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Interim State Superintendent of Schools

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September 23, 2011

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Dr. Kim Hoffman  
Interim Executive Director, Special Education  
Baltimore City Public Schools  
200 East North Avenue, Room 204-B  
Baltimore, Maryland 21202

Dr. Kim Lewis  
Interim Executive Director, Human Capital  
Baltimore City Public Schools  
200 East North Avenue  
Baltimore, Maryland 21202

RE: XXXXX  
Reference: #12-004

Dear Parties:

The Maryland State Department of Education, Division of Special Education/Early Intervention Services (MSDE), 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 July 25, 2011, the MSDE received a complaint from Ms. XXXXXXXXXXXX, hereafter, “the complainant,” on behalf of her son. In that correspondence, the complainant alleged that the Baltimore City Public Schools (BCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student.

The MSDE investigated the following allegations:

1. The BCPS should have begun the evaluation process prior to March 2011, when the evaluation process began, to determine if the student is a student with a disability in need of special education and related services, in accordance with 34 CFR §§300.111, and .301-.311 and COMAR 13A.05.02.13(A);
2. The BCPS did not follow proper procedures when disciplinarily removing the student from school during the 2010-2011 school year, in accordance with 34 CFR §300.534;

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3. The BCPS did not follow proper procedures when using physical restraint with the student in June 2011, in accordance with COMAR 13A.08.04.05; and
4. The BCPS did not ensure that a copy of the May 2011 Individualized Education Program (IEP) document was maintained in the student's education record, in accordance with COMAR 13A.08.02.04 and 13A.08.02.28.

### **INVESTIGATIVE PROCEDURES:**

1. Ms. Kathy Stump, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On July 27, 2011, the MSDE sent a copy of the complaint, via facsimile, to Dr. Kim Hoffman, Executive Director, BCPS; and Ms. Nancy Ruley, Associate Counsel, BCPS.
3. On that same date, Ms. Stump spoke with the complainant by telephone to clarify the allegations to be investigated.
4. On July 29, 2011, 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 Dr. Hoffman of the allegations and requested that her office review the alleged violations.
5. On August 9, 2011, Ms. Stump reviewed the student's education record at the BCPS Central Office. Ms. Tiffany Puckett, Associate Counsel, BCPS, was present at the record review.
6. On September 1, 2011, Ms. Stump and Ms. Koliwe Moyo, Education Program Specialist, MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXX and interviewed the following school staff:
  - a. Ms. XXXXXXXXXXX, Special Education Teacher;
  - b. Ms. XXXXXXXXXXX, Third (3<sup>rd</sup>) Grade Teacher;
  - c. Ms. XXXXXXXXXXX, IEP Team Associate; and
  - d. Ms. XXXXXXXXXXX, Principal.

Ms. Puckett attended the site visit as a representative of the BCPS and to provide information on BCPS policies and procedures, as needed.

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7. 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 MSDE, received on July 25, 2011;
  - b. Child find referral, dated March 7, 2011;
  - c. Notice and consent for assessment, dated March 7, 2011;
  - d. Educational assessment report, dated March 14, 2011;
  - e. Psychosocial assessment report, dated April 27, 2011;
  - f. Psychological assessment report, dated May 3, 2011;
  - g. Evaluation report and determination of initial eligibility form, dated May 3, 2011;
  - h. IEP, dated May 3, 2011;
  - i. Receipt of parental rights document, dated May 3, 2011;
  - j. IEP, dated June 2, 2011;
  - k. Functional behavior assessment, dated June 2, 2011;
  - l. Behavior intervention plan, dated June 2, 2011;
  - m. Receipt of parental rights document, dated June 2, 2011; and
  - n. Student's discipline record for the 2010-2011 school year.

### **BACKGROUND:**

The student is nine (9) years old. On May 3, 2011, the student was identified as a student with an emotional disability under the IDEA. He attends XXXXXXXXXXXXXXXXXXXX, where he receives special education and related services. During the period of time addressed by this investigation, the complainant participated in the education decision-making process and was provided with notice of the procedural safeguards (Docs. a, c, g, h, i, j, and m).

### **ALLEGATION #1:**

### **EVALUATION PROCEDURES**

### **Findings of Facts:**

1. There is documentation that since the beginning of the 2010-2011 school year, the student demonstrated disruptive behaviors at school, such as defying instructions from his teachers, initiating arguments and physical fights with his peers, disrupting instruction, and eloping from class (Docs. b, e, f, and g).
2. On October 18, 2010 and December 1, 2010, the Student Services Team (SST) met to discuss and address the student's behaviors that interfered with his learning. The SST developed a set of behavioral interventions to be implemented in the general education classroom, including tracking behavior through charts, shortening assignments, allowing the student to talk with the school social worker, giving the student verbal praise for appropriate conduct, providing the student with "time out" and extended breaks, and teaching the student conflict resolution skills (Doc. b).

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3. On March 7, 2011, in response to a written referral from the student's teacher, the IEP team convened. The referral indicates that the student has difficulty in several areas, including social/emotional skills. Specifically, the written referral indicates that the student lacks motivation, lacks self-control, is easily frustrated, has sudden changes in mood throughout the school day, interrupts and distracts the class, is unusually aggressive toward others, has difficulty interpreting social cues, does not accept responsibility for his own behavior, and is easily influenced by others. The written referral indicates that the strategies in place from the SST were not effective (Doc. b).
4. Based on the IEP team's review of the information, additional data was needed to determine whether the student is a student with a disability in need of special education instruction and related services. The team recommended that an educational assessment, a psychological assessment, and a psychosocial assessment be conducted. The complainant provided written consent for the assessments (Docs. b and c).
5. On May 3, 2011, the IEP team reconvened to review the results of the assessments. The psychosocial assessment report indicates that the student's behavior interferes with his ability to learn. The report states that the student disrupts instruction by "compulsively banging pencils together," is defiant, requires redirection more often than his peers, initiates arguments with other students, is "impulsive, fidgety, does not respect others, lacks social interpersonal skills, and elopes from class" (Doc. e).
6. The psychological assessment report indicates that the student demonstrates characteristics of a student with an emotional disability that "have persisted to a marked degree and for a period exceeding six months." The psychological assessment report also includes a recommendation that the student would benefit from a "strict, classwide, contingency-based behavior program" and "ready access to school-based mental health professionals." The supports would also be available to staff (Doc. f).
7. The educational assessment report indicates that the student scored "average" in reading, with demonstrated needs in "passage comprehension," and scored "low average" in math and written language (Doc. d).
8. After the IEP team reviewed the results of the assessments, it recommended that in order to follow-up on the recommendation of the psychological assessment report, additional data was needed to better address the student's behavioral needs. The team determined that a functional behavior assessment (FBA) should be conducted and a behavior intervention plan (BIP) developed. The complainant provided consent for the FBA (Doc. h).

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9. Based on the IEP team's review of the assessment data available at the May 3, 2011 meeting, it determined that the student is a student with an emotional disability and requires special education instruction and related services (Doc. g).
10. The team developed an IEP with goals to address the student's identified needs in math, reading, written language, and behavior related to social interaction skills. In order to assist the student in achieving the IEP goals, the team determined that he requires special education instruction in the general education classroom and counseling as a related service outside of the general education classroom. The IEP team at the May 3, 2011 meeting determined that the least restrictive environment (LRE) in which the student's IEP can be implemented is the general education classroom (Doc. h).
11. The team further determined that in order to implement the student's IEP in the LRE, the student requires accommodations and supplementary aids and services, including use of visual and graphic organizers, extended time to complete assignments, reduced distractions to the student, use of a word bank, repetition of directions, and breaking assignments into smaller units (Doc. h).
12. On June 2, 2011, the IEP team reconvened to review the results of the FBA and to develop the BIP. The FBA indicates that the student's behavior appears "to be triggered by [his] perceptions of what is happening around him" and that he removes himself "from a setting or situation that he perceives as threatening or noxious" (Doc. k).
13. After reviewing the results of the FBA, the team developed a BIP including strategies to use "proximity control," give the student frequent positive feedback for desired behaviors, teach the student to recognize when his anxiety is beginning to escalate and to seek alternative ways to remove himself to a different environment, use a tangible reward system, and give the student choices (Doc. l).

### **Discussion/Conclusions:**

#### **Implementation of Interventions and Strategies Prior to Special Education Referral**

The "child find" requirements of the IDEA impose an affirmative obligation on the school system to identify, locate, and evaluate all students residing within its jurisdiction who have disabilities and who need special education and related services, or are suspected of having disabilities and being in need of special education and related services. It is, however, the intent of State and federal law that interventions and strategies be implemented to meet the needs of students within the regular school program, as appropriate, before referring students for special education services (34 CFR §300.111 and COMAR 13A.05.02.13(A)).

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To meet this expectation, school staff may review a student's academic and behavioral performance and determine teaching strategies, modifications to instruction, and behavior management techniques that will appropriately assist the student. However, the public agency must ensure that implementation of intervention strategies do not delay or deny a student's access to special education services under the IDEA (34 CFR §300.111).

In order to ensure that students are not misidentified as being disabled, the IDEA requires that students meet specific criteria to be determined eligible for special education instruction and related services. To be identified as a student with an emotional disability, a student must exhibit specific characteristics, such as an inability to build or maintain satisfactory interpersonal relationships with peers and teachers and inappropriate behaviors or feelings under normal circumstances, over a long period of time (34 CFR §300.8).

There are no regulations or guidelines to define the term "long period of time" for purposes of determining how long interventions and strategies should be provided prior to evaluating a student to determine whether the student is a student with emotional disability and in need of special education. However, the United States Department of Education, Office of Special Education Programs (OSEP) has stated that "because of the variation in the type and intensity of behaviors which may be exhibited [by students], a number of States have elected to operationalize 'long period of time' by providing a range of time during which the behavior must have been present, generally two to nine months." OSEP has stated that these State practices are acceptable (*Letter to Anonymous*, 213 IDELR 247, 1989).

Based on the Findings of Facts #1-3, the MSDE finds that school staff implemented interventions and strategies designed to address the student's interfering behaviors in the general education classroom for a period of six (6) months before referring him to the IEP team for evaluation. Based on the Finding of Fact #3, the MSDE finds that only after these strategies were deemed ineffective did school staff refer the student to the IEP team. Therefore, the MSDE finds no violation regarding this aspect of the allegation.

#### Evaluation Procedures

As part of an initial evaluation, the IEP team must review existing evaluative data including evaluations and information provided by the student's parents; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related service providers. On the basis of that review, and input from the student's parents, the team must identify what additional data, if any, is needed to determine, among other things, whether the student is a student with a disability and the educational needs of the student (34 CFR §300.305).

In conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the

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student and must not use any single measure or assessment as the sole criterion for determining whether a student is a student with a disability or for determining an appropriate educational program for the student. The public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities (34 CFR § 300.304).

Based on the Findings of Facts #3 and 4, the MSDE finds that when the IEP team convened on March 7, 2011 to consider whether the student is a student with a disability in need of special education instruction and related services, it reviewed the data available, determined that additional data was needed in order to make that determination and recommended assessments. Based on the Findings of Facts #5-13, the MSDE further finds that on May 3, 2011, the IEP team reviewed the assessments and other data, determined that the student is a student with a disability, and developed an IEP. Therefore, the MSDE finds no violation regarding this aspect of the allegation.

## **ALLEGATION #2: DISCIPLINARY REMOVALS**

### **Findings of Facts:**

14. When the IEP team met on March 7, 2011, to determine if the student is a student with a disability under IDEA, the student's discipline record documents that the student had been disciplinarily removed from school for ten (10) school days since the start of the 2010-2011 school year (Doc. n).
15. On March 22, 2011, the student was disciplinarily removed from school for two (2) more school days. While there is documentation that the student received a "work packet" from his teacher to complete at home, there is no documentation that the student received instruction (Doc. n, review of education record, and interview with school staff).

### **Discussion/Conclusions:**

#### **IDEA Protections for Students Suspected of Having a Disability**

A student who has not been determined to be eligible for special education and related services under the IDEA and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in the IDEA if the public agency had knowledge that the student may be a student with a disability before the behavior that precipitated the disciplinary action occurred (34 CFR §300.534).

A public agency is deemed to have knowledge that a student is a student with a disability under the IDEA if, among other events, a teacher of the student expresses specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of

the public agency or to other supervisory personnel of the agency *before* the behavior that precipitated the disciplinary action occurred (34 CFR §300.534).

Based on the Finding of Fact #14, the MSDE finds that the BCPS had knowledge that the student was a student with a disability because the IEP team met in March 2011 to consider the specific concerns of the student's teacher, which she expressed to supervisory personnel of the school when she completed a referral for evaluation. Therefore, the MSDE finds that the disciplinary removal protections applied to this student, even though his disciplinary removals occurred prior to the IEP team's eligibility determination.

#### Free Appropriate Public Education (FAPE) During Periods of Disciplinary Removal from School

The IDEA offers protections to a student with a disability who is disciplinarily removed from school for more than ten (10) school days in a school year, including ensuring the student continues to receive services to enable the student to continue to participate in the general education curriculum, although in another setting (34 CFR §300.530). Under Maryland law, the instructional setting for the provision of educational services to a student who has been disciplinarily removed from school in accordance with the IDEA *may not* be the student's home (COMAR 13A.05.01.10C(6)) (emphasis added).

Based on the Finding of Fact #15, the MSDE finds that the student was disciplinarily removed from school for more than ten (10) school days during the 2010-2011 school year and there is no documentation that the student received services after the tenth (10<sup>th</sup>) day of disciplinary removal. Therefore, the MSDE finds a violation regarding this allegation.

#### **ALLEGATION #3: USE OF PHYSICAL RESTRAINT**

##### **Findings of Facts:**

16. The student's BIP, developed on June 2, 2011, includes the use of restraint as a "last resort" if necessary, when the student "hits or otherwise attempts to injure others" (Doc. 1).
17. On June 14, 2011, there is documentation that the student was restrained by his classroom teacher. The documentation of the incident indicates that the student became noncompliant with the teacher's directions, cursed at her, then attempted to leave the room with more than five (5) pencils gripped in his hand. When the teacher attempted to redirect him, the student "began flailing his arms and hitting" her. The teacher "quickly and safely restrained" the student to "prevent additional harm" to her or other students (Doc. n).



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18. The documentation of the incident includes a description of the precipitating event immediately preceding the behavior that prompted the use of restraint, the behavior that prompted the use of restraint, the names of the school personnel who observed the behavior that prompted the use of restraint, and the names of the staff members implementing and monitoring the use of restraint (Doc. n).
19. The documentation of the incident does *not* include a description of other less intrusive interventions that failed or were determined inappropriate, a description of the type of restraint used, the length of time the student was in the restraint, the student's behavior and reaction during the restraint or the name and signature of the administrator informed of the use of restraint (Doc. n).
20. The student's classroom teacher reported that she has not been trained in the use of physical restraint (Interview with school staff).

### **Discussion/Conclusions:**

#### Use of physical restraint

The use of physical restraint is prohibited in public agencies unless 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. Physical restraint is also permitted if the student's BIP or IEP describes specific behaviors and circumstances in which physical restraint may be used (COMAR 13A.08.04.05A(1)(a)).

Based on the Finding of Fact #16, the MSDE finds that the student's BIP includes the use of restraint as a "last resort" if necessary, when he "hits or otherwise attempts to injure others." Based on the Finding of Fact #17, the MSDE further finds that the restraint occurred under the circumstances described in the BIP. Therefore, the MSDE finds no violation regarding this aspect of the allegation.

#### Documentation of the use of restraint

Each time a student is restrained, 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 restraint, the behavior that prompted the use of restraint, the names of the school personnel who observed the behavior that prompted the use of restraint, and the names and signatures of the staff members implementing and monitoring the use of restraint (COMAR 13A.08.04.05A(3)(a)).

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The documentation shall include a description of the restraint event, including the type of restraint used by school personnel. This serves to certify that school personnel have not placed the student in a face-down position, or in any other position that will obstruct the student's airway, impair the student's ability to breathe, obstruct a staff member's view of the student's face, restrict the student's ability to communicate distress, place pressure on the student's head, neck, or torso, or straddle the student's torso (COMAR 13A.08.04.05A(1)(e)).

The documentation of the restraint shall also include a description of the length of time in restraint, which may not exceed thirty (30) minutes; the student's behavior and reaction during the restraint; and the name and signature of the administrator informed of the use of restraint (COMAR 13A.08.04.05A(3)(b)). Each time restraint is used, the student's parent must be provided oral or written notification within twenty-four (24) hours, unless otherwise provided for in the student's BIP or IEP (COMAR 13A.08.04.05A(5)).

Based on the Finding of Fact #18, the MSDE finds that the documentation of the incident includes a description of the precipitating event immediately preceding the behavior that prompted the use of restraint, the behavior that prompted the use of restraint, the names of the school personnel who observed the behavior that prompted the use of restraint, and the names of the staff members implementing and monitoring the use of restraint.

Based on the Finding of Fact #19, the MSDE finds that the documentation of the incident does not include a description of other less intrusive interventions that failed or were determined inappropriate, a description of the type of restraint used, the length of time the student was in the restraint, the student's behavior and reaction during the restraint or the name and signature of the administrator informed of the use of restraint. Therefore, the MSDE finds a violation regarding this aspect of the allegation.

#### Training of school personnel in the proper use of physical restraint

Each public agency must provide professional development and training to designated school personnel on the appropriate implementation of the policies and procedures related to the use of restraint. The professional development and training must also include current professionally accepted practices and standards regarding positive behavioral intervention strategies and supports, functional behavioral assessment and behavior intervention planning, exclusion, restraint, and seclusion (COMAR 13A.08.04.06C(1)).

The training in current professionally accepted practices and standards regarding positive behavior interventions strategies and supports must include methods for identifying and defusing potentially dangerous behavior, FBA and BIP planning, exclusion, restraint and alternatives to restraint, seclusion, and symptoms of physical distress and positional asphyxia. Professional development shall include a written examination and a physical demonstration of proficiency in the described skills and competencies (COMAR 13A.08.04.06C).

Based on the Finding of Fact #20, the MSDE finds that the school staff who implemented the restraint in this case was not trained to utilize restraint, in accordance with the regulatory requirements. Therefore, the MSDE finds a violation regarding this aspect of the allegation.

**ALLEGATION #4: MAINTENANCE OF THE EDUCATION RECORD**

**Finding of Fact:**

21. There is a copy of the May 3, 2011 IEP, with the complainant's signature, maintained in the student's education record (Doc. h and review of education record).

**Discussion/Conclusions:**

In order to ensure that students are provided with services in accordance with the requirements of the IDEA, each public agency must accurately record information about each student, as specified in the *Maryland Student Records System Manual [Manual]* (COMAR 13A.08.02.04 and 13A.08.02.28). The *Manual* requires that each public agency maintain a copy of the student's IEP and related documentation of the student's program in the student's education record.

In this case, the complainant alleges that she provided written consent for the initial provision of special education instruction and related services by signing the IEP at the May 3, 2011 IEP team meeting. The complainant further alleges that subsequent to this provision of consent, school staff informed her that the signed IEP had been "lost" and requested that she sign a second copy of the IEP, dated June 2, 2011 (Doc. a and interview with complainant). Based on the Finding of Fact #21, the MSDE finds that the May 3, 2011 IEP, signed by the complainant, is maintained in the student's education record. Therefore, the MSDE finds no violation regarding this allegation.

**CORRECTIVE ACTIONS/TIMELINES:**

**Student-specific**

The MSDE requires the BCPS to provide documentation by November 30, 2011, that an IEP team has convened and determined if the student's ability to receive educational benefit from his program was adversely impacted as a result of not receiving instruction after the tenth (10<sup>th</sup>) day of disciplinary removal during the 2010-2011 school year. If the team determines an adverse impact, then the team needs to determine the nature and amount of *compensatory services*<sup>1</sup> or other remedy necessary to redress the violation.

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<sup>1</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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The BCPS 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**

The MSDE requires the BCPS to provide documentation, no later than January 15, 2012, that all staff who will be implementing physical restraint at XXXXXXXXXXXXXXXXXXXX have been trained in accordance with the regulatory requirements.

The MSDE also requires the BCPS to provide documentation, no later than December 15, 2011, of the steps taken to determine if the remaining violations related to physical restraint and disciplinary removals identified in this letter of findings are unique to this case or if they represent a pattern of noncompliance at XXXXXXXXXXXXXXXXXXXX.

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.

If the school system determines that the regulatory requirements are not being implemented, the school system must identify the actions that will be taken to ensure that the violations do not recur. The school system must submit a follow-up report to document correction within ninety (90) days of the initial date that the school system determines non-compliance.

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 OSEP. Furthermore, the findings in the Letter of Findings will be shared with the MSDE's Office of Quality Assurance and Monitoring for Continuous Improvement for its consideration during present or future monitoring of the BCPS.

Documentation of all corrective action taken is to be submitted to this office to: Attention: Chief, Complaint Investigation/Due Process 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.

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Please be advised that both the complainant and the school system 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.

Questions regarding the findings, conclusions and corrective actions contained in this letter of findings 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 a 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.

Sincerely,

Marcella E. Franczkowski, M.S.

Assistant State Superintendent

Division of Special Education/Early Intervention Services

MEF:ks

cc : Andrés Alonso  
Nancy Ruley  
Tiffany Puckett  
Erin Leff  
XXXXXXXXXX  
Dori Wilson  
Martha Arthur  
Kathy Stump