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State Superintendent of Schools

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February 28, 2011

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Ms. Mary Lee Phelps, Interim Acting Director
Department of Special Education Operations
Montgomery County Public Schools
850 Hungerford Drive, Room 225
Rockville, Maryland 20850

RE: XXXXX
Reference: #11-046

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 January 3, 2011, MSDE received correspondence from Ms. XXXXXXXXXXXX, hereafter, "the complainant," on behalf of her son. In that correspondence, the complainant alleged that the Montgomery County Public Schools (MCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student. MSDE investigated the allegation that MCPS has not followed proper procedures when responding to the complainant's requests for an evaluation under IDEA since June 10, 2010, in accordance with 34 CFR §§300.301 and .503, and COMAR 13A.05.01.04-.06 and .12.

INVESTIGATIVE PROCEDURES:

1. Ms. Koliwe Moyo, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On January 4, 2011, MSDE sent a copy of the complaint, via facsimile, to Ms. Mary Lee Phelps, Interim Director, Department of Special Education Operations, MCPS; Ms. Gwendolyn Mason, Director, Department of Special Education Services, MCPS; and Ms. Alison Steinfelds, Supervisor, Equity Assurance and Compliance Office, MCPS.

XXX

Ms. Mary Lee Phelps

February 28, 2011

Page 2

3. On January 6, 2011, Ms. Moyo contacted the complainant by telephone to clarify the allegation to be investigated.
4. On January 12, 2011, MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegation subject to this investigation. On the same date, MSDE notified Ms. Phelps of the allegation to be investigated and requested that her office review the alleged violation.
5. On February 3, 2011, Ms. Moyo and Ms. Kathy Stump, Education Program Specialist, MSDE conducted a site visit at XXXXXXXXXXXX School (XXXXXXXXXX) to review the student's education record and interview the following XXXXXXXXXXXX staff:
 - a. Mr. XXXXXXXXXXXX, Principal;
 - b. Mr. XXXXXXXX, Special Education Supervisor;
 - c. Ms. XXXXXXXX, Special Education Resource Teacher;
 - c. Ms. XXXXXXXXXXXX, School Counselor;
 - d. Ms. XXXXXXXX, Teacher; and
 - e. Ms. XXXXXX, Resource Counselor.

Ms. Meryl Benko, Paralegal, Equity Assurance and Compliance Office, MCPS and Ms. Steinfelds attended the site visit as representatives of MCPS and to provide information on MCPS policies and procedures, as needed.

6. MSDE reviewed documentation relevant to the findings and conclusions referenced in this Letter of Findings (LOF), which includes:
 - a. Note from the student's private physician, dated June 7, 2010;
 - b. Summary of Parent Conference, dated June 10, 2010;
 - c. Teacher Referrals, dated June 11, 2010;
 - d. Correspondence from the complainant to school staff, dated June 14, 2010;
 - e. Written invitation to the complainant to attend a July 8, 2010 Individualized Education Program (IEP) team meeting, dated June 22, 2010;
 - f. Parent Interview/Questionnaire, dated July 8, 2010;
 - g. Student Screening Profile Worksheet, dated July 8, 2010;
 - h. Written summary of the July 8, 2010 IEP team meeting;
 - i. Correspondence from MCPS to the complainant, dated July 9, 2010;
 - j. Teacher Referrals, dated between September 20 and 22, 2010;
 - k. Parent Interview/Questionnaire, dated September 27, 2010;
 - l. Student Screening Profile Worksheet, dated October 5, 2010;
 - m. Patient Instruction Sheet completed by the student's private physician, dated October 7, 2010;
 - n. Written invitations to the complainant to attend the IEP team meeting held on October 11, 2010, dated September 22, 2010 and October 6, 2010;
 - o. Written summary of the October 11, 2010 IEP team meeting;
 - p. Correspondence from MCPS to the complainant, dated October 12, 2010; and
 - q. Correspondence from the complainant alleging a violation of IDEA, received by MSDE on January 3, 2011.

BACKGROUND:

The student is fourteen (14) years old and attends XXXXXXXXXXXX. Although the IEP team has met, the student has not been identified as a student with a disability under IDEA.

There is documentation that during the time period covered by this investigation, the complainant participated in the education decision-making process. There is also documentation that the complainant has been provided with procedural safeguards, as required (Docs. e, h, n, and o).

FINDINGS OF FACT:

1. At a parent/teacher conference held on June 10, 2010, the complainant expressed concern about the student's reading skills and requested testing in order to determine whether the student is a student with a disability. Following that meeting, on June 14, 2010, the complainant sent a letter to school staff reiterating her request (Docs. b and d).
2. On July 8, 2010, the IEP team, including the complainant, met and considered the following data:
 - a. The complainant's concerns that the student's reading skills are below grade level and that the student has health concerns, such as allergies, asthma, and frequent dehydration, which impact his education;
 - b. The complainant's report that the student's private physician is recommending that the student be provided with special education services;
 - c. Teacher reports that the student is performing a year below grade level in reading;
 - d. Teacher reports that the student's academic performance is negatively impacted by the fact that he has frequent absences from school due to illness, which results in his not receiving instruction, and that his performance improves with regular school attendance; and
 - e. Teacher reports that the student has been provided with reading instruction using an intensive research-based intervention program, which has resulted in the improvement of his reading skills (Docs. c, f, and g).
3. At the July 8, 2010 meeting, the team determined that the student was not suspected of being a student with a disability under IDEA and recommended that the student continue to be provided with interventions in the general curriculum, including supports provided through a program designed to assist students with attendance and other behavioral issues (Docs. h and i).

XXX

Ms. Mary Lee Phelps

February 28, 2011

Page 4

4. At the July 8, 2010 meeting, the team also agreed to reconvene to consider any additional data that the complainant reported that she was obtaining from the student's private physician (Doc. h).
5. There is documentation in the student's education record, dated July 9, 2010, which indicates that the complainant was provided with written notice of the team's decisions, the basis of those decisions, and the options and data considered when making the decisions (Docs. h and i).
6. On October 11, 2010, the IEP team reconvened after the complainant provided school staff with a note from the student's private physician. At the meeting, the team considered the following:
 - a. Report from the student's private physician, dated June 7, 2010, along with a note, dated October 7, 2010, which state that the student "likely has a learning disability in reading and possibly math," should be followed for possible attention deficit hyperactivity disorder, and should be provided with special education instruction based on his responses to the interventions being provided in the general curriculum. The note indicates that the physician bases the recommendations on information from the complainant and documents from the student's education record, which were provided by the complainant; and
 - b. Information from the student's teachers that, although the student can be inattentive when he wants to socialize with classmates, he is able to pay attention in order to receive instruction and continues to make progress with the interventions being provided in the general curriculum (Docs. a and j – m).
7. At the October 11, 2010 meeting, the team again decided that the student was not suspected of being a student with a disability and that interventions would continue to be provided in the general curriculum in order to assist the student with improving his reading skills (Docs. o and p).
8. There is documentation in the education record, dated October 12, 2010, which indicates that the complainant was provided with written notice of the team's decisions, including the basis for the decisions and the options and data considered when making the decisions (Docs. o and p).

DISCUSSION/CONCLUSIONS:

A student with a suspected disability who may need special education shall be referred, in writing, to a public agency. If the public agency determines that no assessment data is needed to conduct the evaluation or does not suspect the student of being a student with a disability, it must provide written notice of that decision to the parent. This notice includes a statement of the decision, the basis for the decision, the options considered and reasons for rejection of options, a description of any other factors relevant to the determination, and notice of the procedural safeguards (COMAR 13A.05.01.04 and 34 CFR §300.503).

XXX

Ms. Mary Lee Phelps

February 28, 2011

Page 5

In order to ensure that students are not misidentified as being disabled, IDEA requires that in order for a student to be determined eligible for special education instruction and related services, the student must meet specific eligibility criteria. A student with a disability under IDEA is defined as a student with one of a list of specific disabilities, including specific learning disability and other health impairment, and who, by reason thereof, needs special education and related services (34 CFR §300.8).

A student may not be determined to be a student with a disability under IDEA if the determinant factor is:

- a. Lack of appropriate instruction in reading or math; or
- b. Limited English proficiency; and
- c. The student does not require special education instruction as a result of a disability (34 CFR §300.306).

In this case, the complainant alleges that, based on recommendations made by the student's private physician, the student should be identified as a student with a disability under IDEA (Doc. q). Based on Findings of Fact #1, 2, 4, and 6, MSDE finds that the IEP team considered the data, including the information from the student's private physician. Based on Findings of Fact # 2, 3, 6, and 7, MSDE further finds that the team's decision that the student was not suspected of having a disability was consistent with data regarding the lack of instruction resulting from his absences from school and the progress being made with the interventions being provided in the general curriculum.

Based on Findings of Fact # 5 and 8, MSDE further finds that the complainant has been provided with proper written notice of the team's decisions. Therefore, this office does not find that a violation occurred.

This office understands that the complainant disagrees with the team's decisions. However, because a procedural violation was not identified, MSDE may not require that the school system take the action she requests. The United States Department of Education, Office of Special Education Programs (OSEP), requires that, during the investigation of an allegation that a student has not been provided with an appropriate educational program under IDEA, the state educational agency must review the procedures used by a school system to reach determinations about the program. Additionally, the state educational agency must also review the evaluative data to determine if decisions made by the IEP team are consistent with the data. The state educational agency may not, however, overturn an IEP team's decisions (OSEP Letter #00-20, July 17, 2000 and Analysis of Comments and Changes to IDEA, *Federal Register*, Vol. 71, No. 156, p.46601, August 14, 2006). The complainant is reminded that she maintains the right to request mediation or to file a due process complaint in order to resolve any continuing dispute regarding the identification and evaluation of the student under IDEA.

XXX

Ms. Mary Lee Phelps

February 28, 2011

Page 6

Please be advised that both parties have the right to submit additional written documentation to this office 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.

Questions regarding the findings and conclusions 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 a due process complaint.

Sincerely,

Carol Ann Heath, Ed.D.
Assistant State Superintendent
Division of Special Education/
Early Intervention Services

CAH/km

cc : Jerry Dean Weast
Gwendolyn J. Mason
Alison Steinfelds
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