



Karen B. Salmon, Ph.D.
State Superintendent of Schools

April 20, 2018

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Mr. Philip A. Lynch
Director of Special Education Services
Montgomery County Public Schools
850 Hungerford Drive, Room 230
Rockville, Maryland 20850

RE: XXXXX
Reference: #18-094

Dear Parties:

The Maryland State Department of Education (MSDE), Division of Special Education/Early Intervention Services (DSE/EIS), 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 February 21, 2018, the MSDE received a complaint from Ms. XXXXXXXXXXXXXXX, hereafter, “the complainant,” on behalf of her son, the above-referenced student. 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 student.

The MSDE investigated the following allegations:

1. The MCPS has not ensured that the student has been provided with a Free Appropriate Public Education (FAPE), since October 2017, in accordance with 34 CFR §300.101, .320, .323 and .324, COMAR 13A.05.01.01 and .02, COMAR 13A.05.01.10, and COMAR 13A.08.04.
2. The MCPS did not ensure that proper procedures were followed when disciplinarily removing the student from school, since October 2017, in accordance with 34 CFR §300.530.

3. The MCPS did not ensure that proper procedures were followed when using physical restraint with the student, since October 2017, in accordance with COMAR 13A.08.04.
4. The MCPS did not ensure that the parent was provided with the draft IEP that was considered at the December 2017 and January 2018 IEP team meetings, at least five (5) business days prior to the scheduled meetings, in accordance with COMAR 13A.05.01.07.
5. The MCPS did not ensure that the IEP team meeting convened in January 2018, included the required participants, in accordance with 34 CFR §300.321.

BACKGROUND:

The student is ten (10) years old and is identified as a student with an Emotional Disability under the IDEA. He has an IEP that requires the provision of special education and related services. The student is in the fourth (4th) grade and is enrolled at XXXXXXXXXXXX (XXXXXXXX).

**ALLEGATIONS #1 AND #2 PROVISION OF A FAPE AND DISCIPLINARILY
REMOVALS OF THE STUDENT**

FINDINGS OF FACTS:

1. In September 2017, the complainant enrolled the student in the MCPS system following the family's relocation to Montgomery County.
2. Prior to his enrollment in the MCPS, the student attended XXXXXXXXXXXXXXXXXXXX XXXXX (XXXXXXXXXXXX), in Prince George's County Public Schools (PGCPS), and had an IEP requiring the provision of special education instruction and related services.
3. On September 15, 2017, the school system staff completed an MCPS "Authorization to Request/Release Student Records" (MCPS Records Request) form to request the student's academic records, health records and confidential records from XXXX XXXXXXXX. The MCPS Records Request form includes a fax number for XXX XXXXXXXX, but there is no documentation that the form was faxed to XXXXXXXXXXXX XX on September 15, 2017, or on any later date.
4. The MCPS Records Request form includes a section at the bottom of the page, where the date when the records were requested is to be recorded, as well as the date when the records were received is to be recorded. These sections of the MCPS Records Request form completed by the school system staff, on September 15, 2017, are blank.

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5. On September 20, 2017, the complainant completed the MCPS “New Student Information” form. The complainant checked the “yes” box indicating that the student has an IEP, and identified XXXXXXXXXXXXX as the school that the student last attended.
6. On September 22, 2017, the student began attending XXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX), the school that he would attend if not disabled.
7. On October 9, 2017, the XXXXXXXX ES IEP team convened, with the participation of staff from the MCPS Central Office, Social and Emotional Supports. The IEP team reviewed the IEP developed by XXXXXXXXXXXXX, dated February 7, 2017 (PGCPS IEP), that the complainant had provided to the school staff.
8. The PGCPS IEP identifies that the student has an Emotional Disability that impacts his social, emotional, and behavioral skills where he is functioning at a “significantly limited” level of performance. It reflects that the student “has limited attention span and will have meltdowns, elope or avoid work” when required to complete academic tasks for more than thirty (30) minutes. The PGCPS IEP documents that the student requires support with accepting consequences for his actions and that, when corrected by a teacher, “he will resort to crying in frustration.” It also states that the student “is a flight risk, has aggression towards peers and adult, immediate behavior switches (overly excited to overly depressed), and does not do any work.”
9. The PGCPS IEP identifies that the student requires a Behavior Intervention Plan (BIP). It documents that, while the student has an Functional Behavior Assessment (FBA) and BIP under a Section 504 Accommodations Plan, the IEP team determined in February 2016 that the FBA and BIP needed to be updated.
10. The PGCPS IEP documents that the student requires instructional and testing accommodations including extended time, multiple or frequent breaks, changes in schedule or order of activities, and reduced distractions including “constant praises or prodding in order to maintain working.” It also documents that supplementary supports are also required, including the following:
 - daily use of positive and concrete reinforcers to increase desired behavior in all academic settings;
 - weekly social skills training in learned coping skills and self-advocacy to assist with the development of skills and strategies for managing peer and adult relationships;
 - crisis intervention, as needed;
 - meetings with a guidance counselor, crisis instructor and/or school based mental health provider on a weekly or as needed basis, “for instruction, practice, and application/review of learned strategies to prevent crisis, understand crisis when it occurs, and how to de-escalate and re-enter the instructional setting;” and
 - opportunities to “recognize and regulate his feelings and to develop strategies for calming and coping.”

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11. The PGCPS IEP documents that the student needs a “small, structured separate class program” to address his social and emotional needs. It requires twenty-two (22) hours per week of specialized instruction, in a separate special education classroom. It also documents that the student requires thirty (30) minutes per week of counseling as a related service to address his coping skills, self-advocacy skills, and social skills, and that the counseling is to be provided by a school-based mental health care provider in a separate special education classroom.
12. The IEP team determined that the student requires the special education services identified in the PGCPS IEP. The IEP team also determined that the student requires additional supplementary supports, including instruction on coping strategies, social skills training on an as needed or daily basis, by a school based mental health provider, checks for understanding, and advanced preparation for schedule changes. The team also added a new goal requiring the student to complete preferred and non-preferred tasks, in order to address newly identified needs in the area of self-management skills. The IEP team adopted the PGCPS IEP, with revisions.
13. The IEP continued to reflect the decision made by the PGCPS in February 2016, that the student requires a new FBA and BIP. The IEP team did not address this identified need, and there is no documentation that the school staff obtained an updated FBA and BIP from the PGCPS.
14. The IEP team discussed that the services that the student requires cannot be provided at XXXXXXXX ES, and determined that the Least Restrictive Environment (LRE) in which the IEP can be implemented is XXXXXXXX ES that provides Behavioral and Emotional Support Services. The MCPS documentation reflects that the Behavioral and Emotional Support Services are “for students who are experiencing social and emotional challenges,” and are supported by a multidisciplinary team that includes a special educator, a resource teacher, paraeducators, social worker, psychologist and behavior support teacher.
15. On October 23, 2017, the student started attending XXXXXXXX ES. There is documentation that, in order to assist the student with transition, the school staff permitted the complainant to accompany the student in school.
16. For the first month at XXXXXXXX ES, the student did not demonstrate interfering behaviors. However, in late November 2017, the student began to exhibit “significant behavioral outbursts,” “tantrum-like behaviors,” resistance to completing assignments, and difficulty with peer interactions. His behaviors escalated and also included aggressive behaviors. Following the outbursts, the student would “shutdown” all communications with school staff, becoming non-responsive.

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17. On November 28, 2017, the student was removed from the classroom to a support room for throwing items towards the school staff.¹ While in the support room, the student “dug into his forehead with a broken pencil,” and banged his head against the walls and the floor, requiring the school staff to use restraint.
18. On November 30, 2017, the student was restrained again for throwing items towards the school staff, and the complainant was called. The school staff informed the complainant that the student was banging his head against the wall and making suicidal statements. The school staff left a voicemail message for the complainant stating that “We need you to come get him as soon as possible.”
19. On November 30, 2017, the school staff began to keep ABC data² of the student’s behavior.
20. On December 7, 2017, the student was restrained again for throwing items towards the school staff and banging his head against the wall. The school staff documented that his behavior was “explosive” had increased in frequency and intensity over a period of two (2) weeks, that it “looks like rage,” and that the student was verbalizing suicidal thoughts. The school staff referred the student to the Montgomery County Crisis Center (Crisis Center). The school staff called the complainant inquiring when she was coming to pick the student up from school.
21. On December 12, 2017, the complainant requested an emergency IEP meeting to discuss her concerns about the student’s behavior and how he is supported “when he is having an emotional breakdown.” The complainant proposed four (4) dates of her availability in December 2017 for the meeting. The school staff proposed three (3) other dates in January 2018 for the meeting. The complainant objected, noting that her request was for an emergency meeting “due to the drastic change in [the student’s] behavior and needs.” The IEP meeting was scheduled on January 5, 2018.
22. On January 5, 2018, the complainant sent an email to the school staff requesting an FBA to assist in identifying positive behavioral interventions, supports, and other strategies to address the student’s behavior.
23. The IEP meeting scheduled on January 5, 2018 was rescheduled, and the IEP team convened on January 25, 2018. They discussed that the student’s disability “impacts his ability to manage his frustration, remain safe, solving problems, and complete his classwork as well as to engage written language process and solve math problems.”

¹ He was suspended for one (1) day for “damaging school property and throwing items which endangered others and himself.”

² “ABC” refers to antecedent, behaviors, and consequences. ABC data serves to provide documentation of the antecedent to identified interfering behavior, a description of the behaviors, and the consequence or response to the behaviors.

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24. The present levels of performance were updated based on information reported on January 9, 2018, prior to the IEP team meeting. The information reflects the following about the student's functioning:
 - He has difficulty communicating with adults and peers;
 - "Most" of the times when he becomes upset are related to hunger or a demand to complete a non-preferred academic task;
 - When upset, angry, or frustrated, he responds by destroying classroom materials, shutting down, not responding to verbal prompts, banging his head and "will cry inconsolably;"
 - When upset, he has a difficult time communicating the reason why he is upset;
 - It can take "up to an hour to four hours to problem solve and get back on task in the classroom;" and
 - He has difficulty completing assignments, and may refuse to participate.
25. The complainant expressed her desire for the student to receive the supports and services he needs in order to be successful in school, and her belief that the student's needs are not being met. She expressed the belief that the student needs daily counseling services, access to mental health staff, and a connection with the school staff to build trust with "a trusted few."
26. The IEP team reviewed the results of the FBA of the student's "tantrums" that are defined as screaming, crying, misuse of property, throwing, slamming, kicking or breaking items, throwing himself on the floor, and engaging in self-harm. The results of the FBA, dated January 18, 2018, are based on a review of several sources of data, including ABC data collected since the end of November 2017. The school staff reported that the student's tantrums "often occur with little or no provocation" and include multiple forms of physical aggression. The student does not respond to prompts to explain the reason for his upset, does not comply with directives by staff. They also reported that the student's aggression increases when he is moved to a seclusion room, as demonstrated by displays of self-injurious behaviors and statements of suicidal ideation.
27. The FBA documents that the tantrums range in duration from approximately 60 to 300 minutes per incident, and that the functions of the behavior are to obtain access to an activity, object or event, and to avoid or escape adult attention, peer attention, and participating in an activity.
28. There is documentation that, as of the date of the January 2018 IEP meeting, the school staff had used seclusion with the student eight (8) times, and used restraint eight (8) times. The documentation also reflects that the school staff had made student referrals to the crisis center four (4) times due to his "aggressive and self-injurious behavior."
29. The IEP team identified that the student's disability affects him in the areas of math, written language, task completion, and behavior in the areas of problem solving, social and emotional, and social interaction skills. The IEP team revised the behavioral goals. They also revised the supplementary supports required by the IEP to include the daily use

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- of an emotion scale for the student to indicate his feelings, access to a preferred adult or adult of his choice when feeling frustrated, angry or anxious, access to an alternate location of the student's choice to calm down when he gets upset, home-school communication, breaking down of assignments, and providing alternative ways to demonstrate learning. The IEP team continued the daily social skills supplementary support, but changed the provider from a school-based mental health provider to a special educator or instructional assistant.
30. The IEP team decided to conduct observations of the student four (4) days a week, for sixty to ninety (60 - 90) minutes, over a two (2) week period, to obtain additional information about his behavior.
 31. The IEP team increased group counseling as a related service to twice a week, changing the provider from a mental health provider to a psychologist. The IEP team also determined that the student requires psychological services as a related service. The IEP was revised to require individual counseling services twice a week from a psychologist.
 32. At the January 2018 IEP meeting, the complainant provided the team with a report of an independent evaluation of the student by a private evaluator. The IEP team agreed to reconvene on March 2, 2018, to review the private report, and amend the IEP, as appropriate.
 33. In February 2018, the school staff documented an increase in the intensity and the frequency of the student's interfering behaviors, resulting in loss of instruction and classroom disruption.
 34. There is documentation that the student called the complainant many times by telephone during school hours when he was upset. The documentation reflects occasions when the student was able to calm down and follow instructions after talking with the complainant. There is also documentation that the student would ask the complainant to pick him up early.
 35. The early dismissal sign-out sheets and MCPS "Absence Report" document that the complainant picked the student up prior to the end of the school day once in January 2018 "for behavior," and twice in February 2018 because the "school called."
 36. The ABC behavior data documents that the school staff frequently called the complainant as a "consequence" to the student's disruptive behavior.
 37. The complainant's telephone logs document approximately twenty (20) incoming calls from the school's telephone number between January 8, 2018 and February 5, 2018. The communication log of the school staff documents approximately twenty-five (25) telephone calls made by the school staff to the complainant between February 6, 2018 and March 9, 2018.
 38. On March 9, 2018, the school staff documented that "for the past 2^{1/2} hours (and ongoing) [the student] has been raging, head banging, throwing things, hitting and

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kicking staff.” The school staff completed a Petition for Emergency Evaluation (EEP) requiring the student’s removal from school and informed the complainant. A police officer transported the student from school to a hospital for evaluation.

39. The complainant did not return the student to school after the school staff conducted the EEP on March 9, 2018.
40. On March 25, 2018, the IEP team convened with the participation of staff from the MCPS Central Office. The IEP team reviewed the private evaluation report obtained by the complainant, the student’s academic performance, teacher reports, and behavioral data. The IEP team also discussed the observations that were conducted as a result of recommendations at the January 2018 IEP meeting.
41. The IEP team documented that the student was not accessing instruction on a consistent basis, refusing to complete any school work, and refusing to attend general education art and physical education classes. They discussed that the student’s behaviors have escalated, and increased in intensity, duration and frequency, since he began attending XXXXXXXX ES. The documentation reflects that, since the January 2018 meeting, the school staff used restraint with the student approximately 12 times, and seclusion was used approximately 13 times.
42. The school staff members of the IEP team determined that the student requires “a small highly structured school setting with less students, minimal transitions and on-site mental health services,” and staff trained in de-escalation strategies to address the student’s “high emotionality.” They decided to refer the student for possible admission to a public separate special education school, and two (2) nonpublic separate special education schools but the complainant disagreed with the team’s decision. The school system staff report that they are now in communication with the complainant to coordinate visits to the recommended school placements.
43. There is no documentation that reports of the student’s progress towards mastery of the IEP goals were developed in the first (1st) quarter of the school year. The progress reports for the second (2nd) quarter of the school year developed on January 24, 2018, document “newly introduced skill; progress not measurable at this time.”
44. While there is documentation that the school staff provided some of the supplementary supports required by the IEP, at times during the investigation period, there is no documentation that the supports were provided on a consistent basis.

DISCUSSION/CONCLUSIONS:

ALLEGATION #1

PROVISION OF A FAPE

Based on the Findings of Facts #1 - #5 and #13, the MSDE finds that the MCPS did not ensure that the student’s educational record was obtained when the student transferred into the school system, in accordance with 34 CFR §300.323, COMAR 13A.08.02, and the Maryland Student

Records System Manual. As a result, the school staff did not have the BIP, and therefore, could not have implemented the supports that were required.

Based on the Findings of Facts #1 - #44, the MSDE further finds that the MCPS did not ensure that the IEP team addressed the student's interfering behaviors from October 2017 until March 25, 2018 (when the IEP team decided to move to a nonpublic placement), in accordance with 34 CFR §300.324. Therefore, this office finds that violations occurred and that the student was denied a FAPE during this time period.

ALLEGATION #2 DISCIPLINARY REMOVAL

Based on the Findings of Facts #20, and #34 - #37, the MSDE finds that, while the student was dismissed early from school during the school year for behavior, which constitutes disciplinary removal, there is no documentation that the student was disciplinarily removed from school in excess of ten (10) school days during the school year. Therefore, the IDEA disciplinary protections do not apply and this office does not find that a violation of 34 CFR 34 CFR §300.530 occurred.

ALLEGATION #3 PROCEDURES WHEN USING PHYSICAL RESTRAINT

FINDINGS OF FACTS:

- 45. There is documentation the school staff used restraint with the student on numerous occasions between November 2017 and March 2018.
- 46. The MCPS has acknowledged that violations occurred with respect to this allegation.
- 47. The MCPS has proposed training of the XXXXXXXXX ES school staff and administration on the proper procedures required for the use of restraint. In addition, the MCPS proposes to require the XXXXXXXX staff to provide the MCPS Central Office with documentation of all instances of the use of restraint for the remainder of the 2017 - 2018 school year, for its review.

CONCLUSION:

Based on the Findings of Facts #45 - #47, the MSDE finds, and the MCPS acknowledges, that the MCPS did not ensure that proper procedures were followed when using physical restraint with the student, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred.

**ALLEGATION #4 PROVISION OF DRAFT IEP FIVE (5) BUSINESS DAYS
PRIOR TO IEP MEETING**

FINDINGS OF FACTS:

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48. There is no documentation that the IEP team convened a meeting in December 2017.
49. The school staff scheduled an IEP team meeting on January 5, 2018. The MCPS acknowledges that the complainant was not provided with documents intended for discussion at the meeting five (5) business days ahead of time. The complainant requested that the meeting be rescheduled for this reason.
50. The school staff rescheduled the meeting for January 25, 2018. There is documentation that the school staff sent the complainant documents intended for discussion at the upcoming IEP meeting on January 15, 2018, more than five (5) business days in advance of the meeting. The documents included a draft IEP, and were sent home via the student.

CONCLUSION:

Based on the Findings of Facts #48 - #50, the MSDE finds that there is no documentation that the IEP team met and considered a draft IEP without providing a copy of the draft to the complainant at least 5 days prior to the meeting in which it was considered, in accordance with COMAR 13A.05.01.07. Therefore, this office does not find that a violation occurred

ALLEGATION #5 IEP TEAM PARTICIPANTS AT THE JANUARY 25, 2018 MEETING

51. On January 25, 2018, the IEP team convened.
52. The IEP developed at the January 25, 2018 meeting documents that the required members of the IEP team were present.

DISCUSSION/CONCLUSION:

In this case, the complainant assert that, because the IEP team did not take appropriate steps to address the student's interfering behavior when it met in January 2018, the team did not include a public agency representative who was knowledgeable about the availability of resources.

As stated in Allegation #1, the MSDE finds that the MCPS did not ensure that the IEP addressed the student's needs in January 2018. However, based on the Findings of Facts #51 and #52, the MSDE finds the documentation does not support the assertion that the violation was the result of lack of participation on the IEP team by a public agency representative, as required by 34 CFR §300.321. Therefore, this office does not find that a violation occurred.

CORRECTIVE ACTIONS/TIMELINES:

Student-Specific

The MSDE requires the MCPS to provide documentation by August 1, 2018, that the student has been offered an appropriate placement.

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The MSDE also requires the MCPS to provide documentation by August 1, 2018, that the IEP team has convened and determined the compensatory services needed to remediate the violations identified during this investigation, and developed a plan for the provision of compensatory services within one (1) year of the date of this Letter of Finding.

School-Specific

The MSDE requires the MCPS to provide documentation by the end of the 2017 - 2018 school year, of the steps it has taken, including training, to ensure that the staff at XXXXXXXXX ES comply with requirements for IEP development and implementation, and the proper procedures for the use of restraint. The documentation must include a description of how the MCPS will evaluate the effectiveness of the steps taken and monitor to ensure that the violations do not recur.

Documentation of all corrective action taken is to be submitted to this office to: Attention: Chief, Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE.

TECHNICAL ASSISTANCE:

Technical assistance is available to the parties by contacting Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE at (410) 767-7770.

Please be advised that both the complainant and the MCPS 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 facts 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 the 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 requirement as reported in this Letter of Findings.

Questions regarding the findings and conclusions contained in this letter should be addressed to this office in writing. The parent and the MCPS 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 this State complaint

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investigation, consistent with the IDEA. The MSDE recommends that this Letter of Findings be included with any request for mediation or a due process complaint.

Sincerely,

Marcella E. Franczkowski, M.S.

Assistant State Superintendent

Division of Special Education/

Early Intervention Services

MEF/ksa

c: Jack Smith
Kevin Lowndes
Julie Hall
Tracee Hackett
XXXXXXXXXXXX
Dori Wilson
Anita Mandis
K. Sabrina Austin
Nancy Birenbaum