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November 8, 2011

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Ms. Kalisha Miller
Director of Special Education
Baltimore County Public Schools
6901 North Charles Street
Towson, Maryland 21204

RE: XXXXX
Reference: #12-018

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 September 23, 2011, the MSDE received a complaint from Rachel E. Stafford, Esq., hereafter, “the complainant,” on behalf of the above-referenced student. In that correspondence, the complainant alleged that the Baltimore County Public Schools (BCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student. The MSDE investigated the following allegations:

1. The BCPS should have begun the evaluation process to determine if the student is a student with a disability in need of special education and related services prior to December 2010 when the evaluation process began, in accordance with 34 CFR §300.111;
2. The BCPS did not ensure that the evaluation initiated in December 2010 was completed within the required timelines, in accordance with 34 CFR §§300.301, and .304-.306, and COMAR 13A.01.05.06;

3. The BCPS has not ensured that the student's Individualized Education Program (IEP) has contained a statement of the special education instruction to be provided to the student since the IEP was developed in March 2011, in accordance with 34 CFR §§300.39 and .320; and
4. The BCPS did not follow proper procedures when determining the student's need for Extended School Year (ESY) services at an IEP team meeting in April 2011, in accordance with 34 CFR §300.106, COMAR 13A.05.01.07B(2) and COMAR 13A.05.01.08B(2).

INVESTIGATIVE PROCEDURES:

1. Ms. Kathy Stump, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On September 27, 2011, the MSDE sent a copy of the complaint, via facsimile, to Ms. Kalisha Miller, Director of Special Education, BCPS; Mr. Stephen Cowles, Associate General Counsel, Special Education Compliance, BCPS; and Ms. Sharon Floyd, Supervisor of Compliance, BCPS.
3. On September 30, 2011, Ms. Anita Mandis, Chief, Complaint Investigation Section, Complaint Investigation and Due Process Branch, MSDE, spoke with the complainant by telephone to clarify the allegations to be investigated.
4. On October 5, 2011, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to this investigation. On the same date, the MSDE notified Ms. Miller of the allegations and requested that her office review the alleged violations.
5. On October 7, 2011, the MSDE requested documentation from the student's educational record, which was provided on October 25, 2011.
6. On October 28, 2011, Ms. Stump and Mrs. Martha J. Arthur, Education Program Specialist, MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXXXXXX (XXXXXXXXXXXXXXXX) to review the student's educational record, and interviewed the following school staff:
 - a. Ms. XXXXXXXXXXX, Assistant Principal and Student Support Team Chairperson;
 - b. Mr. XXXXXXXXXXX, Principal; and
 - c. Ms. XXXXXXXXXXX, Second (2nd) Grade Classroom Teacher.

Ms. Floyd and Ms. Pamela Weitz, Resource Teacher, Special Education Compliance, BCPS, attended the site visit as representatives of the BCPS and to provide information on the BCPS policies and procedures, as needed.

7. On November 2, 2011, the BCPS provided MSDE with additional documentation related to the allegations, via e-mail.
8. MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
 - a. Correspondence from the complainant to MSDE, received on September 23, 2011;
 - b. Student's report card for the 2009-2010 school year;
 - c. BCPS *Referral to Student Support Team* form, dated November 19, 2010;
 - d. BCPS *Student Support Team Summary* form, dated December 6, 2010;
 - e. BCPS *Student Eligibility Form For Students Identified with a Disability Under Section 504*, dated December 8, 2010;
 - f. BCPS *Section 504 Plan*, dated December 20, 2010;
 - g. BCPS *Student Support Team Summary* form, dated December 20, 2010;
 - h. BCPS *Initial Referral to IEP Team* form, dated December 20, 2010;
 - i. IEP team meeting summary, dated January 10, 2011;
 - j. Receipt of Parental Rights document, dated January 10, 2011;
 - k. Parent Permission for Assessment form, dated January 19, 2011;
 - l. IEP team meeting summary, dated March 10, 2011;
 - m. Eligibility Determination form, dated March 10, 2011;
 - n. IEP team meeting summary, dated April 7, 2011;
 - o. IEP, dated April 7, 2011;
 - p. Student's attendance data from the 2010-2011 school year;
 - q. Student's disciplinary record from the 2010-2011 school year;
 - r. Written correspondence from the BCPS personnel to the MSDE, received October 25, 2011; and
 - s. BCPS *Student Support Model: A Three-Tiered Response to Intervention Process* from the BCPS IDEA Manual, undated.

BACKGROUND:

The student is seven (7) years old and on March 10, 2011 was identified as a student with an emotional disability under the IDEA. Prior to that, the student was identified as a student with a disability under Section 504 of the Rehabilitation Act of 1974 based on Attention Deficit/Hyperactivity Disorder (ADHD) and had a 504 accommodations plan.

The student attends XXXXXXXXXXXX, where he receives special education instruction and related services. During the period of time addressed by this investigation, the student's parent participated in the education decision-making process and was provided with notice of the procedural safeguards (Docs. a, f, i, j, and l-o).

ALLEGATION #1: **CHILD FIND**

Findings of Facts:

1. There is no documentation that the student demonstrated behaviors that interfered with his learning during the 2009-2010 school year (Doc. b).
2. There is documentation that during the first quarter of the 2010-2011 school year, the student began engaging in behaviors that interfered with his learning, including actively disengaging from learning, not completing class work, homework, or assessments, inattentiveness, and engaging in distracting behaviors by “playing with objects in his desk” (Doc. c).
3. On November 19, 2010, the student’s teacher completed a *Referral to Student Support Team (SST¹) Form*. The referral form indicates that the student’s teacher used academic and behavioral interventions in the general education program, including small group instruction, modified class work, proximity to the teacher, and a reward system for acceptable behavior; these interventions were not successful in addressing the student’s behaviors (Doc. c).
4. The SST convened on December 6, 8, and 20, 2010 and reviewed information from the student’s mother and his private counselor regarding the formal diagnosis of ADHD for which he is prescribed medication. The SST also reviewed information from the student’s teacher that the student is “resistant to share information” and demonstrates a lower tolerance for frustration in the afternoon than in the morning. At each meeting, the SST determined academic and behavioral supports to be provided in the general education program. Supports that were provided include the use of a “time out” pass to go to the student support room, use of an individualized incentive plan to promote “pro-social” behaviors, use of a “visual chart” to help him “see how he is progressing,” use of verbal and visual cues to assist with maintaining on-task behaviors, “chunked” assignments, opportunities for movement breaks, and extended time (Docs. d-h).
5. During this time period, the student also received counseling from a private counselor within the school building through an arrangement between the school system and the community-based counseling service provider (Docs. d and g).
6. Between December 8, 2010 and December 20, 2010, the student’s interfering behaviors increased in frequency and in seriousness. The student was suspended from school for four (4) school days during this time period for noncompliant behaviors in which he would stop communicating with staff, pull his “hoodie” over his head, “clench his fists,” get close to staff members and “nudge” them, and push furniture or destroy papers (Doc. q).

¹ The Student Support Team is a comprised of school staff that identifies instructional strategies to be provided in the general education program to improve student performance, measures and monitors student responses to those strategies and refers students for evaluation under IDEA if expected progress is not made in response to the general education interventions provided (Doc. s).

7. On December 20, 2010, the SST reviewed information from the student's teacher that the student was not responding to the behavior interventions being provided in the general education program. Based on this and a review of the student's recent disciplinary removals, the SST referred the student to the IEP team for an evaluation under the IDEA because the SST suspected that the student's "emotional status is impacting his ability to access instruction" (Docs. i and j).
8. The parties agree that, at some point prior to the student's referral to the IEP team for evaluation, school staff shortened the student's school day to end at 11:45 a.m. School staff report that the student was unable to receive instruction by the afternoon; there is no documentation of this. Additionally, school staff acknowledge that they did not accurately document the early dismissals (Docs. a, i, p, and interview with school staff).

Discussion/Conclusions:

The "child find" requirements of the IDEA impose an affirmative obligation on the school system to identify, locate, and evaluate all students residing within its jurisdiction who have disabilities and who need special education and related services, or are suspected of having disabilities and being in need of special education and related services. It is, however, the intent of State and federal law that interventions and strategies be implemented to meet the needs of students within the regular school program, as appropriate, before referring students for special education services (34 CFR §300.111 and COMAR 13A.05.02.13(A)).

To meet this expectation, school staff may review a student's academic and behavioral performance and determine teaching strategies, modifications to instruction, and behavior management techniques that will appropriately assist the student. However, the public agency must ensure that implementation of intervention strategies do not delay or deny a student's access to special education services under the IDEA (34 CFR §300.111).

In order to ensure that students are not misidentified as being disabled, the IDEA requires that students meet specific criteria to be determined eligible for special education instruction and related services. To be identified as a student with an emotional disability, a student must exhibit specific characteristics, such as an inability to build or maintain satisfactory interpersonal relationships with peers and teachers and inappropriate behaviors or feelings under normal circumstances, over a long period of time (34 CFR §300.8).

There are no regulations or guidelines to define the term "long period of time" for purposes of determining how long interventions and strategies should be provided prior to evaluating a student to determine whether the student is a student with emotional disability and in need of special education. However, the United States Department of Education, Office of Special Education Programs (OSEP) has stated that "because of the variation in the type and intensity of behaviors which may be exhibited [by students], a number of States have elected to operationalize 'long period of time' by providing a range of time during which the behavior must have been present, generally two to nine months." The OSEP has stated that these State practices are acceptable (*Letter to Anonymous*, 213 IDELR 247, 1989).

Based on the Findings of Facts #1 - #6, the MSDE finds that school staff implemented interventions and strategies designed to address the student's interfering behaviors in the general education program for a period of three (3) months before referring him to the IEP team for evaluation. Based on the Finding of Fact #7, the MSDE finds that when the student did not respond to these strategies, school staff made a referral for an evaluation under IDEA, as required. Therefore, the MSDE finds no violation regarding this aspect of the allegation.

ADDITIONAL ISSUE: MAINTENANCE OF EDUCATION RECORD

The public agency must accurately record information about each student, as specified in the *Maryland Student Records System Manual (Manual)* (COMAR 13A.08.02.04 and 13A.08.02.28). The *Manual* requires that the public agency maintain information related to the student's enrollment, attendance, and promotion.

In this case, based on the Finding of Fact #8, the MSDE finds that the BCPS did not ensure that the student's attendance data was accurately maintained for the 2010-2011 school year. Therefore, the MSDE finds that a violation has occurred.

ALLEGATION #2: EVALUATION TIMELINE

Findings of Facts:

9. On January 10, 2011, the IEP team convened to conduct an evaluation of the student in response to a referral made on December 20, 2010 by the SST. The IEP team reviewed information from the SST and from the student's teachers that indicates behavior interventions had not been successful and that the student continues to "shut down" and be defiant and noncompliant. Based on this review, the IEP team recommended psychological, educational, and speech-language assessments, a functional behavior assessment (FBA), and a classroom observation (Docs. h and i).
10. On January 19, 2011, the student's mother provided consent for the assessments to be conducted (Doc. k).
11. On March 10, 2011, the IEP team reconvened and considered the assessment results. After reviewing the information, the IEP team determined that the student is a student with an emotional disability under the IDEA and requires special education and related services (Docs. l and m).
12. On April 7, 2011, the IEP team reconvened and developed the student's IEP (Docs. n and o).

Discussion/Conclusions:

The evaluation of a student must be completed within sixty (60) days of parental consent for assessments and ninety (90) days of the receipt of a written referral (34 CFR § 300.301 and COMAR 13A.05.01.06(A)). The public agency must ensure that a meeting to develop an IEP is

conducted within thirty (30) days of a determination that a student needs special education and related services (34 CFR §300.323).

Based on the Findings of Facts #9 - #12, the MSDE finds that the evaluation was completed and the IEP developed within the required timelines. Therefore, the MSDE finds no violation regarding this allegation.

ALLEGATION #3: **IEP THAT CONTAINS A STATEMENT OF THE SPECIAL EDUCATION INSTRUCTION TO BE PROVIDED**

Findings of Facts:

13. On March 10, 2011, the IEP team determined that the student's emotional disability impacts his learning because without the provision of special education instruction the student "would have extreme difficulty meeting the daily demands of the classroom" (Doc. m).
14. On April 7, 2011, the IEP team developed an IEP with annual goals to assist the student with improving on-task behavior, following school and class rules, routines, and expectations, increasing positive "pro-social" interactions, using self-management and coping strategies, and using problem-solving skills (Doc. o).
15. The IEP team determined that the student requires special education services to achieve the annual goals to develop the skills needed to ensure his participation in instruction. The IEP requires that this be delivered in the general education classroom by the general education teacher, the special education teacher, and/or the instructional assistant (Doc. o).

Discussion/Conclusions:

Each student's IEP must include a statement of the special education instruction that will be provided to the student (34 CFR §300.320). Special education instruction is defined as specially designed instruction to meet the unique needs of a student. Specially designed instruction means adapting the content, methodology, or delivery of instruction to address the student's needs and ensure access to the general education curriculum in order to meet the educational standards within the jurisdiction of the public agency that apply to all students (34 CFR §300.39).

Based on the Findings of Facts #13 - #15, the MSDE finds that the student's IEP contains a statement of the special education instruction to be provided to the student. Therefore, the MSDE finds no violation regarding his allegation.

ALLEGATION #4: ESY SERVICES DETERMINATION

Findings of Facts:

16. At the April 7, 2011 IEP team meeting, the team considered whether the student required ESY services. The BCPS acknowledges that the team did not follow proper procedures when making this determination. The BCPS indicates that the IEP team will convene to address any impact on the provision of a free appropriate public education (FAPE) and the need for *compensatory services*²(Docs. o and r).

Discussion/Conclusions:

ESY services are an individualized extension of specific services beyond the regular school year 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, Educ. §8-405(b)).

When determining whether ESY services are required for the provision of a FAPE, the IEP team must consider whether the student's IEP includes annual goals related to critical life skills, 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, the student's degree of progress toward mastery of the annual IEP goals related to critical life skills, the presence of emerging skills or breakthrough opportunities, interfering behaviors, the nature and severity of the disability, and 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 received from the education program during the regular school year will be *significantly jeopardized* if the student is not provided with ESY services (*MM v. School District of Greenville Co.* (S.C.), 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 bases for the decisions (34 CFR §300.503(b)).

In this case, based on the Finding of Fact #16, the MSDE finds that the BCPS has acknowledged that the team did not follow proper procedures when making the ESY determination and that a violation has occurred. Based on that same Finding, the MSDE finds that the BCPS has developed a corrective action to redress the violation. The MSDE concurs with this acknowledgement and will require no additional student-specific corrective action.

² For the purpose of this letter, these are services, as determined by the IEP team, needed to remediate the denial of appropriate services to the student (34 CFR §300.151).

CORRECTIVE ACTIONS/TIMELINES:

Student specific

The MSDE requires the BCPS to provide documentation by January 30, 2012, that the IEP team has convened and determined whether the violation related to the ESY determination had a negative impact, and if so, determined the nature and amount of *compensatory services*² necessary to redress the violation.

The BCPS must provide the student's mother 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 student's mother 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

The MSDE requires the BCPS to provide documentation by January 30, 2012, of the steps it has taken to determine if the violations related to ESY determination procedures and maintenance of educational records identified in the Letter of Findings are unique to this case or if they represent a pattern of noncompliance at XXXXXXXXXXXX. 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 the MSDE. If the school system reports compliance with the requirements, the 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 of the OSEP. Additionally, the findings in the Letter of Findings will be shared with MSDE's Office of Quality Assurance and Monitoring for Continuous Improvement for its consideration during present or future monitoring of the BCPS.

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.

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Please be advised that the complainant and the school system 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.

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The student's mother 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. The 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:ks

cc : XXXXXXXXX
 Joe A. Hairston
 Stephen Cowles
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 Pamela Weitz
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