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State Superintendent of Schools

November 13, 2020

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RE: [REDACTED]
Reference: #20-134

Dear Parties:

The Maryland State Department of Education (MSDE), Division of Early Intervention and Special Education Services, 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 June 3, 2020, the MSDE received a complaint from Brianna Kitchelt, Esq., and [REDACTED] hereafter “the complainants,” on behalf of the above-referenced student and his parent surrogate, Ms. [REDACTED]. 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 student.

While there is a sixty (60) day timeline for completing the investigation process, the parties were notified on July 2, 2020 that the timeline for completion of this Letter of Findings was extended in order to obtain documents that were not accessible, as a result the Statewide closure of school buildings due to the national COVID-19 pandemic. This correspondence is the report of the final results of our investigation. The MSDE investigated the following allegations:

1. The MCPS has not developed and implemented an Individualized Education Program (IEP) that addresses the student's identified social, emotional, and behavioral needs since June 3, 2019, in accordance with 34 CFR §§300.101 and .324.
2. The MCPS has not followed proper procedures when using physical restraint and seclusion from June 4, 2019 to January 25, 2020, in accordance with COMAR 13A.08.04.05.

BACKGROUND:

The student is ten (10) years old, is identified as a student with Autism under the IDEA, and has an IEP that requires the provision of special education and related services.

From the start of the time period covered by this investigation until January 2020, the student was placed by the MCPS at the [REDACTED] a community-based public residential, clinical, and educational facility licensed by the Maryland Department of Health, where the education program is operated by the MCPS.

In January 2020, the MCPS placed the student at [REDACTED] a nonpublic separate special education school, where he attended school until the March 2020 closure of school buildings and start of virtual instruction due to the COVID-19 pandemic.

ALLEGATION #1 DEVELOPMENT AND IMPLEMENTATION OF THE IEP

FINDINGS OF FACTS:

IEP Development

1. The IEP in effect in June 2019 was developed on March 27, 2019. The data used to develop the IEP reflects that the student demonstrates difficulty with self-regulation resulting in screaming, running around the classroom, standing on furniture, attempting to punch, kick, and scratch staff, and using inappropriate language with staff and peers. The student also scratches and slaps his own face and bangs his head on the floor which has resulted in self-injury. The data reflects that the student experiences difficulty with behavior particularly during transitions.
2. When the IEP was developed, on March 27, 2019, there was data from a private neuropsychological assessment that the parent had provided to the school staff, which was not considered by the IEP team. That data identified that the student has Autism and recommended that behaviors be addressed through supports such as positive reinforcers and a visual menu of coping strategies. The data was not considered by the team, and those supports were not included in the IEP at that time.
3. The March 27, 2019 IEP included goals for the student to improve his social, emotional, and behavioral functioning consistent with the needs identified at that time arising out of an Emotional Disability. The IEP required the provision of special education instruction in a

small group, and weekly speech/language therapy services to assist him with achieving the goals. It also required redirection, reduction of distractions, use of manipulatives and sensory activities to promote listening skills, strategies to initiate and sustain attention, frequent eye contact, proximity control, encouragement to demonstrate appropriate behavior and to ask for assistance. It also included prompting, modeling, frequent feedback, and access to a quiet room/space and staff for problem solving. The IEP further required the provision of clinical services to the student. The clinical component of the [REDACTED] program involves weekly individual therapy from psychologists and clinical social workers, as well as family therapy.

4. The March 27, 2019 IEP further required the use of a Behavioral Intervention Plan (BIP) that included strategies to address the targeted behavior identified in the data, as well as many accommodations and supports, including providing coping strategies through modeling and role play, visual schedules and reminders, and teaching social skills. It also required using a calm voice and redirection. The effectiveness of the BIP was supposed to be considered by the IEP team by May 7, 2019.
5. The IEP team did not consider the effectiveness of the BIP until it met on October 19, 2019 for the annual IEP review. At that time, the team considered the results of an updated Functional Behavioral Assessment (FBA). The FBA did not identify new behaviors. It reflected that the use of an alternate location such as the quiet room sometimes is effective but that, at other times, it elevates the student's behaviors. It included recommendations for additional interventions and supports, which the team added to the BIP.
6. The supports added to the BIP on October 19, 2019 included the use of visual reminders, a coping box¹, tangible rewards in a token reward system, advanced notice of changes to schedule, breaks between tasks, first/then statements, timers, prompt cards and use of other school rooms/locations. The BIP was revised to reflect that, in response to the targeted behaviors school staff will redirect with short, calm phrases, offer choices of coping strategies, contact the student's therapist and direct the student to an alternate room to calm down.
7. At the October 19, 2019 IEP team meeting, the IEP team decided that the social, emotional, and behavioral goals remained appropriate, but that the student would work on those goals with faded adult supervision and demonstrate mastery with a decreased number of trials. The IEP team also considered the results of the private neuropsychological assessment. Based on that data, the IEP team added supports including the use of positive reinforcers and visual menu of coping strategies recommended in the assessment report. At the October 19, 2019 IEP team meeting, the parent reported that the family would no longer accept clinical services and those services were removed from the IEP.

¹ A coping box is an evidence-based strategy that consists of visuals, sensory items and other activities that serves to teach emotional skills and calm students with Autism.

8. On November 20, 2019, the IEP team convened and considered the student's progress without the clinical services. At that time, the IEP team decided that the student requires placement in a nonpublic separate special education school. In the meantime, the IEP team added individual counseling with a social worker as a related service on the IEP, until an appropriate placement could be obtained.
9. In January 2020, the student was placed at [REDACTED] the nonpublic, separate, special education school. On September 25, 2020, the IEP team convened to conduct the annual IEP review. While the student's accommodations and supports remained the same, his communication and social/emotional behavioral goals were updated to reflect current needs. The IEP continues to require special education instruction, counseling, and speech language therapy.

IEP Implementation at [REDACTED]

10. There are reports of the student's progress towards achievement of the annual IEP goals, dated June 14, 2019, August 2, 2019, November 8, 2019, January 24, 2020, which document the provision of special education instruction to address the annual IEP goals.
11. There are service logs to document the provision of clinical services included in the IEP prior to October 16, 2019 when the IEP team discontinued those services.
12. There is no documentation of the provision of speech/language and counseling services.
13. While there is documentation of the provision of some behavioral supports required by the IEP and BIP in incident reports that were developed, there is no documentation that all of the required supports were provided.

IEP Implementation at [REDACTED]

14. There are reports of the student's progress towards achievement of the annual IEP goals, dated March 25, 2020, and June 8, 2020, which document the provision of special education instruction to address the annual IEP goals. Those reports reflect sufficient progress is being made on the goals.
15. There are speech/language therapy and counseling logs that document the provision of related services.
16. While the September 25, 2020 IEP documents the provision of some behavioral support required by the IEP and BIP, there is no documentation that all of the required supports are being provided. The IEP reflects that the student's behavior is improving and that he has not had any major behavioral incidents since he began attending [REDACTED]

DISCUSSION/CONCLUSIONS:

In order to provide a student with a Free Appropriate Public Education (FAPE), a public agency must ensure that an IEP is developed and implemented that addresses all of the needs arising out of the disability, including the social, emotional, and behavioral needs (34 CFR §§300.101, .320, .323, and .324).

When reviewing and revising the IEP, the public agency must ensure that the IEP team considers all of the evaluation data, including the results of any Independent Educational Evaluation (IEE) (34 CFR §§300.324 and .502).

Based on the Findings of Facts #3, #7, #8 and #9, the MSDE finds that the IEP has included goals for the student to improve his social, emotional, and behavioral functioning, and services to assist him in achieving the goals, in accordance with 34 CFR §§300.320, and .324.

However, based on the Findings of Fact #2, the MSDE finds that the MCPS did not ensure that the IEP team considered the results of the private neuropsychological assessment from June 2019 until October 19, 2019, in accordance with 34 CFR §§300.324 and .502.

In addition, based on the Findings of Fact #5, the MSDE finds that the MCPS did not ensure that the IEP team considered the effectiveness of the BIP from June 2019 until October 19, 2019, in accordance with 34 CFR §300.324. Based on those Findings of Facts, this office finds that violations occurred with respect to the IEP development aspect of the allegation, and that there was a delay in identifying and addressing the student's social, emotional, and behavioral needs and thus the provision of a FAPE during this time period.

Based on the Findings of Facts #10 and #11, the MSDE finds that there is documentation that the student was provided with special education instruction to address the annual IEP goals and clinical services required by the IEP while placed at the [REDACTED] in accordance with 34 CFR §§300.101 and .323.

However, based on the Findings of Facts #12 and #13, the MSDE finds that there is no documentation of the provision of related services or all of the behavioral supports required while placed at the [REDACTED] in accordance with 34 CFR §§300.101 and .323.

Based on the Findings of Facts #14 and #15, the MSDE finds that there is documentation that the student is being provided with special education instruction and related services required by the IEP at [REDACTED] in accordance with 34 CFR §§300.101 and .323.

However, based on the Findings of Fact #16, the MSDE finds that there is no documentation that all of the behavior supports required by the IEP and BIP are being provided, in accordance with 34 CFR §§300.101 and .323. Therefore, this office finds that violations occurred with respect to the IEP implementation aspect of the allegation.

ALLEGATION #2 USE OF BEHAVIORAL INTERVENTIONS

FINDINGS OF FACT:

17. A review of certifications and recertifications issued by the Crisis Prevention Institute (CPI) to the school staff involved in the use of behavioral interventions with the student, as well as a Joint Commission on Accreditation of Healthcare Organizations Joint Commission (JCAHO) award letter and certificate, document that the [REDACTED] is accredited by the JCAHO and that staff have been trained and are certified in the use of the behavioral interventions, including those under COMAR 13A.08.04.
18. Since June 4, 2019, the IEP required “crisis intervention,” which included the use of seclusion and restraint. However, there is no documentation of parental consent for the use of seclusion and restraint. The BIP also states that seclusion and restraint will be used if no other interventions are successful.

June 4, 2019 Incident

19. The school staff documented that the school therapist attempted to calm the student in the “quiet room” in the morning because he was cursing and screaming. The “quiet room” is described as an empty room. When the school therapist was unable to calm the student in that room she took him to her office because she had success in the past with calming him in that location. Eventually she was able to calm him down in that location and he was returned to the classroom.
20. Once in the classroom, the student started cursing and screaming again and got under his desk. The school therapist was able to calm the student down in the classroom.
21. Later in the day, while the student was outside of the school building with other students, the student ran away from the group and the school building. The school staff attempted to redirect him back to the building without success and he was escorted him back to the building into the quiet room.
22. The school therapist attempted to calm the student in the quiet room, but was unsuccessful and the student continued to scream and curse and began scratching his face. The documentation indicates that he was then strapped into a chair in order to restrict his movement, a hood was placed over his head, and medication was administered to calm him. The incident lasted forty-six (46) minutes.
23. The parent was notified of the incident by telephone and mail within twenty-four (24) hours of the incident.

July 31, 2019 Incident

24. The school staff documented that, on that date, the student was in the quiet room with the school therapist and nurse and he refused to accept the support they attempted to provide.

August 1, 2019 Incident

25. The school staff documented that, on that date, the student was provided with support in the quiet room by school staff.

September 29, 2019 Incident

26. The school staff documented that, on that date, the student was provided with support in the quiet room by school staff.

October 21, 2019 Incident

27. The school staff documented that, on that date, the student attempted to elope from the school building. The school staff attempted to redirect him back to the building without success and he was escorted back to the building into a “comfort room,” which is described as a room with beanbag chairs. There is no documentation that the student was provided with support in the comfort room.
28. While the principal sent correspondence to the foster parents indicating that the student had been “secluded,” the documentation does not reflect that the student was prevented from leaving the comfort room.

October 29, 2019 Incident

29. The school staff documented that, on that date, the student was placed in the quiet room because he was being disruptive to the class. There is no documentation that supports were provided to the student in the quiet room.
30. While the principal sent correspondence to the foster parents indicating that the student had been “secluded,” the documentation does not reflect that the student was prevented from leaving the comfort room.
31. The school staff further documented that the school nurse examined the student while he was in the quiet room after a “manual hold” was used. There is no documentation of why the “manual hold” was used or the length of time it was used.
32. The [REDACTED] policy manual describes a “manual hold” as the application of physical force on a student’s body that prevents or limits the student’s ability to independently moved. It does not include briefly holding a student to calm or comfort the student, or holding the student’s hand to safely escort the student from one area to another.

33. There is no documentation that the parent was notified of the use of the “manual hold.”

October 30, 2019 Incident

34. The school staff documented that, on that date, the student refused to enter the school building after exiting the bus in the morning. After finally entering the school building with prompting, the student went to the quiet room, but then left the quiet room, punching a paraeducator and scratching assistant principal.
35. While the principal sent correspondence to the foster parents indicating that restraint had been used that day, there is no documentation that what occurred involved the use of restraint. The documentation reflects that, after initially leaving the quiet room, the student was escorted back to the quiet room, where the school staff attempted to provide support, which was unsuccessful. The student was then dismissed early from school and disciplinarily removed from school for two (2) days.

November 18, 2019 Incident

36. The school staff documented that, on that date, the student hit a staff member working with him in the quiet room.

November 27, 2019 Incident

37. The school staff documented that, on that date, the student eloped from the school building and was escorted to the comfort room. Prior to being placed in the comfort room, a “manual hold” was used, but there is no documentation of the behavior that was exhibited to require the “manual hold.”
38. While in the comfort room, the student bit himself and was placed in another “manual hold.” There is no documentation that less intrusive interventions were used prior to the use of the “manual holds” and there is no documentation of the length of the time that the “manual holds” lasted.
39. There is no documentation that the parent was notified of the use of the “manual hold.”

December 2, 2019 Incident

40. The school staff documented that, on that date, the student was hitting himself in the face, and was directed to the comfort room.
41. There is no documentation that supports were provided to him in the comfort room. There is also no documentation that the student was prevented from leaving the comfort room.
42. On that date, the school staff informed the foster parent that the student was involved in several emergency situations requiring physical restraint. There is documentation that the

school nurse conducted a “post-hold” assessment, but there is no documentation of the hold, including the length of time in the hold or the behavior that required the hold.

December 19, 2019 Incident

43. The school staff documented that, on that date, the student attempted to elope from the school building and was redirected to the quiet room after other strategies were used and were unsuccessful.
44. There is no documentation that the student was provided with support in the quiet room. There is also no documentation that the student was prevented from leaving the quiet room.

DISCUSSION/CONCLUSIONS:

The Code of Maryland Regulations (COMAR) mandates the conditions that must be met in order for a public agency to use student behavior interventions. These behavior interventions include the use of exclusion, seclusion, and restraint (COMAR 13A.08.04).

The COMAR defines these interventions as follows:

- a. Exclusion is defined as the removal of a student to a supervised area for a limited period of time during which the student has an opportunity to regain self-control and is not receiving instruction including special education, related services, or support.
- b. Seclusion is defined as the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. Seclusion does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.
- c. Physical restraint is defined as a personal restriction that immobilizes or reduces the ability of a student to move the student’s torso, arms, legs, or head freely. It does not include briefly holding a student to calm or comfort the student. It also does not include a physical escort, which is defined as the temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a student who is acting out to walk to a safe location. Furthermore, it does not include moving a disruptive student who is unwilling to leave the area if other methods such as counseling have been unsuccessful, or intervening in a fight.
- d. Mechanical restraint is defined as the use of any device or equipment to restrict a student’s freedom of movement that are not prescribed by an appropriate medical or related services professional for purposes such as adaptive devices used to achieve proper body position (COMAR 13A.08.04).

The COMAR prohibits the use of seclusion and restraint as follows:

- a. Neither seclusion nor restraint may be used unless there is an emergency situation and the intervention is necessary to protect the student or other person from imminent, serious, physical harm after less intrusive, nonphysical interventions have failed or been determined inappropriate;
- b. Neither seclusion nor restraint may be used in excess of thirty (30) minutes;
- c. When using restraint, the public agency may not obstruct a staff member's view of a student's face or restrict a student's ability to communicate distress; and
- d. Mechanical restraint may not be used unless the staff are certified by and meet the requirements of JCAHCO (COMAR 13A.08.04).

Once seclusion or restraint is used or a determination is made that they may need to be used, they may only be included on the BIP or IEP if the school personnel do the following:

- a. Review available data to identify any contraindications to their use based on medical history or past trauma;
- b. Identify less intrusive, nonphysical interventions to be used before the behavior intervention; and
- c. Obtain written parental consent (COMAR 13A.08.04).

Each time seclusion or restraint is used, the public agency must ensure that the parent is provided with oral or written notification within twenty-four (24) hours (COMAR 13A.08.04).

Use of Seclusion

In this case, the complainants allege the following with respect to the use of seclusion:

1. It was used with the student even though its use was known to escalate the student's behavior;
2. It was used in an excessive manner to manage the student's behavior and the IEP was not revised to consider positive behavioral interventions;
3. It was used in non-emergency situations when it was not needed to protect the student or other person from imminent, serious, physical harm after less intrusive, nonphysical interventions have failed or been determined inappropriate;
4. It was used without notification to the parent within twenty-four (24) hours;
5. It was used in excess of thirty (30) minutes; and

6. It was included on the IEP without parental consent.

Based on the Findings of Facts #27 - #30, the MSDE finds that, despite the principal's use of the term "secluded" to describe the use of the comfort and quiet rooms on two (2) occasions, the documentation of the use of those rooms reflect that their use does not constitute seclusion under the COMAR definition.

Based on the Findings of Facts #27 - #30 and #40 - #41, the MSDE finds that the incidents that occurred on October 21, 2019, October 29, 2019 and December 2, 2019 constituted exclusion because there is no documentation that the student was provided with supports in the quiet room or comfort room.

Based on the Findings of Facts #19, #21 - #22, #24 - #26, #34 - #37 and #43 - #44 the MSDE finds that the remaining incidents that occurred in the quiet room and comfort room did not constitute exclusion because there is documentation that he was provided with supports in those rooms. Therefore, this office does not find that a violation occurred with respect to the use of seclusion.

However, based the Findings of Fact #18, the MSDE finds that the MCPS did not ensure that parent consent was obtained before including the use of seclusion on the IEP without parental consent, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred.

Use of Restraint

In this case, the complainants allege the following with respect to the use of restraint:

1. Physical restraint was used in an excessive manner to manage the student's behavior and did not revise the IEP to consider positive behavioral interventions;
2. Physical restraint was used in non-emergency situations when it was not needed to protect the student or other person from imminent, serious, physical harm after less intrusive, nonphysical interventions have failed or been determined.
3. Mechanical restraint was used by staff who did not have JCAHCO accreditation;
4. While mechanical restraint was used, the student's ability to communicate distress was restricted and staff's view of the student's face was obstructed, and forced medication was impermissibly used in order to restrain him;
5. Physical restraint was used in excess of thirty (30) minutes;
6. Physical restraint was used without notification to the parent within twenty-four (24) hours; and
7. Physical restraint was included on the IEP without parental consent.

Based on the Findings of Facts #21 - #22, #31 - #32 and #37 - #38, the MSDE finds that documentation of three (3) to four (4) incidents of physical restraint from June 4, 2019 to January 25, 2020 does not constitute an excessive use of the intervention, in accordance with COMAR 13A.08.04. Therefore, this office does not find that a violation occurred with respect to this aspect of the allegation.

Based on the Findings of Facts #31 - #32, #37 - #38 and #42, the MSDE finds that there is documentation that the MCPS did not ensure that physical restraint was used in a manner consistent with the regulations. Specifically, the MSDE finds that restraint was used in non-emergency situations when it was not needed to protect the student or other person from imminent, serious, physical harm after less intrusive, nonphysical interventions have failed or been determined, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

Based on the Findings of Fact #18, the MSDE finds that there is documentation that the staff who used mechanical restraint with the student held JCAHCO accreditation, in accordance with COMAR 13A.08.04. Therefore, this office does not find that a violation occurred with respect to this aspect of the allegation.

However, based on the Findings of Facts #22, the MSDE finds that, while COMAR 13A.08.04 does not address the administration of medication as physical restraint, the MSDE finds that the MCPS did not ensure that the student's ability to communicate distress was not restricted and that the staff's view of the student's face was not obstructed, during the June 4, 2019 incident, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred.

Based on the Findings of Facts #31 and #42, the MSDE finds that the MCPS did not ensure that physical restraint did not exceed thirty (30) minutes, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation. Based on the Findings of Facts #31, the MSDE finds that the MCPS did not ensure that the parent was notified within twenty-four (24) hours of each incident of restraint, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

Based the Findings of Facts #17, the MSDE finds that the MCPS did not ensure that parent consent was obtained before including the use of physical restraint on the IEP, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

CORRECTIVE ACTIONS/TIMELINES:

The IDEA requires that State complaint procedures include those for effective implementation of the decisions made as a result of a State complaint investigation, including technical assistance activities, negotiations, and corrective actions to achieve compliance (34 CFR §300.152). Accordingly, the MSDE requires the public agency to provide documentation of the completion of the corrective actions listed below.

The MSDE has established reasonable timeframes below to ensure that noncompliance is corrected in a timely manner. This office will follow up with the public agency to support it in working toward completion of required actions consistent with the MSDE Special Education State Complaint Resolution Procedures.

If the public agency anticipates that any of the timeframes below may not be met, or if either party seeks technical assistance, they should contact Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action. Dr. Birenbaum can be reached at (410) 767-7770 or by email at nancy.birenbaum@maryland.gov.

Student-Specific

The MSDE requires the MCPS to provide documentation that the student is being provided with all of the behavioral supports required by the IEP and BIP.

The MSDE also requires the MCPS to provide documentation that the IEP team has taken the following actions:

- a. Removed the use of seclusion and restraint from the IEP and BIP; and
- b. Determined the amount and nature of compensatory or other services needed to remediate the violations identified through this investigation.

School-Based

The MSDE requires the MCPS to provide documentation of the steps taken at RICA-Rockville to ensure that the violations identified through this investigation do not recur. The documentation must include a description of how the school system will evaluate the effectiveness of the steps taken and monitor to ensure that the violations do not reoccur.

System-Based

The MSDE requires the MCPS to provide documentation of the steps taken to ensure that students placed by the school system at The Children's Guild are provided with all of the supports required by the IEP.

As of the date of this correspondence, this Letter of Findings is considered final. This office will not reconsider the conclusions reached in this Letter of Findings unless new, previously unavailable documentation is submitted and received by this office within fifteen (15) days of the date of this correspondence. The new documentation must support a written request for reconsideration, and the written request must include a compelling reason for why the documentation was not made available during the investigation. Pending this office's decision on a request for reconsideration, the public agency must implement any corrective actions within the timelines reported in this Letter of Findings.

Brianna Kitchelt, Esq.
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November 13, 2020
Page 14

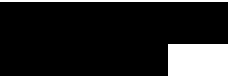
The complainants maintain the right to request mediation or to file a due process complaint, if they disagree with the identification, evaluation, placement, or provision of a Free Appropriate Public Education (FAPE) for the student, including issues subject to this State complaint investigation,

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 Early Intervention
and Special Education Services

MEF/dec

c: Jack R. Smith
Kevin Lowndes
Tracee Hackett

Marcella Franczkowski
Anita Mandis
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