

July 16, 2015

Mark McWilliams
Michigan Protection and Advocacy Service, Inc.
4095 Legacy Parkway, Suite 500
Lansing, MI 48911-4263

Dear Mr. McWilliams:

This letter is in response to the Michigan Protection and Advocacy Service, Inc. (MPAS) letter to me regarding concerns about how the Michigan Department of Education (MDE) responds to State complaints that allege a public agency's failure to implement a behavioral intervention plan (BIP) included in an individualized education program (IEP). On May 19, 2014¹ MPAS filed a "formal systemic complaint" under 34 CFR §§300.151 – 300.153 and State regulation R 340.1851-55 against the MDE alleging that MDE improperly dismissed a complaint regarding a BIP that was part of an IEP. MPAS' letter included a copy of that State complaint and MDE's Final Decision dated July 7, 2014.²

We express no opinion on the underlying issue of whether the public agency in fact failed to implement a BIP, or otherwise violated Part B of the Individuals with Disabilities Education Act (IDEA) or its implementing regulations in the circumstances surrounding your inquiry. However, MDE's Final Decision made two conclusions of law regarding BIPs that we want to address: (1) that the BIP was neither a supplementary aid or service nor an "instructional activity"³; and (2) that it may only investigate a public agency's failure to implement a BIP if the BIP results from a manifestation determination review where the behavior was a result of the disability. See 34 CFR §300.530(f).

A State educational agency must resolve any complaint, including one filed by an organization or individual from another State, that meets the requirements in 34 CFR §300.153. 34 CFR §§300.151 – 300.152. A State complaint must include a statement alleging that a public agency has violated a requirement of Part B of the IDEA or the IDEA implementing regulations. 34 CFR §300.153(b)(1). An allegation in a State complaint that a public agency failed to implement a BIP that is part of an IEP may constitute a violation of Part B of the IDEA, and would thus trigger a State's obligation to resolve a complaint under 34 CFR §§300.151 through 300.153. Once an IEP Team considers a child's behavioral needs through the IEP process, consistent with 34 CFR §300.324(a)(2)(i), and deems a BIP necessary for the child to receive a free appropriate public education (FAPE), IDEA does not address how the BIP must be reflected in the child's IEP. As we understand MDE's analysis, in order for a BIP to be properly reflected in a child's IEP, it must be reflected in the annual goals and the statement of special education and related

¹ MPAS' communication with the Office of Special Education Programs (OSEP) included a copy of the State complaint, which was dated December 30, 2014. However, it appears from other information that the correct date of the State complaint is May 19, 2014.

² An initial complaint investigation based on a parent complaint was conducted by MDE with the letter of findings issued on January 17, 2014.

³ MDE uses the term "instructional activity" multiple times in its Final Decision. It should be noted that this term does not exist in the IDEA or its implementing regulations.

services, but not as a supplementary aid or service. Under 34 CFR §300.42, “supplementary aids and services” means “aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§300.114 through 300.117.” See also 34 CFR §300.320(a)(4)(iii) (instruction and services included in an IEP to enable a child with a disability to be educated and participate with other children with disabilities and nondisabled children in extracurricular and other nonacademic activities). Given the breadth of this definition, depending on a child’s needs, we do not believe it would be inconsistent with the IDEA for an IEP Team to designate a BIP as a supplementary aid or service. Next, even in those instances where the regulations require a BIP, we understand MDE to be suggesting that its review of a State complaint would be limited to whether the BIP was actually provided, not to whether the BIP was appropriate. As noted above, a BIP developed through the IEP process is a proper subject of a State complaint, regardless of the manner in which the BIP is reflected in a child’s IEP.

With respect to the issue of whether BIPs can be required in circumstances where a child’s behavior is not a manifestation of his or her disability, we note that the IDEA provides that the IEP Team must consider a variety of special factors in the development, review, and revision of a child’s IEP, and “must in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” Section 614(d)(3)(B)(i) of the IDEA; 34 CFR §300.324(a)(2)(i); see also 34 CFR §300.324(b)(2). *See also*, Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46721 (Aug. 14, 2006) (the IDEA “emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child’s IEP, ‘the use of positive behavioral interventions, and other strategies to address the behavior.’ (See section 614(d)(3)(B)(i) of the Act). This provision should ensure that children who need behavior intervention plans to succeed in school receive them.”).

Moreover, OSEP’s June 2009 *Questions and Answers on Discipline Procedures* provided further guidance related to BIPs (copy enclosed). Specifically, the answer to Question E-1 states: “. . . FBAs [functional behavioral assessments] and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child.” In addition, Question E-2 addresses when a BIP should be included in a child’s IEP and explains: “For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child’s disability, the IEP Team must include a BIP in the child’s IEP to address the behavioral needs of the child.”

The above guidance clarifies that while IEP Teams are not required to include BIPs in an IEP outside the context of a manifestation determination, IEP Teams may elect to include BIPs in other circumstances, such as when they deem a BIP necessary for a child whose behavior impedes his or her learning or that of others to receive FAPE.

As a result of OSEP's review of the information provided in MPAS' July 29, 2014 letter and MDE's Final Decision dated July 7, 2014, OSEP concludes that MDE is incorrectly applying the State complaint procedures, promulgated under 34 CFR §§300.151-300.153, by not resolving complaints alleging that BIPs that are included in IEPs or developed as part of a manifestation determination were inappropriate. OSEP will share this letter with the MDE and provide technical assistance to MDE to ensure that MDE's State complaint policies and procedures are consistent with the IDEA.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have any questions, please contact the OSEP Michigan State Contact, Daniel Schreier at (202) 245-6552 or by email at daniel.scheier@ed.gov.

Sincerely,

/s/

Melody Musgrove, Ed.D.

Director

Office of Special Education Programs

Enclosure

cc: Teri Johnson Chapman, Ed.S., Michigan State Director of Special Education
Ron Hager, National Disability Rights Network