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State Superintendent of Schools

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November 26, 2013

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Mr. Daniel Martz  
Director of Special Education and  
Psychological Services  
Frederick County Public Schools  
191 South East Street  
Frederick, Maryland 21701

RE: XXXXX  
Reference: #14-026

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 October 2, 2013, the MSDE received a complaint from Ms. XXXXXXXXX, hereafter, “the complainant,” on behalf of her son. In that correspondence, the complainant alleged that the Frederick County Public Schools (FCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) and applicable State regulations with respect to the above-referenced student.

The MSDE investigated the allegations listed below:

1. The FCPS has not ensured that the student has been provided with the behavior supports required by the Individualized Education Program (IEP) or the Behavior Intervention Plan (BIP) since the start of the 2013-2014 school year, in accordance with 34 CFR §§300.101 and .323.
2. The FCPS has not ensured that proper procedures were followed when utilizing behavior interventions with the student, including the use of restraint and seclusion, since the start of the 2013-2014 school year, in accordance with COMAR 13A.08.04.02, .03, and .05.

**INVESTIGATIVE PROCEDURES:**

1. Ms. Koliwe Moyo, Education Program Specialist, MSDE, was assigned to investigate the complaint.
  2. On October 7, 2013, the MSDE sent a copy of the complaint, via facsimile, to Mr. Daniel Martz, Director of Special Education and Psychological Services, FCPS.
  3. On October 15, 2013, Ms. Moyo spoke with the complainant by telephone and clarified the allegations to be investigated.
  4. On October 18, 2013, the MSDE sent correspondence to the complainant that acknowledged receipt of the complaint and identified the allegations subject to this investigation. On the same date, the MSDE notified Mr. Martz of the allegations and requested that his office review the alleged violations.
  5. On October 22, 2013, the complainant provided the MSDE with documentation to be considered during the investigation, via electronic mail correspondence (email).
  6. On November 12, 2013, Ms. Moyo and Ms. Chezia Calloway, Nonpublic School Approval Specialist, MSDE conducted a site visit at XXXXXXXXXXXXXXX and interviewed the staff listed below.
    - a. Ms. XXXXXXXXXXXXX, Principal, XXXXXXXXXXXXXXX;
    - b. Ms. JXXXXXXXX, Senior School Administrator, XXXXXXXXXXXXXXX;
    - c. Ms. XXXXXXX, Clinical Supervisor, XXXXXXXXXXXXXXX;
    - d. Mr. XXXXXXXXXXX, Director, XXXXXXXXXXXXXXX;
    - e. Ms. XXXXXXX, Quality and Evaluation Coordinator, XXXXXXXXXXXXXXX; and
    - f. Mr. XXXXXXXXXXX, Principal, XXXXXXXXXXXXXXX.
- Ms. Linda Chambers, Special Education Supervisor, FCPS and Ms. Donna Piper, Special Education Coordinator for Nonpublic Placements, FCPS, attended the site visit as representatives of the FCPS and to provide information on the FCPS policies and procedures, as needed. On the same date, the FCPS staff provided Ms. Moyo with documentation from the student's educational record.
7. On November 20, 2013, Ms. Moyo conducted a telephone interview with the complainant regarding the allegations being investigated.
  8. The MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
    - a. Correspondence and attachments from the complainant to the MSDE, received on October 2, 2013;
    - b. Functional Behavior Assessment report, dated May 15, 2013;
    - c. Behavior Intervention Plan, dated May 15, 2013 and September 27, 2013;

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- d. IEP, dated May 15, 2013;
- e. The Restraint/Seclusion data sheet from August 15, 2013 to November 7, 2013;
- f. Seclusion or Restraint incident reports from August 15, 2013 to November 7, 2013;
- g. The log of the use of the resource room from August 15, 2013 to November 7, 2013;
- h. The log of the provision of counseling service logs from August 15, 2013 to November 7, 2013;
- i. The classroom progress reports from August 15, 2013 to November 8, 2013;
- j. The log of the provision of occupational therapy from August 19, 2013 to November 7, 2013;
- k. The log of the daily attendance of the one-to-one adult support from August 15, 2013 to November 11, 2013;
- l. Electronic mail correspondence (email) between school staff and the complainant, dated September 2, 2013;
- m. The reports of the student's progress towards achieving the annual IEP goals, dated September 20 and 26, 2013;
- n. Correspondence from the FCPS staff to the complainant, dated September 26, 2013;
- o. Email between school administrators and school staff, dated October 28, 2013;
- p. IEP and prior written notice, dated September 24, 2013;
- q. Review of certification of training in the implementation of student behavior interventions for XXXXXXXXXXXXXXXX staff for the 2013-2014;
- r. XXXXXXXXXXXXXXXX behavior management procedures;
- s. Student's daily class schedule and report card for the 2013-2014 school year.

### **BACKGROUND:**

The student is fifteen (15) years old and is identified as a student with Multiple Disabilities under the IDEA including an Emotional Disability and Other Health Impairment related to Attention Deficit Hyperactivity Disorder. He attends XXXXXXXXXXXXXXXX<sup>1</sup>, a nonpublic, separate, special education school where he was placed by the FCPS.

During the period of time addressed by this investigation, the complainant participated in the education decision-making process and was provided with written notice of the IEP team decisions and notice of the procedural safeguards (Docs. a – d, p, r, and s).

### **FINDINGS OF FACTS:**

#### **Behavioral Supports**

1. The IEP requires that the student be provided with twenty-eight and three quarters (28.75) hours of special education instruction per week from a special education teacher to assist him with achieving the annual IEP goals. It also requires that the student be

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<sup>1</sup> XXXXXXXXXXXXXXXX is a part of the XXXXXXXXXXXXXXXX with a twelve (12) month special education program for students with emotional and behavioral disabilities (www.XXXXXXXXXXXXXX).

provided with “one-to-one adult support” throughout the day to assist him with transitions between classes, check for understanding, provide additional processing time, ensure preferential seating, provide him with breaks, and ensure the availability of sensory materials, as needed. In addition, the IEP reflects that the student will be provided with space outside of the classroom where there are reduced distractions when he demonstrates disruptive behavior so that he can work with “one-to-one adult support.” It indicates that either the school staff or the student can initiate the student’s removal from the classroom to this setting, if necessary (Docs. d, k, m, and p).

2. The IEP further requires that the student be provided with counseling and occupational therapy, as related services, to assist him with his behavioral and sensory needs. The IEP also includes supports such as the use of a visual daily schedule, redirection, verbal prompts, clear directions, reduced distractions and sensory input, including “a quiet place to complete class work,” when the student is unable to function in the classroom or becomes distracted (Docs. d and p).”
3. The weekly logs maintained by the school social worker and the occupational therapist document that the student has been provided with counseling and occupational therapy on a weekly basis. The classroom progress reports completed by the teachers, the provision of one-to-one adult support, daily attendance logs, logs of time in the resource room, behavior intervention incident reports, and reports of progress towards achieving the annual goals document that the student has been provided with the behavior supports in the IEP including the use of a quiet area to complete work, redirection, use of sensory materials, and breaks (Docs. d, g – k, m, and p).

### **Time Outside of the Classroom**

4. There is documentation that the student is removed from the classroom setting to work with “one-to-one adult support” on a daily basis and that the student has only been able to access special education instruction in the classroom for approximately five to fifteen (5 – 15) minutes per class due to his interfering behaviors (Docs. g, i, l, and m).
5. On September 24, 2013, the IEP team considered the complainant’s concerns that the student’s inability to remain in the classroom, due to his behaviors, is impacting his access to special education instruction. The school staff agreed that the student is not able to remain in the classroom consistently throughout the school day and reported that they were not sure why the behavioral interventions being provided were not working. However, the IEP team decided that the IEP remains appropriate because, despite these concerns, the student has the opportunity to complete his class work outside of the classroom with “one-to-one adult support” (Doc. p).

### **Behavioral Interventions**

6. The IEP and BIP in effect since August 15, 2013 state that “crisis intervention” services are to be used when the student “becomes a danger to himself or others,” including the “use of exclusion, seclusion, and physical restraint.” While the document states that the

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interventions will be used when the student becomes a danger to himself or others, it does not describe the specific behaviors or circumstances which would constitute such a danger (Docs. c and d ).

### **Restraint**

7. On September 26, 2013, the FCPS informed the complainant, in writing, that the student was accidentally injured when he and the school staff fell to the floor during an incident of physical restraint (Doc. n).
8. There is documentation of the use of physical restraint with the student on at least sixteen (16) occasions since August 15, 2013. The documentation of incidents that occurred between August 15, 2013 and October 16, 2013 do not include information about the interventions used prior to the use of physical restraint or identify the staff who used the physical restraint with the student. The log of the use of physical restraint reflects that it was used with the student on September 17 and 24, 2013, but does not document specific information about each incident or that the complainant was informed of the use of the behavior intervention (Docs. e and f).

### **Seclusion**

9. The documentation indicates that on September 24, 2013 and November 6 and 7, 2013, seclusion was used with the student following incidents where he threatened to cause physical harm to school staff or another student. The documentation of the use of seclusion does not include all of the required content, such as length of time of each incident and the student's behavior during each incident, nor does it include the signature of the administrator informed of the use of the behavior intervention (Docs. e - g).

### **DISCUSSION/CONCLUSIONS:**

#### **Allegation #1: Provision of Behavioral Supports Required by the IEP**

In order to provide a student with a Free Appropriate Public Education (FAPE), the public agency must ensure that the student receives the special education and related services, as required by the IEP (34 CFR §§300.101, .320, and .323). The IEP must include annual goals for the student to improve in the areas of need arising out of the disability and a statement of the special education and related services and supplementary aids and services needed to assist the student in achieving the annual IEP goals, consistent with the evaluation data (34 CFR §300.320). For students whose behavior interferes with their learning or that of other students, the IEP team is also required to consider positive behavioral interventions to address the behavior (34 CFR §300.324).

When reviewing and revising the IEP to ensure that it addresses the student's needs consistent with the evaluation data, the IEP team must consider the concerns of the parents, information from the school staff about the student's classroom performance, and results of assessment data. Based on the information, the IEP team must ensure that the IEP addresses any lack of

expected progress towards the annual IEP goals and the student's anticipated needs (34 CFR §300.324).

Based on the Findings of Facts #1 - #3, the student has been provided with the behavioral supports required by the IEP. However, based on the Findings of Facts #4 and #5, the MSDE finds that, even with the provision of the behavioral supports, the student is only in the classroom and receiving instruction for short periods of time during the school day due to his interfering behaviors.

Further, based on the Findings of Facts #1, #2, and #4, the MSDE finds that the student is not being provided with the amount of special education instruction required by the IEP because, due to these same interfering behaviors, he is out of classroom and, therefore, missing special education instruction.

Based on the Finding of Fact #5, the MSDE further finds that the IEP team has not reviewed and revised the IEP to address the interfering behaviors consistent with the evaluation data. Therefore, as the result of these violations the MSDE finds that FCPS denied the student a FAPE since August 15, 2013.

## **Allegation #2: Use of Restraint and Seclusion**

### Use of Seclusion

Seclusion is defined as the confinement of a student, alone in a room, from which the student is physically prevented from leaving. The use of seclusion is prohibited in public agencies and nonpublic schools unless the student's IEP or BIP describes the specific behaviors and circumstances in which seclusion may be used (COMAR 13A.08.04.02).

The room used for seclusion must be free of objects and fixtures with which a student could self-inflict bodily harm. The room used for seclusion must provide school personnel with an adequate view of the student from an adjacent area and adequate lighting and ventilation (COMAR 13A.08.04.05).

While using seclusion with the student, the school personnel must keep the student in their view at all times. The school personnel must also provide a student placed in seclusion with an explanation of the behavior that resulted in the removal and instructions on the behavior required to return to the learning environment. A seclusion event must be appropriate to the student's developmental level and severity of the behavior, cannot restrict the student's ability to communicate distress, and cannot exceed thirty (30) minutes (COMAR 13A.08.04.05).

Each time a student is placed in seclusion, school personnel must document the other less intrusive interventions that have failed or been determined inappropriate, the precipitating event immediately preceding the behavior that prompted the use of seclusion, the behavior that prompted the use of seclusion, and the names and signatures of the staff members implementing and monitoring the seclusion. The documentation must also include a description of the seclusion event, including justification for initiating the use of seclusion. The length of time in

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seclusion, the student's behavior and reaction during the seclusion, the name and signature of the administrator informed of the use of seclusion. The documentation of the use of seclusion must be maintained in the student's educational record and available for inspection by the student's parent or legal guardian (COMAR 13A.08.04.05B).

In this case, the complainant alleges that seclusion has been utilized with the student on a daily basis. However, as determined in Allegation #1, the MSDE finds that the student's daily removal from the classroom has been for the purpose of working in the area of reduced distractions with "one-to-one adult support," which does not constitute the use of seclusion.

Based on the Finding of Fact #6, the MSDE finds that while the IEP and BIP permit the use of seclusion, they do not describe the specific behaviors or circumstances that constitute a threat of harm to the student or others that require the use of this behavior intervention. Further, based on the Finding of Fact #9, the MSDE finds that when the school staff did utilize seclusion with the student, they did not properly document its use. Therefore, this office finds that there is no documentation that school staff followed proper procedures when using seclusion with the student and that a violation occurred with respect to this aspect of the allegation.

#### Use of Physical Restraint

Physical restraint is defined as the use of physical force, without the use of any device or material, which restricts the free movement of all or a portion of the student's body (COMAR 13A.08.04.02). The use of physical restraint is prohibited in public agencies and nonpublic schools unless specified in the IEP or if there is an emergency situation and physical restraint is necessary to protect a student or another person from imminent, serious physical harm, after other less intrusive, nonphysical interventions have failed, or been determined inappropriate (COMAR 13A.08.04.03).

The school staff may only use physical restraint in a humane, safe, and effective manner (COMAR 13A.08.04.03). When utilizing physical restraint, school personnel may not place the student in any position that will obstruct the student's airway or otherwise impair the student's ability to breathe, obstruct a staff member's view of a student's face, restrict a student's ability to communicate distress, or place pressure on the student's head, neck, or torso (COMAR 13A.08.04.05). Physical restraint must be discontinued as soon as the student is calm and its use may not exceed thirty (30) minutes (COMAR 13A.08.04.05A(1)).

Each time that physical restraint is used, school staff must document the incident, which must include specific information about the type of restraint used and the length of time in restraint (COMAR 13A.08.04.05(3)). The parent must also be provided with either verbal or written notification of the incident within twenty-four (24) hours unless otherwise provided for in the IEP or behavior intervention plan (COMAR 13A.08.04.05).

In this case, based on the Finding of Fact #7, the MSDE finds that school staff did not ensure that physical restraint was utilized with the student in a safe manner on August 15, 2013. Further, based on the Finding of Fact #8, the MSDE further finds that there is no documentation that

school staff consistently followed proper procedures when using physical restraint with the student and that, as result, a violation occurred with respect to this aspect of the allegation.

**CORRECTIVE ACTIONS/TIMELINE:**

**Student-Specific**

The MSDE requires the FCPS to provide documentation by February 1, 2014 that the student's behavioral needs have been properly identified, that the IEP team has reviewed and revised the IEP consistent with the evaluation data, and that the student is receiving the amount of special education instruction required by the IEP.

The MSDE requires the FCPS to provide documentation by April 1, 2014 that the IEP team has determined the amount and nature of compensatory services or other remedy for the loss of a FAPE from August 15, 2013 until the date when there is documentation that the IEP has been reviewed and revised to address the student's behavioral needs and the student is receiving the amount of special education instruction required by the IEP.

The FCPS must provide the complainant with proper written notice of the determinations made at the IEP team meeting, including a written explanation of the basis for the determinations, as required by 34 CFR §300.503. If the complainant disagrees with the IEP team's determinations, she maintains the right to request mediation or to file a due process complaint, in accordance with the IDEA

**Systemic**

The MSDE requires the FCPS to provide documentation by April 1, 2014 of the steps it has taken to ensure compliance with the requirements related to development and implementation of the IEP and the use of the behavior interventions for all students that it has place at XXXXXXXXXXXX.

Upon receipt of this report, the MSDE will re-verify the data to ensure continued compliance with the regulatory requirements, consistent with the requirements of The United States Department of Education, Office of Special Education Programs. By copy of this Letter of Findings this office is informing the MSDE Nonpublic School Approval Branch of the findings made as a result of the investigation for its use in conducting future monitoring activities at XXXXXXXXXXXX.

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 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, which must be received within fifteen (15) days of the date of this letter, if they

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disagree with the findings of fact 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 requirements as reported in this Letter of Findings.

Questions regarding the findings, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The complainants 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 this State complaint investigation, consistent with the IDEA. The MSDE recommends that this Letter of Findings be included with any request for mediation or due process complaint.

Sincerely,

Marcella E. Franczkowski, M.S.  
Assistant State Superintendent  
Division of Special Education/Early Intervention Services

MEF/km

cc : Theresa R. Alban  
Linda Chambers  
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Donna Piper  
Sarah Spross  
Chezia Calloway  
Dori Wilson  
Cynthia Amirault  
Anita Mandis  
Martha J. Arthur  
Koliwe Moyo