



Mohammed Choudhury  
State Superintendent of Schools

January 6, 2023

Ms. Karen Serio<sup>1</sup>  
Adult Protective Services Investigator  
401 Hungerford Drive - 3rd Floor  
Rockville, Maryland 21754

Mr. Troy Keller  
Dr. Linda Chambers  
Co-Directors of Special Education  
Frederick County Public Schools  
191 South East Street  
Frederick, Maryland 21701

RE: [REDACTED]  
Reference: #23-079

Dear Parties:

The Maryland State Department of Education, Division of Early Intervention and Special Education 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 November 7, 2022, MSDE received a complaint from Ms. Karen Serio, hereafter, “the complainant,” on behalf of the above-referenced student. In that correspondence, the complainant alleged that the Frederick County Public Schools (FCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student.

MSDE investigated the following allegations:

1. The FCPS did not follow proper procedures when using physical restraint with the student on September 14, 2022, in accordance with COMAR 13A.08.04.05.
2. The FCPS did not follow proper administrative procedures regarding restraint since the start of the 2022-2023 school year, in accordance with COMAR 13A.08.04.06.
3. The FCPS has not followed proper procedures when conducting a re-evaluation of the student, since the start of the school year 2022-2023, in accordance with 34 CFR §§300.303 - .306, and COMAR 13A.05.01.06.

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<sup>1</sup> MSDE has not received a release of information from the student’s parent authorizing a release of personally identifiable information to the complainant. Therefore, a copy of this Letter of Findings will be sent to the student’s parent and the complainant will be notified that the investigation has been completed.

4. The FCPS did not ensure that the student's Behavior Intervention Plan (BIP) was consistently implemented since the start of the 2022-2023 school year, in accordance with 34 CFR §§300.101 and 323.
5. The FCPS did not provide the parent with proper Prior Written Notice (PWN) of the team's decisions made at the Individualized Education Program (IEP) team meeting on August 31, 2022, in accordance with 34 CFR §300.503.

#### **BACKGROUND:**

The student is nineteen (19) years old and is identified as a student with Multiple Disabilities under the IDEA. He is placed by the FCPS at the [REDACTED] a private, separate, special education school and has an IEP that requires the provision of special education services.

#### **ALLEGATIONS #1 AND #2**

#### **THE USE OF RESTRAINT**

#### **FINDINGS OF FACTS:**

1. On July 26, 2022, the IEP team met to conduct an annual review of the student's IEP. The IEP team discussed the use of restraint. The FCPS staff member proposed that restraint not be included on the student's IEP. The team agreed to "resume this discussion" the next day.
2. On July 27, 2022, the IEP team met to continue the annual review of the student's IEP. The IEP team discussed the student's data "relative to the use of restraint." The student's parent did not consent to the use of restraint. The student's IEP was not updated to reflect this decision.
3. The student's IEP dated August 31, 2022, reflects that the IEP team did not recommend the "inclusion of physical restraint in his IEP and /or BIP." There is no indication that the parent provided consent to the use of restraint.
4. On September 14, 2022, the student was involved in an incident that resulted in the use of physical restraint. The typed "incident report" created by school staff following the restraint reflects that prior to the restraint, the student wanted to swing; due to an injury on his foot, school staff explained he was not allowed to swing. The student became "aggressive by hitting, kicking, and throwing sharp/dangerous objects at staff." The school staff "blocked the attacks and redirected the student to eat." The student did not follow the staff's redirection and continued to be aggressive. A "standing restraint" was used to protect staff from the student "throwing sharp/dangerous objects", and the student was calm after two minutes and ten seconds. The student bit his lip, "while trying to attack staff, which resulted in slight bleeding from his lip." A hand-written portion of the report reflects that the student was treated by the school nurse for his lip and was examined for other injuries. The report identifies two staff members who implemented and monitored the use of the restraint and the administrator who was informed of the restraint. The report reflects that the parents were "verbally" notified by the end of the school day. There is no documentation of any school personnel who observed the behavior that prompted the use of the restraint.
5. On November 8, 2022, the IEP team met, in part, to review the incident of restraint that occurred on September 14, 2022. The IEP team considered whether the use of physical restraint should be a part of the student's IEP. The IEP team agreed that restraint should not be added.

6. There is documentation that the staff member involved in the use of restraint on September 14, 2022 was not currently certified in its use. There is documentation that staff at the student's school were provided training on the proper use of restraint on September 29, 2022.

## **CONCLUSIONS:**

### **ALLEGATIONS #1 and #2**

### **USE OF PHYSICAL RESTRAINT AND RELATED PROCEDURES**

#### **Obligation of the FCPS to ensure a FAPE for the Student**

In their response to the complaint, the FCPS asserts that the IDEA "places a joint responsibility on the FCPS and the (Student's nonpublic school) for ensuring that publicly placed private school students with disabilities receive a Free and Appropriate Public Education." While the IDEA does allow an Local Education Agency (LEA) to delegate the actual implementation of a student's IEP, the responsibility to ensure that this student, and all students enrolled in the FCPS who are placed in private special education schools by the FCPS, is entirely and unequivocally on the FCPS (34 CFR § 300.325).

#### **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. If the use of physical restraint is included on the student's BIP or IEP, the student's BIP or IEP must describe specific behaviors and circumstances in which physical restraint may be used. Schools must ensure that parental consent is obtained prior to including restraint in a student's IEP (COMAR 13A.08.04.05C(6)(a)).

Physical restraint shall be removed as soon as the student is calm and may not exceed thirty minutes (COMAR 13A.08.04.05A(1)(e)). 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)(f)).

#### **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 shall 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 hours, unless otherwise provided for in the student's BIP or IEP (COMAR 13A.08.04.05A(5)).

### **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 shall meet within ten business days of the incident to consider the need for conducting a Functional Behavior 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)).

### **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), (3)).

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 Findings of Facts #1 to #6, MSDE finds that the FCPS did not follow proper procedures when using physical restraint with the student on September 14, 2022, by applying physical restraint by school personnel whose training had expired, failing to provide the names of the school personnel who observed the behavior that prompted the use of restraint, and not convening an IEP team meeting within ten business days of the incident, in accordance with COMAR 13A.08.04.05. Therefore, this office finds that a violation has occurred with respect to the allegation.

### **ALLEGATION #2**

### **PHYSICAL RESTRAINT PROCEDURES**

Based on the Findings of Fact #6, MSDE finds that the FCPS did not follow proper administrative procedures regarding restraint by failing to provide training at the beginning of the school year in current professionally accepted practices and standards regarding restraint and alternatives to restraint, since the start of the 2022-2023 school year, in accordance with COMAR 13A.08.04.06. Therefore, this office finds that a violation has occurred with respect to the allegation.

### **ALLEGATION #3**

### **CONDUCTING AN EVALUATION OF THE STUDENT**

#### **FINDINGS OF FACTS:**

7. There is documentation that the student's most recent evaluation under the IDEA occurred on October 31, 2019.
8. On February 7, 2022, the IEP team met to continue the review of the student's IEP. During this IEP team meeting, the IEP team recommended that an FBA be conducted for the student.

9. On March 17, 2022, the IEP team met to review the results of the FBA. As a result of that review, the IEP team did not make any changes to the student's IEP. The IEP team did not determine the student's continued eligibility under the IDEA at that time.
10. On May 6, 2022, the IEP team met to continue the annual review of the student's IEP. During the IEP team meeting, the team recommended that a "reading" assessment be conducted for the student. There is documentation that following this meeting, the parent was asked to provide consent to assess the student in math.
11. On June 14, July 6, July 26, and July 27, 2022, the IEP team met for the student to review and revise, as appropriate, the student's IEP as part of a continued annual review. There is no documentation that the IEP team reviewed the results of the assessments recommended for the student, or made a determination regarding his continued eligibility under the IDEA during these IEP team meetings.
12. There is no documentation, to date, that the IEP team has met to review the observation or reading assessment recommended for the student, and utilized the results in the development of the student's IEP, or completed the re-evaluation of the student to determine his continued eligibility under the IDEA.

### **CONCLUSIONS:**

#### **Re-Evaluation Every Three Years**

Based on the Findings of Facts #7 to #12, MSDE finds that FCPS has not ensured that a re-evaluation of the student has occurred at least once every three years, since October 30, 2022, in accordance with 34 CFR §§300.303(b)(2) - .306, and COMAR 13A.05.01.06. Therefore, this office finds that a violation has occurred with respect to this aspect of the allegation.

#### **Re-Evaluation Within the Required Time Period**

Based on the Findings of Facts #8 to 12, MSDE finds that FCPS has not followed proper procedures when conducting a re-evaluation of the student, to ensure that it was completed within 90 days of the date that assessments were recommended by the IEP team, since May 8, 2022, in accordance with 34 CFR §§300.303 - .306 and COMAR 13A.05.01.06. Therefore, this office finds that a violation has occurred with respect to this aspect of the allegation.

#### **Allegation #4**

#### **IMPLEMENTATION OF THE STUDENT'S BEHAVIOR MANAGEMENT PLAN (BMP)**

### **FINDINGS OF FACTS:**

13. The student's BMP, dated July 27, 2022, requires the following supports:

Supervision: Close male supervision, within arm's reach. Second male staff close. Closely monitor/provide assistance in bathroom.

Safety: Position between others, exits, objects to throw.

Transportation: Staff sit next to him, must sit away from driver, not next to exit. Keep busy with chats, set expectations prior to riding. Likes riding in the big van.

Written schedule: Go over in the morning, before/after activities. Five minute waiting when ending preferred. Non-preferred should be in the AM. Transitional activity: moderately preferred scheduled after most preferred.

Independent Desk Job: Staff gradually fading attention/support during mastered prevoc activities. Staff must be trained to run program. Record time activity, number of items complete, number of behaviors, comments, staff initials.

VI: Fifteen minute +/- five and specific praise. (food, social, activity, sensory) Can give more frequent R+ when completing task steps.

Delay: Complete three to five tasks or one to three minutes before giving less preferred reinforcement after maladaptive behavior. Five minute delay of highly preferred reinforcement after maladaptive behavior.

Praise: Specific praise every ten minutes. Three to five minutes for doing steps of task independently.

Praise Delay: Do not praise during or for five minutes after uncooperative or dangerous.

Teaching: Provide choices during tasks. (only before behavior) Say name, explain upcoming task. Specific/concrete instructions in firm/neutral tone. Access to VOD at all times.

Replacement behavior: Prior to becoming upset, provide assistance as necessary to complete schedule/daily living. Prompt language "help" or "I want help" before assisting. Praise when he repeats prompt. Enthusiastic when independent.

Replacement behavior: Proactively prompt/model greeting to replace inappropriate touch. Teach to wait for items and accept no. Prompt language proactively, not during behavior.

Breaks: If spelled/tapped on device hoot language if possible. If optional, give two alternative choices. If mandatory, give temp work remove then return one to three minutes later. If no break possible, show sympathy let him know when he can access, redirect.

Prompt Hierarchy: Give direction, take attention away, 10-15 seconds, then begin PH. Verbal- Nonspecific - Specific Verbal - Gestural cue - Physical guide.

Set expectations: Throughout the day and prior to transitions. Praise and reinforce if complies to instructions.

Disruptive/Uncooperative Behavior - use planned ignoring. Say nothing about behavior. Direct to task w/gesture, short verbal/PH. Do not provide special attention. Teacher can provide pivot praise during group instructions.

Dangerous Behavior - Give specific verbal instructions, block to prevent injury, continue with task. Do not remove objects from hands unless dangerous.

14. There is documentation that the student's BMP was consistently implemented, since the start of the 2022-2023 school year.

**CONCLUSION:**

Based on the Findings of Facts #13 and #14, MSDE finds that the FCPS has ensured that the student's BMP has been consistently implemented since the start of the 2022-2023 school year, in accordance with 34 CFR §§300.101 and 323. Therefore, this office finds that a violation did not occur with respect to the allegation.

**ALLEGATION #5**

**PROVISION OF PRIOR WRITTEN NOTICE**

**FINDINGS OF FACTS:**

15. There is documentation that the IEP team convened on February 7, March 17, May 6, June 14, July 6, July 26, and July 27, 2022.
16. There is no documentation that an IEP team meeting was convened on August 31, 2022. However, in their response to the State complaint investigation, the FCPS informed that the student's IEP was "closed" on August 31, 2022.

**CONCLUSION:**

Based on the Findings of Fact #16 and #17, MSDE finds that an IEP team meeting was not convened on August 31, 2022 and that the FCPS was not required to provide the parent with prior written notice of a meeting held on that date, in accordance with 34 CFR §300.503. Therefore, this office finds that a violation did not occur with respect to the allegation.

**CORRECTIVE ACTIONS/TIMELINES:**

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

MSDE has established reasonable time frames below to ensure that non-compliance is corrected in a timely manner.<sup>2</sup> This office will follow up with the public agency to ensure that it completes the required actions consistent with MSDE Special Education State Complaint Resolution Procedures.

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<sup>2</sup> The United States Department of Education, Office of Special Education Programs (OSEP) states that the public agency correct noncompliance in a timely manner, which is as soon as possible, but not later than one (1) year from the date of identification of the noncompliance. The OSEP has indicated that, in some circumstances, providing the remedy could take more than one (1) year to complete. If noncompliance is not corrected in a timely manner, the MSDE is required to provide technical assistance to the public agency, and take tiered enforcement action, involving progressive steps that could result in the redirecting, targeting, or withholding of funds, as appropriate.

If the public agency anticipates that any of the time frames below may not be met, or if either party seeks technical assistance, they should contact Diane Eisenstadt, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action.<sup>3</sup> Ms. Eisenstadt can be reached at (410) 767-7770 or by email at Diane.Eisenstadt@maryland.gov.

### **Student-Specific**

MSDE requires the FCPS to provide documentation by March 1, 2023, of the following actions:

- a. That the IEP team has convened to:
  - consider the need for more appropriate behavior interventions to address the student's behaviors, as determined by the IEP team;
  - complete the student's reevaluation, review the observation and reading assessments, determine continued eligibility, revise the IEP consistent with the data and determine the services, or other remedy, needed to remediate the violation;
  - include accurate statements of the parent's consent to the use of restraint as part of the student's IEP and/or BMP, the date of the student's FBA, the date of the student's IEP team meeting, and the projected beginning date of services; and
  - determine whether the violations identified in this Letter of Findings regarding the proper procedures and use of physical restraint, re-evaluation, clear and accurate IEP statements had a negative impact on the student's ability to benefit from the education program. If the IEP team determines that there was a negative impact, it must also determine the amount and nature of compensatory services or other remedy to redress the violation and develop a plan for the provision of those services within a year of the date of this Letter of Findings.

The FCPS must ensure that the complainant is provided with written notice of the team's decisions. The complainant maintains the right to request mediation or to file a due process complaint to resolve any disagreement with the team's decisions.

### **School-Based**

MSDE requires the FCPS to provide documentation that the staff at the [REDACTED] who engage in physical restraint are trained and certified by February 1, 2023. FCPS must also provide professional development to be completed by April 1, 2023, to ensure that the staff at the [REDACTED] properly implements the requirements for the use of physical restraint, re-evaluations, and the development of clear and accurate IEP statements under the IDEA and COMAR. FCPS must also develop a monitoring tool to ensure that proper procedures are followed for the use of physical restraint, re-evaluations and IEPs clear and accurate development for students at the [REDACTED] beginning no later than April 1, 2023. Results of monitoring must be provided to MSDE by June 15, 2023.

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<sup>3</sup> The MSDE will notify the public agency's Director of Special Education of any corrective action that has not been completed within the established timeframe.



Ms. Karen Serio  
Mr. Troy Keller  
Dr. Linda Chambers  
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### **Systemic**

MSDE requires that the FCPS ensure that eligible students enrolled in FCPS, and placed by FCPS in private separate special education schools are afforded the same protections and rights pursuant to the IDEA as those attending public schools in FCPS.

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

The parties maintain the right to request mediation or to file a due process complaint if they disagree with the identification, evaluation, placement, or provision of a Free Appropriate Public Education (FAPE) for the student, including issues subject to this State complaint investigation, consistent with the IDEA. MSDE recommends that this Letter of Findings be included with any request for mediation or a due process complaint.

Sincerely,

Dr. Deann M. Collins  
Deputy Superintendent  
Office of the Deputy Superintendent of Teaching and Learning

c: Cheryl Dyson  
[REDACTED]  
Alison Barmat  
Gerald Loiacono  
Diane Eisenstadt