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State Superintendent of Schools

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May 24, 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: #11-076

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 March 26, 2011, MSDE received correspondence from Mr. XXXXXXXXXXX and Mrs. XXXXXXXXXXX, hereafter “the complainants,” on behalf of their daughter. In that correspondence, the complainants 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 following allegations:

1. MCPS did not provide the complainants with prior written notice of the decisions made by the Individualized Education Program (IEP) team on December 14, 2010, in accordance with 34 CFR §§300.503;
2. MCPS did not follow proper procedures when amending the student’s IEP after the December 14, 2010 IEP team meeting, in accordance with 34 CFR §§300.324; and
3. MCPS did not ensure that proper procedures were followed in response to the complainants’ request for access to the student’s education record, specifically, results of classroom assessments maintained by the student’s teacher, in accordance with 34 CFR §300.613.

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**INVESTIGATIVE PROCEDURES:**

1. Ms. Christine R. Hartman, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On March 28, 2011, MSDE sent a copy of the correspondence received on March 26, 2001, via facsimile, to: Ms. Mary Lee Phelps, Interim Acting Director, Special Education Operations, MCPS; Ms. Gwendolyn Mason, Director, Special Education Services, MCPS; and Ms. Alison Steinfels, Supervisor, Equity Assurance and Compliance Office, MCPS.
3. On March 29, 2011, Ms. Hartman conducted a telephone interview with the student's mother to clarify the allegations to be investigated.
4. On April 5, 2011, MSDE sent correspondence to the complainants that acknowledged receipt of the complaint and identified the allegations subject to the investigation. On the same date, MSDE notified Ms. Phelps of the allegations and requested that her office review the alleged violations.
5. On April 5, 2011, MSDE received correspondence from the student's mother with documents to be considered in conducting the investigation.
6. On April 7, 2011, Ms. Hartman and Ms. Anita Mandis, Chief, Complaint Investigation Section, Complaint Investigation and Due Process Branch, MSDE, met with Ms. Steinfels; Ms. Meryl Benko, Paralegal, Equity Assurance and Compliance Office; and Ms. Patty Grundy, Paralegal, Equity Assurance and Compliance Office at the Montgomery County Board of Education. At this meeting, Ms. Hartman and Ms. Mandis reviewed IEP documents for the student which are maintained electronically via MCPS's on-line IEP program.
7. On April 13, 2011, Ms. Hartman and Ms. Mandis reviewed the test protocol that was used to conduct an assessment of the student.
8. On April 14, 2011, Ms. Steinfels showed Ms. Hartman and Ms. Mandis a mobile device and provided an explanation of how the device is used by school staff to transmit student answers to questions given on assessments in order for scores to be calculated electronically.
9. On May 4, 2011, MSDE received the MCPS written response to the complaint and additional documents to consider in conducting the investigation.
10. On May 17, 18, 19 and 20, 2011, Ms. Hartman conducted telephone interviews with Ms. Grundy regarding the allegations in the complaint.

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11. On May 19, 2011, Ms. Hartman conducted a telephone interview with the student's mother regarding the allegations in the complaint.
12. MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings (LOF), which includes:
  - a. IEP, dated December 14, 2010;
  - b. Electronic mailings (emails) between the complainants and MCPS staff, dated November 18 and 19, 2010 and January 4 and 5, 2011;
  - c. Reading goal page of proposed IEP, dated December 14, 2010 and received by the complainants on January 5, 2011;
  - d. Emails between Ms. Hartman and MCPS staff, dated May 18, 2011;
  - e. Emails between the complainants and MCPS staff, dated January 21, 2011; and
  - f. Emails between the complainants and MCPS staff, dated February 16, 17, 18 and 22, 2011, and March 1, 9, 11, 14, 18, 21, 22 and 23, 2011.

**BACKGROUND:**

The student is eight (8) years old, is identified as a student with Other Health Impairment under IDEA related to attention deficits, and receives special education and related services. She is in the second (2<sup>nd</sup>) grade at XXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX). The parents were provided with a copy of their procedural safeguards (Doc. a).

**ALLEGATIONS #1 and #2:                    PRIOR WRITTEN NOTICE OF THE DECISIONS  
MADE BY THE IEP TEAM ON DECEMBER 14, 2010  
AND PROPER PROCEDURES IN AMENDING THE  
DECEMBER 14, 2010 IEP**

**FINDINGS OF FACT:**

1. On December 14, 2010, the IEP team met, at the complainants' request. During that meeting, in which the parents participated, the IEP team reviewed the student's program and her progress toward achieving her IEP reading goal (Docs. a and b, and interviews with the student's mother and MCPS staff).
2. On January 5, 2011, an IEP was sent to the complainants. The IEP included both decisions made by the IEP team on December 14, 2010 and additional revisions made to the reading goal proposed by school staff but not considered by the IEP team. There is no documentation that the complainants agreed to amend the IEP without convening another IEP team meeting (Docs. b-d, and interviews with the student's mother and MCPS staff).
3. On January 5, 2011, the student's mother expressed her disagreement regarding the proposed changes to the IEP (Doc. b).

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4. On January 14, 2011, a parent-teacher conference was held with the student's mother in order to discuss her concerns regarding the proposed revisions to the IEP (Docs. b-e, and interviews with the student's mother and MCPS staff).
5. Following the January 14, 2011 parent-teacher conference, the complainants were provided with the IEP which included additional amendments that school system staff report were agreed to by the student's mother at the parent-teacher conference. A review of MCPS's on-line IEP documents indicates that this IEP is "locked." MCPS staff report that this means that it is a final version of the IEP (Docs. a, d and e, interviews with the student's mother and MCPS staff, and review of the on-line IEP document).
6. There is no documentation that the complainants agreed to the amendment made following the January 14, 2011 parent-teacher conference (Doc. d, interview with the student's mother, and review of the record).
7. There is no documentation that MCPS provided the complainants with a copy of an IEP or any other documents that reflected only the decisions made by the IEP team on December 14, 2010 (Review of the record).

#### **DISCUSSION/CONCLUSIONS:**

##### **Allegation #1: Prior Written Notice of the Decisions Made by the IEP Team on December 14, 2010**

Written notice must be given to parents within a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or provision of a free appropriate public education (FAPE). This notice must include a description of the action proposed or refused, the basis for the decision, other options considered, and the data used in making the decision (34 CFR §300.503).

In this case, based Findings of Fact #1-#7, MSDE finds that the complainants have not been provided proper written notice of the decisions made by the IEP team on December 14, 2010. Therefore, MSDE finds a violation occurred with respect to Allegation #1.

##### **Allegation #2: Proper Procedures in Amending the December 14, 2010 IEP**

Changes to an IEP may be made in one of two ways. The first way is by decision of the IEP team following review of the student's program at an IEP team meeting. The second way is when, following an IEP team meeting at which the IEP has been reviewed, and with the agreement of the parents and the public agency, the IEP is amended or modified to reflect changes without reconvening the team (34 CFR §300.324(a)(4) and .324(a)(6)).

Based on Findings of Fact #2-#6, MSDE finds that there is no documentation that the complainants agreed to an amendment of the IEP without convening an IEP team. Therefore, MSDE finds a violation occurred with respect to Allegation #2.

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**ALLEGATION #3: ACCESS TO THE STUDENT'S EDUCATION RECORD**

**FINDINGS OF FACT:**

8. The student's reading skills are assessed on an ongoing basis using an observational reading assessment software for grades K-5<sup>1</sup> protected by copyright law. With this software, teachers conduct quick, guided one-to-one reading assessments utilizing a mobile device to record students' interactions with texts from a variety of book sets. Once the student's responses are recorded into the mobile device, the mobile device generates summary reports to track the student's progress, review program effectiveness, and determine which resources and strategies will improve student performance. Student responses are not recorded on the test booklet, and the mobile device does not contain an electronic version of the test booklet (Docs. b and f, interview with MCPS staff, and visual inspection of test protocol and mobile device, and review of product information).
9. While the complainants have been provided with computer-generated reports of the student's assessment results, along with explanations of the reports, the complainants have requested access to the test booklet containing the test questions so that they can compare each question to the answer provided by the student (Docs. b, e and f, interview with the student's mother, an interview with MCPS staff).
10. The test protocol requires that test administrators maintain test security to ensure validity of the test results. This means the test questions may not be shared with persons not responsible for administering the test (Visual inspection of test protocol).

**DISCUSSION/CONCLUSIONS:**

A public agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the public agency under IDEA. However, unless test protocols contain personally identifiable information about a student, they are not considered education records. Test protocols that are secured documents are protected by copyright law, and the public agency using secured test protocols must comply with copyright law restrictions regarding who may access the protocol. Parents are allowed to view student's answer sheets, and, within a reasonable time of a request, must be provided an explanation or interpretation of the answer sheet. However, a public agency is not required to provide parents with a copy of the answer sheet (34 CFR §300.613; Family Educational Rights and Privacy Act [FERPA] Memorandum: Access to Test Protocols and Test Answer Sheets, October 2, 1997; and 20 IDELR 1159, Letter to MacDonald, Office of Special Education Programs, October 25, 1993).<sup>2</sup>

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<sup>1</sup> The particular observational reading assessment software is mCLASS®:Reading 3D.

<sup>2</sup> See, <http://fetaweb.com/04/ferpa.rooker.ltr.protocols.htm>.

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In this case, based on Findings of Fact #8-#10, MSDE finds that the test booklet with the test questions does not contain the student's personally identifiable information, and the mobile device in which the student's answers were recorded does not contain an electronic version of the test protocol. Therefore, MSDE finds that this test protocol is not part of the student's education record and the complainants are not entitled to access to it. Additionally, based on Findings of Fact #8-10, MSDE finds that the complainants have been provided with the student's answers to the test, as well as an explanation of the results. Therefore, MSDE does not find a violation occurred with respect to this allegation.

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

#### **Student-Specific**

MSDE requires MCPS to provide documentation by the start of the 2011-2012 school year that the IEP team has reviewed the IEP and ensured that it was revised consistent with decisions made at the team meeting. MCPS must ensure that the complainants are provided with proper written notice of the team's decisions, including the basis for those decisions.

#### **School-Based**

MSDE requires MCPS to provide documentation by October 31, 2011 of the steps it has taken to determine if the violations identified in the LOF are unique to this case or if they represent a pattern at XXXXXXXXXX. Specifically, the school system is required to conduct a review of student records, data, or other relevant information to determine if the regulatory requirements are being implemented and must provide documentation of the results of this review to MSDE. If the school system reports compliance with the requirements, MSDE Complaint Investigation and Due Process Branch staff will verify compliance with the determinations found in the initial report.

If the school system determines that the regulatory requirements are not being implemented, the school system must identify the actions that will be taken to ensure that the violations do not recur. The school system must submit a follow-up report to document correction within ninety (90) days of the initial date that the school system determines non-compliance. Upon receipt of this report, MSDE will re-verify the data to ensure continued compliance with the regulatory requirements, consistent with the requirements of the United States Office of Special Education Programs (OSEP) and Memorandum #09-02. Additionally, the findings in the LOF will be shared with MSDE's Office of Quality Assurance and Monitoring for Continuous Improvement for their consideration for future monitoring activities.

Documentation of all corrective action taken 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.

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**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 within fifteen (15) days of the date of this letter if they disagree with the findings of fact or conclusions reached in this LOF. The additional written documentation must not have been provided or otherwise available to this office during the complaint investigation and must be related to the issues identified and addressed in the LOF. If additional information is provided, it will be reviewed and MSDE will determine if a reconsideration of the conclusions is necessary. Upon consideration of this additional documentation, this office may leave its findings and conclusions intact, set forth additional findings and conclusions, or enter new findings and conclusions. Pending the decision on a request for reconsideration, the school system must implement any corrective actions consistent with the timeline requirements as reported in this LOF.

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The complainant, 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 free appropriate public education (FAPE) for the student, including issues subject to a State complaint investigation, consistent with IDEA. MSDE recommends that this LOF be included with any request for mediation or due process.

Sincerely,

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

CAH/crh

cc : Jerry D. Weast  
Gwendolyn J. Mason  
Alison Steinfelds  
Patricia Grundy  
XXXXXXXXXX  
Dori Wilson  
Martha J. Arthur