



Bernard J. Sadusky, Ed.D.
Interim State Superintendent of Schools

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November 15, 2011

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Dr. Kim Lewis
Executive Director, Special Education
Baltimore City Public Schools
200 East North Avenue
Baltimore, Maryland 21202

Dr. Kim Hoffman
Director, Data Monitoring & Compliance
Baltimore City Public Schools
200 East North Avenue, Room
Baltimore, Maryland 21202

RE: XXXXX
Reference: #12-022

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 September 27, 2011,¹ the MSDE received a complaint from Ms. XXXXXXXXX, 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 On September 15, 2011, the complainant provided the MSDE with correspondence containing allegations of violations of IDEA, which did not contain all of the necessary information to initiate a State complaint investigation. On September 27, 2011, the complainant provided the additional required information and the complaint investigation was initiated (34 CFR §300.153).

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1. The BCPS did not ensure the student was provided with the services of a dedicated aide required by the Individualized Education Program (IEP), at the start of the 2010-2011 school year,² in accordance with 34 CFR §300.101;
2. The BCPS did not follow proper procedures when using physical restraint with the student in October 2010, in accordance with COMAR 13A.08.04.05;
3. The BCPS did not follow proper procedures when using exclusion with the student between September 27, 2010 and the end of the 2010-2011 school year,² in accordance with COMAR 13A.08.04.04;
4. The BCPS did not ensure the student was provided with the supports required by his Behavior Intervention Plan (BIP) between September 27, 2010 and the end of the 2010-2011 school year,² in accordance with 34 CFR §300.101;
5. The BCPS has not ensured the student's IEP addresses his behavioral needs since September 27, 2010,² in accordance with 34 CFR §300.324; and
6. The BCPS has not ensured that the student has been provided with special education instruction in the placement required by his IEP since the start of the 2011-2012 school year, in accordance with 34 CFR §§300.114-.116 and .324.

INVESTIGATIVE PROCEDURES:

1. Ms. Kathy Stump, Education Program Specialist, MSDE, was assigned to investigate the complaint.
2. On September 15, 2011, the MSDE received written correspondence from the complainant containing allegations of violations of the IDEA.
3. On September 19, 2011, Ms. Anita Mandis, Section Chief, Complaint Investigation Section, Complaint Investigation and Due Process Branch, MSDE, spoke with the complainant by telephone to clarify the allegations and discussed the need for the complainant to provide a proposed remedy in order for a State complaint investigation to be initiated.
4. On September 27, 2011, the MSDE received the proposed remedy from the complainant.

² Although the complainant has alleged violations dating back to the start of the 2010-2011 school year, this office has authority to investigate allegations of violations that occurred not more than one (1) year prior to the date the complaint is received (34 CFR §300.153). Therefore, this investigation covers the time period since September 27, 2010.

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5. On September 28, 2011, the MSDE sent a copy of the complaint to Dr. Kim Lewis, Executive Director, Special Education, BCPS; Dr. Kim Hoffman, Director, Data Monitoring & Compliance, BCPS; and Ms. Nancy Ruley, Associate Counsel, BCPS, via facsimile.
6. On October 4, 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.
7. On October 13, 2011, Ms. Stump reviewed the student's education record at the Baltimore City Central Office. Ms. Ruley was present at the record review.
8. On October 19, 2011, Ms. Stump and Ms. Koliwe Moyo, Education Program Specialist, MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX (XXXXXXXXXXXX), a BCPS public school, and interviewed the following school staff:
 - a. Mr. XXXXXXXXX, Special Education Teacher;
 - b. Ms. XXXXXXXXX, School Social Worker;
 - c. Ms. XXXXXXXXX, Educational Associate;
 - d. Ms. XXXXXXXXX, Educational Associate; and
 - e. Ms. XXXXXXXXX, Principal.

Ms. Ruley attended the site visit as a representative of the BCPS and to provide information on the BCPS policies and procedures, as needed.
9. On October 25, 2011, Ms. Stump conducted a telephone interview with the complainant and requested that the complainant provide additional documentation.
10. On October 27, 2011, the complainant provided additional documentation related to the allegations, via United States mail. On the same date, the BCPS provided additional documentation related to the allegations, via e-mail.
11. On October 28, 2011, Ms. Stump conducted an interview, via telephone conference, with Ms. XXXXXXXXXXXX, Assistant Principal; Ms. XXXXXXXXXXXX, one-to-one aide; and Ms. XXX. Ms. Ruley also participated in the conference call.
12. On that same date, the BCPS provided the MSDE with additional documentation from the student's educational record, via e-mail.
13. On October 31, 2011 and November 1 and 2, 2011, the BCPS provided the MSDE with additional documentation and information regarding the allegations, via e-mail.

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14. 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 September 27, 2011;
 - b. Receipt of Parental Rights Notice, dated September 2, 2010;
 - c. IEP, dated September 2, 2010;
 - d. IEP, dated October 18, 2010;
 - e. Functional Behavior Assessment, dated March 16, 2011;
 - f. Behavior Intervention Plan, dated March 16, 2011;
 - g. Written correspondence from the complainant to XXXXXXXXXXXXX staff, dated April 7, 2011;
 - h. Written correspondence from the complainant to XXXXXXXXXXXXX staff, dated May 4, 2011;
 - i. IEP, dated May 17, 2011;
 - j. Student's class schedule for the 2010-2011 school year;
 - k. IEP progress reports for the 2010-2011 school year;
 - l. Student's disciplinary record for the 2010-2011 school year;
 - m. Communication log for the 2010-2011 school year;
 - n. E-mail correspondence between BCPS personnel, dated October 27, 2011; and
 - o. Student's class schedule for the 2011-2012 school year.

BACKGROUND:

The student is fifteen (15) years old. He is identified as a student with autism under the IDEA and receives special education instruction and related services. Since the start of the 2010-2011 school year, the student has attended XXXXXXXXXXXXX. 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 IEP team decisions and notice of the procedural safeguards (Docs. a-d and h).

ALLEGATION #1:

PROVISION OF A DEDICATED AIDE

Finding of Fact:

1. The IEP requires that the student be provided with a dedicated one-to-one aide. There is documentation that since September 27, 2010, a dedicated one-to-one aide has been provided (Docs. d, n, and interview with school staff).

Discussion/Conclusions:

The public agency is required to ensure that the student is provided with the special education and related services required by the IEP (34 CFR §300.101). In this case, the complainant alleges that the student was not provided with the services of a one-to-one aide at the start of the

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2010-2011 school year (Doc. a). Based on the Finding of Fact #1, the MSDE finds that the student was provided with the services of a dedicated one-to-one aide throughout the period covered by this complaint investigation. Therefore, the MSDE finds no violation regarding this allegation.

ALLEGATION #2: USE OF PHYSICAL RESTRAINT IN OCTOBER 2010

Findings of Facts:

2. Neither the student's IEP nor BIP includes the use of restraint as a behavior intervention (Docs. c, d, e, and h).
3. On October 25, 2010, the student began kicking, hitting, and spitting at his one-to-one aide. The documentation indicates that the aide "started to restrain" the student and also "grabbed [the student's] shirt to cover his mouth." The office referral form documents the precipitating event immediately preceding the behavior that prompted the use of the restraint, the behavior that prompted the use of the restraint, other less intrusive interventions that were attempted, the names of the school personnel who observed the behavior that prompted the use of the restraint, and the name and signature of the staff member who implemented the restraint (Doc. 1).
4. There is no documentation of a description of the restraint event, including the type of restraint; the length of time in restraint; the student's behavior and reaction during the restraint; the signatures of the other school personnel who observed the restraint; and the name and signature of the administrator informed of the use of restraint (Doc. 1).
5. The IEP team did not meet within ten (10) business days of the October 25, 2010 restraint incident (Docs. d, h, and review of educational record).
6. There is no documentation that the one-to-one aide who was involved in the restraint incident was trained in the use of restraint (Review of educational record and interview with the BCPS personnel).

Discussion/Conclusions:

Use of physical restraint

The use of physical restraint is prohibited in public agencies and nonpublic schools 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)).

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Physical restraint must be removed as soon as the student is calm and may not exceed thirty (30) minutes (COMAR 13A.08.04.05A(1)(d)). When utilizing physical restraint, school personnel may not place a student in a face-down position. School personnel may not place a student in any other position that will obstruct the student's airway or otherwise impair the student's ability to breathe. School personnel may not place a student in a position that will obstruct a staff member's view of the student's face, restrict the student's ability to communicate distress, or place pressure on the student's head, neck, or torso. School personnel may not straddle the student's torso (COMAR 13A.08.04.05A(1)(e)).

Based on the Finding of Fact #2, the MSDE finds that restraint was not included as a behavior intervention in the student's IEP or BIP. However, based on the Finding of Fact #3, the MSDE finds that the circumstances documented in the office referral describe an emergency situation in which physical restraint was necessary to protect the student or another person from imminent, serious bodily harm.

Notwithstanding the finding that an emergency existed, based on the Findings of Facts #3 and #4, the MSDE finds that the documentation of the restraint event indicates that during the incident, the student's face was partially obstructed in a manner that would restrict his ability to communicate. Therefore, the MSDE finds a 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)).

The documentation must include a description of the restraint event, including the type of restraint; the length of time in restraint; 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 Findings of Facts #3 and #4, the MSDE finds that the documentation of the restraint incident does not contain all of the required information. Therefore, the MSDE finds a violation regarding this aspect of the allegation.

Requirement to meet following the use of restraint

If restraint is used, and the student's IEP or BIP does not include the use of restraint, the IEP team must meet within ten (10) business days of the incident to consider the need for conducting

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a Functional Behavioral Assessment (FBA), developing appropriate behavioral interventions, and implementing a BIP. If the student already has a BIP, the team, at that meeting, must review and revise it, as appropriate, to ensure that it addresses the student's behavioral needs (COMAR 13A.08.04.05C(2)).

Based on the Finding of Fact #5, the MSDE finds that the IEP team did not meet as required. 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," FBA 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 (COMAR 13A.08.04.06C(3)). Professional development shall include a written examination and a physical demonstration of proficiency in the described skills and competencies (COMAR 13A.08.04.06C(4)).

Based on the Finding of Fact #6, the MSDE finds that school staff who implemented the restraint were not trained in accordance with the regulations. Therefore, the MSDE finds a violation regarding this aspect of the allegation.

ALLEGATION #3: USE OF EXCLUSION WITH THE STUDENT

Findings of Facts:

7. The student's IEP requires that he be provided with crisis intervention services. School staff report that the student is removed to an alternative instructional setting for the provision of these services, when necessary. This behavioral intervention is designed to take the student away from the circumstance that led to his agitation, allow him to deescalate, receive supports and instruction and complete his work (Docs. c, d, h, and interview with school staff).
8. There is documentation that the student is provided with the supports as indicated when removed to an alternative instructional setting for the purpose of crisis intervention (Docs. i and j).

Discussion/Conclusions:

The term “exclusion” means 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 (COMAR 13A.08.04.02). Based on the Findings of Facts #7 and #8, the MSDE finds that the student was not excluded from class because he was receiving support in an alternative instructional setting as a behavior intervention. Therefore, the MSDE finds no violation regarding this allegation.

ALLEGATION #4: IMPLEMENTATION OF THE BIP

Findings of Facts:

9. The BIP in effect on September 27, 2010 required that the student be provided with supports such as a highly structured classroom environment with consistent routines, a modified workload, frequent breaks, constant nonverbal reminders to stay on task, immediate praise and rewards, limited attention for unwanted behaviors, and access to “positive attention” opportunities such as classroom jobs (Docs. c, d, e, and h).

10. On May 17, 2011, the IEP team revised the BIP to require additional supports such as the use of social stories to reinforce appropriate behavior, the identification of new rewards for the points system (including giving snacks and spending time with classmates or staff members of the student’s choice), and seating the student in the back of the room (Doc. h).

11. There is no documentation that the student was provided with the supports required by the BIP during the 2010-2011 school year (Review of educational record).

Discussion/Conclusions:

As stated above, the public agency is required to ensure that the student is provided with the special education and related services required by the IEP, including the supports in a BIP (34 CFR §300.101). Based on the Findings of Facts #9 - #11, the MSDE finds that there is no documentation that student’s BIP was implemented from September 27, 2010 until the end of the 2010-2011 school year. Therefore, the MSDE finds a violation regarding this allegation.

ALLEGATION #5: IEP THAT ADDRESSES THE STUDENT’S BEHAVIOR NEEDS SINCE SEPTEMBER 27, 2010

Findings of Facts:

12. The IEP in effect on September 27, 2010 identified difficulty remaining on-task, remaining in the assigned location, initiating tasks, contributing appropriately to class discussion, and controlling compulsive and preservative behaviors as behaviors that

arise from the student's disability. The IEP contained annual goals to assist him with improving these behaviors and required that he be provided with special education instruction in a separate special education classroom for math, language arts, reading, and social studies, and counseling as a related service. The IEP included accommodations and supplementary aids and services, including providing the student with verbatim reading of assessments, a scribe, calculation devices, extended time to complete assessments and written responses, frequent breaks, cues and reminders to focus attention, assistance with organization, and modified academic achievement standards (Doc. c).

13. On October 18, 2010, the IEP team convened to review the student's program and progress. The team reviewed reports from the student's teachers and service providers, indicating that he continues to struggle with work habits, remaining in his seat, keeping his hands to himself, managing frustration, talking out of turn, and disrupting class. The reports also indicate that the student has difficulty empathizing and seeing the perspective of others, is often unable to let go of negative emotions, and can be "inflexible" in many situations. The reports indicate that the student's frustration frequently arises from conflicts with his one-to-one aide (Doc. d).
14. Based on the IEP team's review of the information at the October 18, 2011 meeting, the team revised the student's annual goals to improve his ability to comply with school and classroom rules. In order to assist the student with achieving the revised goals, the IEP team determined that the student requires additional supports, including allowing the student to use graphic organizers, reducing the distractions to the student, providing the student with "sentence starters" and "journal prompts," and allowing the student extra time to complete written work. The team determined that the remainder of the student's program continued to be appropriate (Doc. d).
15. The IEP progress reports, dated January 21, 2011 and March 30, 2011 indicate that the student was not making sufficient progress to achieve the annual goals (Doc. k).
16. On April 7, 2011 and May 4, 2011, the complainant requested an IEP team meeting be held in order to address the student's behavior because the complainant believed that her son's behaviors in class were interfering with his learning. The communication log indicates that only the May 4, 2011 request was received. However, both requests were maintained in the student's educational record (Docs. f, g, m, and review of educational record).
17. On May 17, 2011, the IEP team convened to review the student's program and progress. The team determined that the student's lack of progress toward achieving the annual goals resulted from his inability to remain in his assigned location, keep his hands to himself, and remain on-task (Doc. h).

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18. In order to address the lack of expected progress, the team determined that the student would be provided with additional supports, including notes and outlines and the use of spelling and grammar devices and visual organizers. The team determined that the student's teachers would be provided with strategies to initiate and sustain the student's attention. The team also revised the student's BIP to include additional behavioral supports (Doc. h).

Discussion/Conclusions:

In 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. In the case of a student whose behavior impedes the student's learning or that of others, the team must consider the use of positive behavioral interventions and supports and other strategies, to address that behavior (34 CFR §300.324).

The IEP team must review the IEP periodically, but not less than annually, to determine whether the annual goals are being achieved. The IEP team must revise the IEP, as appropriate, to address any lack of expected progress toward achieving the goals (34 CFR §300.324).

Based on the Findings of Facts #12 - #14, #17, and #18, the MSDE finds that the IEP team met in October 2010 and May 2011 to review the student's progress and revised the student's program to address the student's behaviors that interfered with his learning. However, based on the Findings of Facts #15 and #16, the MSDE finds that between October 2010 and May 2011, the IEP team did not convene to revise the student's IEP, as appropriate, even though the student did not make progress toward achieving the annual goals for two (2) consecutive quarters and the complainant requested IEP team meetings on two (2) separate occasions. Therefore, the MSDE finds a violation regarding this allegation between October 2010 and May 2011.

ALLEGATION #6:

PROVISION OF SPECIAL EDUCATION INSTRUCTION IN THE PLACEMENT REQUIRED BY THE IEP SINCE THE START OF THE 2011-2012 SCHOOL YEAR

Findings of Facts:

19. The IEP in effect since the start of the 2011-2012 school year requires that the student receive special education instruction in all academic classes except for science in a separate special education classroom. The IEP requires that the student receive special education instruction in science in the general education classroom (Doc. h).
20. The student's classroom schedule for the 2011-2012 school year indicates that the student is receiving special education instruction in the educational placement required by his IEP (Doc. o).

Discussion/Conclusions:

As stated above, the public agency is required to ensure that the student is provided with the special education and related services required by the IEP. These services must be provided in the placement determined appropriate by the IEP team (34 CFR §§300.101., .114-.116, and .324). A placement determination must be made in conformity with the least restrictive environment (LRE) requirements. This means that to the maximum extent appropriate, students with disabilities are educated with students who are not disabled. Further, 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).

In this case, the complainant alleges that the student's placement for the 2011-2012 school year is more restrictive than it was during the 2010-2011 school year because during the 2010-2011 school year, the student changed classrooms and had different teachers for each academic subject. This year, the student remains in the same classroom for all of his academic subjects except science (Doc. a and interview with complainant).

Based on the Findings of Facts #19 and #20, the MSDE finds that the provision of instruction with different teachers for each subject does not impact the decision regarding LRE, and therefore is not a factor to consider in making the educational placement decision. Based on these same Findings, the MSDE further finds that there is documentation that services have been provided in the separate special education classroom as required by the IEP and, as a result, the MSDE finds no violation regarding this allegation.

CORRECTIVE ACTIONS/TIMELINES:

Student specific

The MSDE requires the BCPS to provide documentation by January 31, 2012, that an IEP team has convened and determined the nature and amount of *compensatory services*³ or other remedy necessary to redress the violations identified in this Letter of Findings.

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,

³ 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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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 by January 31, 2012, of the steps it has taken to determine if the violations identified in the Letter of Findings are unique to this case or if they represent 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 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 United States Department of Education, Office of Special Education Programs. Additionally, 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.

Please be advised that 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 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

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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 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 free appropriate public education 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

Erin Leff

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Martha Arthur

Kathy Stump