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September 1, 2011

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RE: XXXXX  
Reference: # 12-002

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 our investigation.

**ALLEGATIONS:**

On July 6, 2011, MSDE received correspondence from Pamela Foresman, Esq., Maryland Disability Law Center, hereafter “the complainant,” filed on behalf of the above-referenced student. In that correspondence, the complainant alleged that the Baltimore City Public Schools (BCPS) 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 following allegations:

1. BCPS has not developed an Individualized Education Program (IEP) that addresses the student’s behavioral needs since the start of the 2010-2011 school year<sup>1</sup>, in accordance with 34 CFR §§300.320 and .324; and

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<sup>1</sup> The complaint alleges violations dating back to August 2009. However, the complainant was informed, in writing on July 12, 2011, that MSDE has authority to investigate allegations of violations that occurred not more than one (1) year from the date the complaint is received, in accordance with 34 CFR § 300.153.

2. BCPS did not follow proper procedures when restraint was utilized with the student on October 12, 2010, in accordance with COMAR 13A.08.04.02, .03, and .05.

**INVESTIGATIVE PROCEDURES:**

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the allegations in the complaint.
2. On July 6, 2011, a copy of the complaint was provided by facsimile to Dr. Kim Hoffman, Interim Executive Director of Special Education, BCPS; Dr. Kim Lewis, Interim Executive Director of Human Capital, BCPS; and Ms. Nancy Ruley, Associate Counsel, Office of Legal Counsel, BCPS.
3. On July 11, 2011, Ms. Williams conducted a telephone interview with the complainant to clarify the allegations to be investigated.
4. On July 12, 2011, MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to this investigation. On that same date, MSDE also notified Dr. Hoffman and Dr. Lewis of the allegations to be investigated and requested that BCPS review the alleged violations.
5. On July 27, 2011, Ms. Williams and Ms. Anita Mandis, Section Chief, Complaint Investigation Section, Complaint Investigation and Due Process Branch, MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXXXXXX to review the student's education record, and interviewed the following school personnel:
  - a. Ms. XXXXXXXXX, School Social Worker;
  - b. Ms. XXXXXXXXX, IEP Specialist; and
  - c. Ms. XXXXXXXXXXX, Special Education Teacher.

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

6. On August 4, 2011, Ms. Williams and Ms. Mandis conducted another site visit at XXXXXXXXXXXXXXXXXXXXXXXX to review the student's record, and interviewed the following XXXXXXXXXXXXXXXX Behavior Resource Team members:
  - a. Ms. XXXXXXXXXXX, Behavior Resource Staff;
  - b. Mr. XXXXXXX, Dean of Students;
  - c. Mr. XXXXXXXXX, Behavior Assistant; and
  - d. Dr. XXXX, Director of Public School Partnerships.

Ms. Ruley attended the site visit as a representative of BCPS and to provide information on BCPS policies and procedures, as needed. Additionally, Ms. XXXXXXXX, Legal Counsel XXXXXXXXXXXXXXXXXXXX, attended the site visit as a representative of XXXXXXXX and to provide information on their policies and procedures, as needed.

7. On August 4, 2011, Mrs. Martha J. Arthur, Education Program Specialist, MSDE, conducted a review of documents of training and professional development of the XXXXXXXXXXXX staff at the BCPS Central Office.
8. Documentation provided by the parties was reviewed. The documents referenced in this Letter of Findings include:
  - a. IEP Meeting Summary, dated April 21, 2010;
  - b. Functional Behavior Assessment, dated April 21, 2010;
  - c. Behavior Intervention Plan, dated April 21, 2010;
  - d. IEP, dated April 21, 2010;
  - e. BCPS Conduct Referrals, dated October 12, 2010;
  - f. Administrative/Participant Narrative Statements, dated October 12, 2010;
  - g. Suspension Services Letter, dated October 12, 2010;
  - h. BCPS Suspension/Restraint Letter, dated October 12, 2010;
  - i. BCPS Suspension Letter, dated October 12, 2010;
  - j. IEP Meeting Notice, dated October 12, 2010;
  - k. BCPS Placement Notice, dated October 12, 2010;
  - l. BCPS Communication Logs, dated October 12, 2010 – December 16, 2010;
  - m. IEP Meeting Summary, dated October 20, 2010;
  - n. Functional Behavior Assessment, dated October 20, 2010;
  - o. Behavior Intervention Plan, dated October 20, 2010;
  - p. IEP, dated October 20, 2010;
  - q. BCPS Proposed Extended Suspension or Expulsion Conference Report, dated October 27, 2010;
  - r. IEP Meeting Notice, dated December 10, 2010;
  - s. Functional Behavior Assessment, dated December 20, 2010;
  - t. Behavior Intervention Plan, dated December 20, 2010;
  - u. IEP, dated December 20, 2010;
  - v. Maryland Student Transfer Notice, dated December 23, 2010;
  - w. BCPS Student registration, dated January 3, 2011;
  - x. IEP, dated December 20, 2010, amended January 11, 2011;
  - y. BCPS Behavioral Management Report, dated March 17, 2011;
  - z. BCPS Disciplinary Log; and
  - aa. School Social Worker Encounter Logs, dated August 30, 2010 through June 7, 2011.

**BACKGROUND:**

The student is sixteen (16) years old. He is identified as a student with other health impairment under IDEA, related to Attention Deficit Hyperactivity Disorder, and he receives special education instruction and related services through an IEP (Docs. d, p, and x).

From the start of the 2010-2011 school year until October 12, 2010, when the student was disciplinarily removed from the school, he attended XXXXXXXXXXXXXXXXXXXXXXXX<sup>2</sup> (Doc. i).

From October 20, 2010 until December 23, 2010, the student was administratively placed in an Alternative Educational Setting (AES) at XXXXXXXXXXXXXXX (Doc. k).

Since December 23, 2010, the student has attended XXXXXXXXXXXXXXXXXXXXXXXX as the result of another administrative transfer (Docs. v and w).

There is documentation that during the time period covered by this investigation, the parent was provided with the opportunity to participate in the education decision-making process and was provided with notice of the procedural safeguards (Docs. d and p).

**ALLEGATION #1: IEP THAT ADDRESSES THE STUDENT'S BEHAVIORAL NEEDS**

**FINDINGS OF FACTS:**

**XXXXXXXXXXXXXXXXXXXXX**

1. The IEP in effect at the start of the 2010-2011 school year was developed on April 21, 2010. The documentation from that meeting indicates that the team considered assessment information from school staff about the student's academic and functional performance (Doc. d).
2. The functional behavioral assessment (FBA) report reviewed at the meeting indicates that the student responds to staff directives with "mockery" and the use of verbally aggressive and inappropriate language. School staff reported that the student has threatened and assaulted other students and that he disrupts instruction and fails to take responsibility for his behavior. They also indicated the student's actions are more likely to occur during periods with limited adult supervision and during science and math classes when the student is challenged by his classwork (Docs. b and d).

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<sup>2</sup> XXXXXXXXXXXXXXXXXXXXXXXX is a Baltimore City Public School operated in partnership with XXXX and the XXXXXXXXXXXXXXX, whose staff provides special education and related services.

3. The April 21, 2010 IEP required that the student be provided with special education instruction and one (1) thirty (30) minute counseling session a week, as a related service. The IEP includes goals for the student to improve his behavior and peer relations as measured by his ability to comply with school rules, to show respect for authority figures, and to use appropriate conflict resolution skills with peers. The IEP also requires that the student be provided with additional supports, such as “chunking” of materials, extra time to complete work, and breaks, as needed, in order to assist him in achieving his individualized annual goals (Doc. d).
4. On April 21, 2010, the IEP team also developed a Behavioral Intervention Plan (BIP) to permit the student to seek immediate assistance when confronted with academic assignments that are difficult for him to understand and to reward the use of appropriate communication skills. The BIP required that the student be provided with the opportunity to access the behavioral support room, which is staffed by the XXXXXXXX XXXXXXXXXXXX (XXX) personnel, so that he can be provided with behavioral support when he becomes upset in order to avoid negative behaviors. The BIP also required the student to be paired with students who are strong in math, science, and social studies classes (Docs. c and d).
5. On October 20, 2010, the IEP team convened to review the student’s program and revise the IEP, if necessary. At the meeting, school staff expressed concern that the student has recently become physically aggressive toward staff, as evidenced by an incident on October 12, 2010, for which he was disciplinarily removed from school. The school social worker reported the student was unwilling to engage or participate in the counseling sessions and the documentation indicates that three (3) different school social workers have attempted to provide the student with counseling services; however, he has made “little progress” (Docs. e, f, g, n, k, p, and q).
6. At the October 20, 2010 meeting, the IEP team revised the behavioral goal to reflect that the student would comply with school rules and address his aggressive and intimidating behavior, such as physically assaulting peers and throwing rocks and chairs at staff. The IEP team also revised the BIP to provide the student with increased opportunities to work with school staff including meeting with staff after school (Doc. p).

**The Alternative Education Setting (AES) at XXXXXXXXXXXX**

7. On October 20, 2010, the student was placed at the AES at XXXXXXXXXXXXXXXX as a result of a disciplinary removal from school (Doc. k).

8. On December 15, 2010 the student was disciplinarily removed from school for three (3) days for a physical assault on a peer (Docs. z and aa).
9. On December 20, 2010, the IEP team at XXXXXXXXXXXXXXXXXXXXXXXXXXXX, the student's home school, met to review his progress. The team reviewed a report of the student's progress provided to them from the AES, in which his teachers indicate that that while the student continues to require prompting and support, he also exhibited "exemplary behavior," followed directions, and "interacts very well with his peers." There is no indication that the IEP team was informed of the disciplinary removal from the AES that had occurred three (3) school days prior to the IEP meeting and as a result, there is no indication that this incident was discussed or addressed by the team (Docs. r, s, t, u, and y).

XXXXXXXXXXXXXXXXXXXXXXXXXX

10. On January 3, 2010, the student was administratively transferred to XXXXXX XXXXXXXXXXXXXXXXXXXX. Since he began attending XXXXXXXXXXXXXXXXXXXX XXXX, the student has not been provided with counseling services, on a weekly basis, as required by the IEP. Further, the documentation with regard to his progress in counseling is inconsistent, examples of which are indicated below.
  - a. In January 2011, the student was provided with counseling services on three (3) occasions, and the documentation states that he was making "little progress" toward achieving the annual IEP goals, especially in the area of peer interaction;
  - b. In February 2011, the student was provided with counseling services on three (3) occasions. The report from one (1) of these sessions indicates that the student was making "good progress" and was working well with his peers. However, another session report notes that the student was making "slow progress" and that the student stated that he "preferred violence" to other means of conflict resolution;
  - c. In March 2011, the student was provided with one (1) session of counseling services, according to the social worker's log, because the student was absent from school, could not be located in school, or was participating in another school activity. The documentation from this session states that the student was making "poor progress;"
  - d. In April 2011, the student did not receive any counseling services but a report of the student's progress toward achievement of the annual behavior goal states that the student was making sufficient progress to achieve the goal;

- e. In May 2011, the student was provided with counseling services on three (3) occasions because the student refused to meet with the social worker on one (1) occasion;
- f. In June 2011, the student did not any receive any counseling services because the student was participating in other activities or the social worker reports being unable to locate the student in the school building. The June 2011 report of the student's progress toward achieving his annual IEP goals states that the student is making sufficient progress to achieve the goal addressing behavior (Docs. v, w, and aa).

### **DISCUSSION/CONCLUSIONS:**

The public agency must ensure that each student with a disability is provided with a free appropriate public education (FAPE). This is done through the development of an IEP, which is a written document that includes, among other things, the student's present levels of academic achievement and functional performance, measurable annual goals designed to meet the needs that arise from the disability, and special education instruction and related services (34 CFR §§300.101 and .320).

To appropriately identify the needs that arise from the disability, the team must consider the strengths of the student, the concerns of the parents, the results of the most recent evaluations, and information about the student's academic and functional performance in the classroom. In the case of a student whose behavior impedes his or her learning or that of others, the team must also consider strategies, including positive behavioral interventions and supports, to address that behavior (34 CFR §§300.320 and .324).

The public agency must ensure that the IEP team reviews the IEP periodically, but not less than annually, to determine whether the annual goals are being achieved in order to ensure that the IEP remains appropriate. The public agency must also ensure that the IEP team reviews and revises the IEP, as appropriate, to address any lack of expected progress toward achievement of the annual goals, the student's anticipated needs, or other matters (34 CFR §300.324).

If a student misses a significant amount of services due to the student's absence or other reasons not associated with participation in school-sponsored activities, it is appropriate for the IEP team to convene to determine whether the program remains appropriate (*Letter to Copenhaver*, March 11, 2008, and *Letter to Balkman* April 10, 1995, United States Department of Education, Office of Special Education Programs (OSEP)).

In this case, based on Findings of Facts #1 through #7, MSDE finds that from the start of the 2010-2011 school year until December 20, 2010, the IEP team considered the strengths of the student, concerns of the parent, assessment data, and information from the student's teachers

about his academic and functional performance. Based on that information, the IEP team developed an IEP that addressed the behavioral needs identified. Therefore, MSDE does not find that a violation occurred with respect to this aspect of the allegation for this period of time.

However, based on Findings of Facts #8 and #9, MSDE finds that the IEP team did not have current information regarding the student's behavioral incident at the AES when they met to review his progress on December 20, 2010. Based upon Finding of Fact #10, MSDE also finds that the IEP team has not met since December 20, 2010 to address the lack of provision of counseling services, the inconsistencies in the reporting of progress, and the student's refusal to accept services. As a result of these findings, MSDE finds that BCPS has not ensured that the IEP addresses the student's behavioral needs since December 20, 2010, and that a violation occurred with respect to this allegation.

## **ALLEGATION # 2 USE OF RESTRAINT ON OCTOBER 12, 2010**

### **FINDINGS OF FACTS:**

11. On October 12, 2010, the student was restrained by XXX Behavioral Support Staff working at XXXXXXXXXXXXXXXXXXXXXXXX. The documentation indicates that when school staff attempted to escort the student to the behavioral support room to provide counseling, he pushed the behavioral specialist. In response, the behavioral specialist and other school staff restrained the student for 15 -20 seconds until he appeared to calm down. When he was released from the restraint, the student again acted in a physically aggressive manner toward staff and was restrained again for another 15 – 20 seconds. Documentation of the incident states that “[the student] was laid down on his back [and] held down by his arms and ankles”(Docs. e, f, g, and h).
12. The documentation includes the names and signatures of the staff members who implemented and monitored the restraint. There is also documentation of the names and signatures of school personnel who observed the behavior that prompted the use of restraint (Doc. f).
13. There is documentation that the school staff involved in the restraint incident completed the required training and are certified to utilize restraint, if necessary (MSDE review of documents).
14. On October 20, 2010, the IEP team convened to review the restraint incident. At the meeting, the IEP team reviewed and revised the BIP and IEP to address physical aggression towards school staff (Docs. l, m, n, o, and p).



## **DISCUSSION/CONCLUSIONS:**

### **Use of Physical Restraint**

Physical restraint means the use of physical force, without the use of any device or material that restricts the free movement of all or a portion of a student's body (COMAR 13A.08.04.02B). For students with disabilities, the use of physical restraint is prohibited unless there is an emergency situation and physical restraint is necessary to protect a student or other person from imminent, serious, physical harm after other less intrusive, nonphysical interventions have failed or been deemed inappropriate, or the student's BIP or IEP describes the specific behaviors and circumstances in which physical restraint may be used (COMAR 13A.08.04.02B and .05A).

If restraint is utilized, the school personnel shall only use reasonable force, as is necessary, to protect a student or other person from imminent, serious, physical harm. The physical restraint may not exceed thirty (30) minutes and it must be discontinued as soon as the student is calm. When using restraint, school personnel may not place a student in a face down position. The position may not obstruct a student's airway or otherwise impair a student's ability to breathe. Also, the position may not obstruct a staff member's view of a student's face or restrict a student's ability to communicate distress. Finally, school personnel may not place pressure on a student's head, neck, or torso; or straddle a student's torso (COMAR 13A.08.04.05A).

Based on Finding of Fact #11, MSDE finds that physical restraint was used with the student on October 12, 2010, in response to an emergency situation, to protect the student and others from imminent, serious, physical harm after less intrusive and nonphysical intervention was attempted. As a result, MSDE does not find that a violation occurred with respect to this aspect of the allegation.

### **Training and Professional Development**

The public agency must ensure that school staff who use physical restraint receive professional development and training to designated school personnel on the appropriate implementation of the policies and procedures related to the use of restraint (COMAR 13A.08.04.06C).

Based on Finding of Fact # 13, MSDE finds that staff who utilized the restraint were trained and certified in the use of behavior interventions, including the use of restraint. As a result, MSDE does not find that a violation occurred with respect to this aspect of the allegation.

### **Documentation of the Use of Physical Restraint**

The public agency must document all instances when restraint is utilized. The documentation must be maintained in the student's education record and be available for parents to inspect. The school personnel must document that other less intrusive interventions have failed or been

determined inappropriate and must also document both the precipitating event and the behavior that prompted the use of a restraint. The documentation must also include the names of 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. Documentation of the actual restraint event must also include the type of restraint, 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).

Based on Findings of Facts # 11 and # 12, MSDE finds that BCPS properly documented the precipitating behavior and the use of the physical restraint, the type of restraint, length of time in restraint, the student's behavior and reaction during the restraint, and the staff and administrators involved with the restraint. As a result, MSDE does not find that a violation occurred with respect to this aspect of the allegation.

### **Requirement of the IEP Team to Meet Following the Use of Restraint**

If restraint is used for a student with a disability, 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. At the meeting, the team the IEP team must consider the need for conducting a functional behavior assessment, developing appropriate behavioral interventions, and implementing a behavioral intervention plan (COMAR 13A.08.04.05C).

Based on Finding of Fact # 14, MSDE finds that the IEP team met within in ten (10) business days following the use of the restraint, conducted a FBA, and revised the IEP and BIP. As a result, MSDE does not find that a violation occurred with respect to this aspect of the allegation.

### **CORRECTIVE ACTIONS/TIMELINES:**

#### **Student-Specific:**

MSDE requires BCPS to provide documentation by September 30, 2011 that the IEP team has reviewed and revised, as appropriate, the IEP to ensure that it addresses the student's behavioral needs, consistent with the data, and has determined the amount and nature of *compensatory services*<sup>3</sup> or other remedy necessary to redress the violations identified in this Letter of Findings. BCPS must provide the student's parent with proper written notice of the team's determinations. If the parent disagrees with the decisions, she maintains the right to request mediation and to file a due process complaint to resolve the dispute consistent with IDEA.

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<sup>3</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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**School-Based:**

MSDE requires BCPS to provide documentation by November 1, 2011, of the steps taken to determine if the procedural violations identified through this complaint investigation are unique

to this case or if they represent a pattern of noncompliance. If it is determined that a pattern of noncompliance exists, the documentation must describe the actions taken to ensure that staff properly implement the requirements of IDEA and COMAR, and provide a description of how BCPS will evaluate the effectiveness of the steps taken and monitor to ensure that the violations do not recur.

Specifically, the school system is required to conduct a review of student records, data, or other relevant information to determine if the regulatory requirements are being implemented and must provide documentation of the results of this review to MSDE. If the school system reports compliance with the requirements, MSDE staff will verify compliance with the determinations found in the initial report.

If the school system determines that the regulatory requirements are not being implemented, the school system must identify the actions that will be taken to ensure that the violations do not recur. The school system must submit a follow-up report to document correction within ninety (90) days of the initial date that the school system determines non-compliance. Upon receipt of this report, MSDE will re-verify the data to ensure continued compliance with the regulatory requirements, consistent with the requirements.

Documentation of completion of all corrective actions is to be submitted to this office to the attention of: 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.

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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.

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 a FAPE for the student, including issues subject to a State complaint investigation, consistent with 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: Andrés Alonso  
Nancy Ruley  
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