



Lillian M. Lowery, Ed.D.  
State Superintendent of Schools

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July 5, 2013

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Mrs. Chrisandra A. Richardson, Associate Superintendent  
Department of Special Education and Student Services  
Montgomery County Public Schools  
850 Hungerford Drive, Room 220  
Rockville, Maryland 20850

Ms. Gwendolyn J. Mason, Director  
Department of Special Education Services  
Montgomery County Public Schools  
850 Hungerford Drive, Room 225  
Rockville, Maryland 20850

RE: XXXXX  
Reference: #13-089

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 May 8, 2013, 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 above-referenced student. The MSDE investigated the allegations listed below.

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1. The MCPS has not ensured that the student's Individualized Education Program (IEP) addresses his "sensory-seeking" behaviors, since May 8, 2012<sup>1</sup>, in accordance with 34 CFR §300.324.
2. The MCPS has not ensured that proper procedures were followed when determining the student's educational placement in effect since May 8, 2012<sup>1</sup>, in accordance with 34 CFR §§300.114 -.116 and .321.
3. The MCPS has not ensured that proper procedures were followed when determining that the student would pursue a Maryland High School Certificate of Program Completion rather than a Maryland High School Diploma, in accordance with COMAR 13A.03.02.09.

#### **INVESTIGATIVE PROCEDURES:**

1. Ms. Tyra Williams, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On May 10, 2013, the MSDE sent a copy of the complaint, via facsimile, to Ms. Gwendolyn Mason, Director, Department of Special Education Services, MCPS, and Ms. Julie Hall, Director, Division of Business, Fiscal, and Information Systems, MCPS.
3. On May 28 and 30, 2013 and June 3, 2013, Ms. Williams conducted telephone interviews with the complainant to clarify the allegations to be investigated.
4. On June 3, 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 the MCPS of the allegations and requested that the MCPS review the alleged violations.
5. On June 11, 2013, the complainant sent the MSDE documentation to be considered during the investigation.
6. On June 12, 2013, the MCPS sent the MSDE documentation to be considered during the investigation.

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<sup>1</sup> The complainant included allegations of violations that occurred more than a year from the date of receipt of the complaint (Doc. a). On June 3, 2013, the complainant was informed, in writing, that this office has authority to investigate allegations of violations that occurred not more than one (1) year from the date that the complaint was received, in accordance with 34 CFR §300.153.

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7. On June 13, 2013, Ms. Williams and Ms. Kathy Stump, Education Program Specialist, MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXX (XXXXXX) to review the student's educational record, and interviewed the following MCPS staff:

- a. Ms. XXXXXXXX, Special Education Teacher, Autism Unit, XXXXXXXX;
- b. Ms. XXXXXXXX, Occupational Therapist, XXXXXXXX;
- c. Ms. XXXXXXXX, Program Specialist, Autism Unit, XXXXXXXX;
- d. Ms. XXXXXXXXXXXX, School Psychologist, XXXXXXXXXXXXXXXXXXXX (XXXXXXXXXX);
- e. Ms. XXXXXXXXXXXXXXXX, Special Education Program Specialist, Autism Unit, XXXXXXXX;
- f. Ms. XXXXXXXX, Preschool Education Program Coordinator, XXXXXXXX;
- g. Ms. XXXXXXXXXXXX, Preschool Education Program Teacher, XXXXXXXX;
- h. Ms. XXXXXXXX, Principal, XXXXXXXX; and
- i. Ms. XXXXXXXXXXXX, Instructional Specialist, Autism Unit, XXXXXXXX.

Ms. Sharon Gooding, Supervisor, Equity Assurance and Compliance Unit, MCPS, attended the site visit as a representative of the MCPS and to provide information on the MCPS policies and procedures, as needed.

8. On June 13, 2013, Ms. Williams and Ms. Stump conducted a telephone interview with Ms. XXXXXXXXXXXX, IEP Chairperson, XXXXXXXX, concerning the allegations being investigated. Ms. Gooding, and Ms. Meryl Benko, Paralegal, Equity Assurance and Compliance Unit, MCPS, participated in the telephone interview as representatives of the MCPS and to provide information on the MCPS policies and procedures, as needed.

9. 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 May 8, 2013;
- b. Correspondence from the complainant to the MSDE, received on June 11, 2013;
- c. IEP, dated January 3, 2012;
- d. Functional Behavior Assessment, dated May 1, 2012;
- e. Behavior Intervention Plan, dated May 1, 2012;
- f. IEP, dated May 29, 2012;
- g. List of "sensory-seeking" management tools to be used, dated May 29, 2012;
- h. List of "sensory-seeking" management tools to be used, dated December 12, 2012;
- i. IEP, dated January 28, 2013;
- j. Daily progress sheets for the student, documenting progress in the general education classroom, dated February 27, 2013 through June 5, 2013;

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- k. Audio recording of the May 13, 2013 IEP team meeting;
- l. IEP, dated June 3, 2013; and
- m. Audio recording of the June 3, 2013 IEP team meeting.

### **BACKGROUND:**

The student is five (5) years old. He is identified as a student with Autism under the IDEA and has an IEP that requires the provision of special education and related services.

During the 2011-2012 school year, the student participated in a pre-school program at XXXXXX XXXXXXXXXXXX (XXXXXXXXXX). As a result of a change in the student's educational placement, which was determined by the IEP team, the student attended kindergarten at XXX XXXXXXXXXXXXXXXXXXXX (XXXXXX) during the 2012-2013 school year. As the result of another change in the student's educational placement determined by the IEP team, the student has been assigned to the XXXXXXXXXXXXXXXXXXXX for the 2013-2014 school year.

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 procedural safeguards (Docs. c, f, i, k, l, and m).

### **ALLEGATIONS #1 AND #2:      DEVELOPMENT OF THE EDUCATION PROGRAM AND DETERMINATION OF THE EDUCATIONAL PLACEMENT**

### **FINDINGS OF FACTS:**

#### ***IEP in effect from May 8, 2012 through May 28, 2012***

1. The IEP developed on January 3, 2012, at XXXXXXXX, identified the student's needs in the area of adaptive behaviors, including the need to reduce his "sensory-seeking" behaviors, which included biting and hitting himself and grabbing and "patting" his peers. The IEP had an annual goal for the student to reduce these behaviors with the provision of teacher prompts in the classroom and the use of a communication book with him. It also required the provision of supplementary aids and services, such as the daily use of a "sensory diet," which included a variety of ways to address the student's need for sensory input in order to remain focused and organized throughout the school day. Although the IEP required the provision of the "sensory diet" throughout the day, it also stated that the "sensory diet" would be implemented by an occupational therapist who would provide services to address his "sensory-seeking" behaviors once a month (Doc. a).

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2. The IEP team decided that the least restrictive environment (LRE) in which the IEP could be implemented with the provision of supplementary aids and services, including the provision of the “sensory diet,” was a combination of the general and separate special education classrooms, which would address the student’s need for a highly structured program with a low student to teacher ratio. The IEP team documented that these supports were required to address the student’s “significant interfering behaviors, delays in communication, and adaptive skills” (Doc. a).
3. There is no documentation that a “sensory diet” was developed following the January 3, 2012 IEP team meeting (Review of the educational record).

***IEP in effect from May 29, 2012 through January 27, 2013***

4. On May 29, 2012, the IEP team at XXXXXXXXXX reviewed a Functional Behavioral Assessment (FBA), which documents that the student continued to demonstrate “sensory-seeking” behaviors. The FBA indicates that the behaviors are exhibited when the student is frustrated with the inability to communicate his needs and when he is required to perform non-preferred tasks. At the meeting, the IEP team determined the activities in which the student would receive sensory input through the “sensory diet” (Docs. d, e, and f).
5. At the May 29, 2012 meeting, the IEP team also reviewed a Behavioral Intervention Plan (BIP) that required that the student be provided with sensory input before he participates in non-preferred tasks. The BIP also required school staff to review a visual chart of daily expectations with him each day. The BIP stated that these interventions were to be provided by the occupational therapist, the teacher, and a paraprofessional (Docs. d, e, and f).
6. The IEP team decided that special education instruction would be provided in a life skills curriculum and that the LRE in which the IEP can be implemented with the use of supplementary aids and services is a separate special education classroom. The IEP team documented that the basis for the decision was that the student required more one-to-one support in a program that is designed to address behaviors such as those exhibited by students with Autism. The IEP team decided that the services could not be provided in the school the student would attend if not disabled, but that he would be assigned to the school located closest to his home where the required services could be provided (Doc. f).
7. There is no documentation that the BIP was implemented following the May 29, 2012 IEP team meeting. The school staff report that they did not believe that it was necessary to implement the BIP because a “sensory diet” had been developed for the student (Review of the student’s educational record and interview with school staff).

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***IEP in effect from January 28, 2013 through June 2, 2013***

8. The IEP team at XXXXXXXXX met on January 28, 2013 to review the student's program and progress. At that meeting, the IEP team documented that the student continued to exhibit the "sensory-seeking" behaviors, but that the provision of a BIP was no longer needed. There is no documentation of the basis for the discontinuation of the BIP (Docs. h and i).
9. The IEP team also revised the IEP to reflect that the "sensory diet" will be provided by the "IEP team" (Doc. i).

***IEP in effect since June 3, 2013***

10. At an IEP team meeting, held on May 13, 2013 and June 3, 2013, the IEP team considered data from the assessments that had been recommended at a March 4, 2013 IEP meeting to discuss whether the student may be able to receive instruction in the general education curriculum instead of a life skills curriculum. The team also considered information from the student's teacher that the student was able to successfully access special education instruction in the general education curriculum, which was being provided on a trial basis. Based on the data, the team decided that the student will receive instruction in the general education curriculum. The IEP team added supplementary aids and services to the IEP that included the use of manipulatives, strategies to support and sustain attention, and positive/concrete reinforcement of appropriate behavior. The team also determined that the student continues to require the supports of a "sensory diet" to address "sensory-seeking" behaviors (Docs. k and l).
11. The team decided that with the provision of the additional services, as well as consultation between an Autism specialist and the student's teacher, the LRE in which the IEP can be implemented is a combination of general and separate special education classrooms. The team decided that special education instruction would be provided in the separate special education classroom in all academic areas and in the general education classroom in non-academic areas. The team rejected the complainant's request that the student be provided with special education instruction in some academic areas in the general education classroom due to the student's need for a setting with more structure and a lower teacher to student ratio to address his "significant delays in communication and adaptive skills" (Docs. j, k, l, and m).
12. After the educational placement decision was made, the complainant requested that a BIP be developed to address the "sensory-seeking" behaviors that the student continues to display throughout the day. The IEP team agreed that a "transitional BIP" would be

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developed to provide behavioral supports during the student's transition to a less restrictive environment. However, the IEP continues to state that a BIP is not required (Docs. k, l, and m).

## **DISCUSSION/CONCLUSIONS:**

### ***Allegation #1: IEP That Addresses "Sensory-Seeking" Behaviors***

When developing each student's IEP, the public agency must ensure that the IEP team considers the strengths of the student, the concerns of the parents for enhancing the education of the student, the results of the most recent evaluation, and the academic, developmental, and functional needs of the student (34 CFR §300.324).

In order to provide a Free Appropriate Public Education (FAPE) to a student with a disability, the public agency must ensure that the IEP includes a statement of the student's present levels of academic achievement and functional performance. This includes information about how the student's disability affects the student's involvement and progress in the general curriculum. Based on that information, the team must develop annual goals designed to meet the needs that result from the disability to enable the student to be involved in and make progress in the general education curriculum and to meet any other educational needs that result from the student's disability. The IEP must also include a clear statement of the special education instruction, related services, and supplementary aids and services to be provided to assist the student in achieving the annual goals (34 CFR §§300.320 and .324, and *Analysis of Comments and Changes*, Federal Register, Vol. 71, No. 156, p. 46662, August 14, 2006).

In order to ensure that the student receives the services required, the IEP must be written in a manner that is clear to all persons involved in the development and implementation of the IEP (34 CFR §§300.320 and .324, and *Analysis of Comments and Changes*, Federal Register, Vol. 64, No. 48, p.12479, March 12, 1999<sup>2</sup>).

The United States Department of Education, Office of Special Education Programs (OSEP), has indicated that, during a State complaint investigation, the State Educational Agency must determine whether proper procedures were followed by the IEP team when developing the IEP. The State Educational Agency must also review the evaluation data and determine whether the decisions made by the IEP team are consistent with the data (OSEP Memorandum #00-20, July 17, 2000 and *Analysis of Comments and Changes to IDEA*, Federal Register, Vol. 71, No. 156, p. 46601, August 14, 2006).

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<sup>2</sup> In the 2004 reauthorization of the IDEA, no changes were made to this requirement.

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In this case, the complainant alleges that the IEP is not designed to address the student's identified "sensory-seeking" behaviors (Doc. a). Based on the Findings of Facts #1, #2, #4, #8, and #10, the MSDE finds that the IEP team considered the evaluation data and developed an IEP that includes a goal, consistent with the needs identified by the team, for the student to reduce his "sensory-seeking" behaviors.

However, based on the Findings of Facts #1, #5, #9, and #12 the MSDE finds that the IEP has not contained a clear statement of how services are to be provided to assist the student with addressing his "sensory-seeking" behaviors since May 8, 2012. Therefore, the MSDE finds that the MCPS has not ensured that the IEP has addressed the student's "sensory-seeking" behaviors, and that a violation occurred with respect to this allegation.

Further, based on the Finding of Fact #8, the MSDE finds that there is no documentation of the basis for the IEP team's January 28, 2013 decision that the student no longer required the provision of a BIP. Therefore, the MSDE finds that there is no documentation that the decision is consistent with the data, and that a violation has occurred.

***Additional Violation: Implementation of the "Sensory Diet" and BIP***

The public agency must ensure that the special education, related services, accommodations, and supplementary aids and services, are provided in accordance with each student's IEP (34 CFR §§300.101). Further, based on the Findings of Facts #1 and #3, the MSDE finds that a "sensory diet" was not developed consistent with the IEP team's determination from May 8, 2012 through May 28, 2012. Based on the Findings of Facts #4 and #7, the MSDE also finds that the student was not provided with the supports required by the BIP from May 29, 2012 through January 28, 2013. Therefore, the MSDE finds that the student was not provided with the supports required by the IEP and that a violation occurred.

***Allegation #2: Educational Placement***

The educational placement of a student with a disability must be based on the IEP and be in the LRE in which the IEP can be implemented. To the maximum extent appropriate, students with disabilities must be educated with students who are not disabled. The IDEA requires that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved (34 CFR §§300.114 - .116 and COMAR 13A.05.01.10).



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Unless the student's IEP requires some other arrangement, the public agency must ensure that the student is educated in the school setting that the student would attend if not disabled. If the IEP requires placement in a school other than the school the student would attend if not disabled, the school must be located as close as possible to the student's home (34 CFR § 300.116 and COMAR 13A.05.01.10(C)(1)).

In this case, the complainant alleges that the school system has not ensured that the student has been provided with an educational placement where his "sensory-seeking" behaviors can be addressed (Doc. a). Based on the Findings of Facts #2, #6, and #11, the MSDE finds that the IEP team determined the LRE in which the IEP can be implemented with the provision of supplementary aids and services and determined that the placement would be as close as possible to the student's home when the IEP could not be implemented in the school he would attend if not disabled.

However, based on the Findings of Facts #1, #5, #9, #10 and #12, the MSDE finds that, because the IEP does not contain a clear statement of how services are to be provided to address the student's "sensory-seeking" behaviors, the MCPS has not ensured that the decision regarding the educational placement was based on the LRE in which those services can be provided since May 8, 2012. Therefore, the MSDE finds that a violation has occurred.

**ALLEGATION #3: DETERMINATION THAT THE STUDENT WILL PURSUE A MARYLAND HIGH SCHOOL CERTIFICATE OF PROGRAM COMPLETION**

**FINDINGS OF FACTS:**

13. At the January 28, 2013 IEP team meeting, the IEP team determined that the student would participate in the Alternate Maryland School Assessment Program (Alt-MSA) and that he would pursue a Maryland High School Certificate Program of Completion. However, there is no documentation that the IEP team considered whether the student meets the required criteria for participation in the Alt-MSA (Doc. I and interview with MCPS staff and review of the educational record).
14. At the June 3, 2013 IEP team meeting, the IEP was revised to reflect that the student will participate in the Maryland School Assessments (MSA) and that he will pursue a Maryland High School Diploma (Docs. k and l).

**DISCUSSION/CONCLUSIONS:**

Students in Maryland public schools may pursue either a Maryland High School Diploma or a Maryland High School Certificate of Program Completion. The decision that a student will receive a Maryland High School Certificate of Program Completion may not be made until the

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student's last year in high school unless the student participates in the Alt-MSA, which is Maryland's alternative assessment provided for students with the most significant cognitive disabilities (COMAR 13A.03.02.09).

Each public agency must ensure that all students with disabilities are included in all general State and district-wide assessments with appropriate accommodations and alternate assessments, if necessary, as indicated in the IEP (34 CFR §300.160). The IDEA requires that the IEP team determine the assessments in which a student with a disability will participate (34 CFR §300.320).

The IDEA further requires each State to develop and implement alternate assessments and guidelines for the participation of students with disabilities in alternative assessments for those students who cannot participate in regular assessments, even with accommodations (34 CFR §300.160).

The MSDE has developed guidelines for identifying the students who will participate in the Alt-MSA, which are set forth in the Maryland Accommodations Manual (Manual). The Manual states that a student with a significant cognitive disability will participate in the Alt-MSA if the student meets each of the six (6) factors listed below.

1. The student is learning (at emerging, readiness, or functional literacy levels) extended Maryland Reading and extended Maryland Mathematics Content Standards objectives;
2. The student requires explicit and ongoing instruction in functional skills;
3. The student requires extensive and substantial modification (e.g., reduced complexity of objectives and learning materials, and more time to learn) of the general education curriculum;
4. The student requires intensive instruction and may require extensive supports, including physical prompts, to learn, apply, and transfer or generalize knowledge and skills to multiple settings;
5. The student requires extensive support to perform and participate meaningfully and productively in daily activities in school, home, community, and work environments; and
6. The student cannot participate in the MSA even with accommodations (Manual, Section 3-7).

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Based on the Findings of Facts #13 and #14, the MSDE finds that there is no documentation that the IEP team considered whether the student meets the required criteria when determining that he will participate in the ALT-MSA from January 28, 2013 to June 2, 2013. Therefore, the MSDE finds that there was no data that the student has a significant cognitive disability, which is required in order for the IEP team to have determined that he will pursue a Maryland High School Certificate of Program Completion prior to his last year in high school, and that a violation occurred.

Notwithstanding the violation, based on the Finding of Fact #13, the MSDE finds that the IEP was subsequently revised to reflect that the student will pursue a Maryland High School Diploma. Therefore, no student-based corrective action is required to address this violation.

### **CORRECTIVE ACTIONS/TIMELINE:**

#### **Student-Specific**

The MSDE requires the MCPS to provide documentation by the start of the 2013-2014 school year that the IEP team has reviewed and revised the IEP to ensure that it is written clearly with respect to the services to be provided to address the student's "sensory-seeking" behaviors. The MCPS must also provide documentation that the IEP team has determined the educational placement based on the revised IEP and the *compensatory services*<sup>3</sup> or other remedy needed to redress the violations related to the development of the program, the determination of the educational placement, and the implementation of the IEP.

The MCPS 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 file a due process complaint, in accordance with the IDEA.

#### **School-Based – XXXXXXXXXXXX**

The MSDE requires the MCPS to provide documentation by the start of the 2013-2014 school year that steps have been taken to determine whether the violations related to the development of the IEP, determination of the educational placement, and implementation of the IEP constitute a pattern of noncompliance at XXXXXXXXXXXX. Specifically, the school system is required to conduct a review of student records, data, or other relevant information to determine if the regulatory requirements are being implemented and must provide documentation of the results of

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<sup>3</sup> Compensatory services, for the purposes of this letter, mean the determination by the IEP team as to how to remediate the denial of appropriate services to the student (34 CFR § 300.151).

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this review to the MSDE. If the school system reports compliance with the requirements, the MSDE staff will verify compliance with the determinations found in the initial report.

#### **School-Based – XXXXXXXX**

The MSDE requires the MCPS to provide documentation by the start of the 2013-2014 school year that steps have been taken to determine whether the violations related to the development of the IEP, including the determination that the student would pursue a Maryland Certificate High School Certificate of Program Completion, and the determination of the educational placement constitute a pattern of noncompliance XXXXXXXX. Specifically, the school system is required to conduct a review of student records, data, or other relevant information to determine if the regulatory requirements are being implemented and must provide documentation of the results of this review to the MSDE. If the school system reports compliance with the requirements, the MSDE staff will verify compliance with the determinations found in the initial report.

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 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 requirements as reported in this Letter of Findings.

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Questions regarding the Findings of Facts, Conclusions and Corrective Actions contained in this letter should be addressed to this office in writing. The complainant 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 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:tw

Joshua P. Starr

Julie Hall

Sharon Gooding

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Dori Wilson

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Nancy Vorobey

Anita Mandis

Martha J. Arthur

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