that she had not received the first copy of the document. Therefore, MSDE does not find that a violation occurred with regard to this allegation.

ALLEGATION #4:

ACCESS TO THE EDUCATION RECORD

Findings of Fact:

26. On April 28, 2011, the complainant sent correspondence to school staff requesting to review the student's attendance data and documentation of services provided by occupational therapist and the special education teacher (Doc. t).
27. On May 2, 2011, school staff responded to the complainant's request, via electronic mail, and indicated that the complainant could come to the school at any time to review the student's education record. However, there is no documentation that the complainant followed up on her request to review the record (Doc. u and review of the education record).

Discussion/Conclusions:

The public agency must ensure that the parents of a student with a disability are afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student or the provision of a free appropriate public education (FAPE) that are collected, maintained, or used by the public agency under IDEA (34 CFR §§300.501 and .613). The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP (34 CFR §300.613).

In this case, the complainant alleges that she requested, in writing, to review the student's education record including documentation of the services provided by the student's occupational therapist and the special education teacher and that she was not given the opportunity to review the record. Based on Findings of Facts #26 and #27, MSDE finds that there is documentation that when the complainant requested access to the student's education record, school staff promptly responded to the request and indicated that she could review the record at any time.

Further, based on Findings of Fact #26, MSDE finds that school staff offered the complainant the opportunity to review the education record prior to the next IEP team meeting which was held June 1, 2011. Therefore, MSDE does not find that a violation occurred with regard to this allegation.

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.

XXX

Dr. Kim Hoffman

Dr. Kim Lewis

September 1, 2011

Page 12

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.

Questions regarding the findings of fact or conclusions contained in this Letter of Findings 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, in accordance with IDEA. MSDE recommends that this Letter of Findings be included with any request for mediation or the filing of a due process complaint.

Sincerely,

Marcella E. Franczkowski, M.S.
Assistant State Superintendent
Division of Special Education/
Early Intervention Services

MEF/km

cc: Andrés Alonso
Nancy Ruley
Erin Leff
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Dori Wilson
Anita Mandis
Koliwe Moyo