



Karen B. Salmon, Ph.D.
State Superintendent of Schools

November 22, 2019

Ms. Tacha Marshall
Disability Rights Maryland
1500 Union Avenue, Suite 2000
Baltimore, Maryland 21211

Ms. Linda Chambers
Director of Special Education and Student Support
Frederick County Public Schools
191 South East Street
Frederick, Maryland 21701

RE: [REDACTED]
Reference: #20-037

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 September 23, 2019 the MSDE received correspondence from Ms. Tacha Marshall, hereafter, “the complainant” on behalf of Mr. [REDACTED] and Ms. [REDACTED] and their son, 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.

The MSDE investigated the following allegations:

1. The FCPS did not develop an Individualized Education Program (IEP) that addressed the student’s identified behavioral needs from September 23, 2018 through December 20, 2018, in accordance with 34 CFR §300.324.

2. The FCPS did not ensure that proper procedures were followed when physical restraint and seclusion were used with the student from September 23, 2018 through December 20, 2018, in accordance with COMAR 13A.08.04.03 and .05.

BACKGROUND:

The student is eight (8) years old and is identified as a student with an Emotional Disability under the IDEA. He has an IEP that requires the provision of special education instruction and related services.

During the period of time addressed by this investigation, the student attended [REDACTED] School. In December 2018, the student began receiving Home and Hospital Teaching Services due to an emotional crisis.

At the start of the 2019-2020 school year, the student was placed by the FCPS at [REDACTED] a nonpublic separate special education school in [REDACTED]

FINDINGS OF FACTS:

1. The IEP in effect at the start of the investigation period was developed on January 12, 2018. At the start of the 2018-2019 school year, the student was in the second grade, demonstrating below “average” level behavioral skills, social interaction skills, and self-management skills compared to his same age peers. The IEP team documented that the student would participate in the Pyramid Program¹ due to significant emotional and behavioral difficulties which often resulted in physical and verbal aggression to peers and staff and a risk of self-harm. There is documentation that the parents consented to the use of seclusion and physical restraint in the IEP to address the student’s behaviors. The FCPS has policies and procedures (Regulation No. 400-44) for the use of physical restraint and seclusion that are consistent with the state requirements.
2. The IEP reflects that the student had specific difficulties with following classroom routines, transitioning from preferred tasks to nonpreferred tasks, complying with directions when he disagrees, and accepting the denial for any request. The IEP documents that the student also has difficulty distinguishing between appropriate and inappropriate social interactions, and reciprocating appropriate behaviors shown by peers, such as sharing, taking turns, and waiting for breaks in conversations. The documentation states that he also has difficulty managing his feelings of anger and frustration and has challenges initiating coping strategies in the moments of anger and frustration.

¹ The Pyramid Program is a specialized special education program that serves elementary aged children who have significant social and emotional difficulties. Intensive special education and therapeutic services are provided as well as a small structured learning environment ([www.https://education.fcps.org/les/pyramid](https://education.fcps.org/les/pyramid)).

The IEP also reflects that the student's aggressive behaviors affect his social interactions and peer relationships. The IEP documents that the student's fluctuating behaviors and his inability to regulate his behaviors greatly impact his involvement in the general education curriculum. The IEP also reflects that the student can be kind, funny and empathetic towards his peers and that sometimes he can ignore external triggers to negative behaviors.

3. The IEP documents that the student has exhibited anxiety and emotional instability for at least two years, which is characterized by an inability to learn, an inability to build or maintain satisfactory interpersonal relationships, inappropriate feelings under normal circumstances and a tendency to develop physical symptoms or fears associated with personal or school problems. The documentation also reflects that the student exhibits excessive intensity, frequency and duration of the behaviors in school and at home.
4. The IEP includes three (3) annual goals to improve self-management and social interaction skills. In order to assist in achieving the annual IEP goals, the IEP team also determined that the student requires specialized instruction, related services and supplementary supports, including the following:
 - Thirty-one (31) hours and forty (40) minutes of special education instruction per week in a separate special education classroom;
 - Fifty (50) minutes of social work services each week in a separate education classroom;
 - Crisis intervention (de-escalation and as a last resort, physical restraint and/or seclusion may be used to keep the student and others safe);
 - Non-contingent breaks and built in breaks;
 - Daily 1 to 3-minute preparation for transitions;
 - Provision of choices, when appropriate;
 - Sensory items as needed;
 - Anger management training;
 - Strategies to initiate and sustain attention;
 - Social skills training and social stories;
 - Frequent changes in activities and opportunities for movement;
 - Home-school communication system;
 - Frequent reminders of the rules;
 - Use of positive reward system;
 - Encourage the student to ask for assistance when needed;
 - Advance preparation for schedule changes, and
 - Daily direction cards, picture schedule, task checklist, use of timer, and strategy menu).

5. The Behavior Intervention Plan (BIP) was revised March 12, 2018 and reviewed and revised May 10, 2018 and required response strategies that included if the student ignores the teacher's direction a different staff member will repeat the direction, provide distractions, and give the student wait time to respond. If the student begins to show signs of crisis the teacher or assistant will provide verbal and visual redirection. If the student begins to show minor physical aggression, the adult will offer the student a fidget break outside of the classroom or a cool down space inside of the classroom. The BIP documents that if the student begins to show major physical aggression, the adult will direct the student to receive assistance in the support room. The BIP requires that these strategies be evaluated four (4) to six (6) weeks from its implementation to determine the effectiveness of the intervention plan.
6. There is no documentation that the May 12, 2018 BIP was reviewed until November 8, 2018.
7. A psychological assessment used in development of the IEP states that there are significant concerns regarding anxiety, irritability, temper control, oppositional behavior, aggression, peer and adult relationships, impulsivity, overactivity and limited frustration tolerance and motivation. The report also indicated that moderate concerns were noted with unhappiness, self-esteem, and distractibility. The psychological report further states that the student exhibits a strong resistance to materials that he perceives as work, demonstrates sensory issues, struggles with expression of his thoughts and ideas, and demonstrates frequent meltdowns. The report recommended limiting sources of distraction, incorporating visual reminders, consistent expectations, and positive rewards. It further recommended the development of a verbalized plan of approach for school, controlling antecedents, learning response delay techniques, establishing positive working relationships with teachers, increasing his awareness of how his behavior impacts others through discussion, provision of short breaks, learning conflict management and resolution techniques, using coping strategies, use of social stories, provision of a visual menu of appropriate behaviors, and the use of visual instructions, rules and schedules.
8. The psychological assessment report further documents that the student displays sudden extreme emotional reactions because of change or frustration and intense preoccupation with objects or topics of interests. The report states that the student consistently demonstrates an extreme reaction to noise around him. The report also states that the student has problems with aggression, emotional reactivity, and withdrawal from others. Additionally, the report documents that the student has a significant history of abuse. He demonstrates sudden, intense mood changes and can escalate to extreme physical aggression and violence within moments. Further, the report also states that the student's mood changes so fast that adults are not aware of what has triggered him, and the student is not able to express what he is upset about. The report also documents that the student overreacts to situations, alienates peers through his behavior, struggles with taking responsibility for his actions, and is often not available for learning.

9. On November 8, 2018, the IEP team convened to review the student's progress and revise the IEP. The parents shared concerns that the student "hates coming to school." They also expressed their concerns about the student regressing academically and behaviorally and they shared that there has been an increase in his anxiety levels. The parents requested a change in the classroom and teacher.
10. At the IEP team meeting on November 8, 2018, the team revised the supplementary aids and services to include an increase in the breaks from instruction to occur every thirty (30) minutes for five (5) minutes in duration. The BIP was also revised to include additional preventative strategies. As a result of the student's academic and behavioral regression, the IEP team decided to send a referral to the Countywide IEP Team facilitated by Central Office staff to consider other placement options.
11. There is documentation that during September and October 2018, there were 90 incidents reported by school staff of physical restraint and 38 incidents of seclusion used with the student. While most of the incidents documented that these interventions were used to protect the student or others from imminent, serious physical harm, the interventions were also used without documentation of this circumstance, and there is no documentation that the IEP team considered whether there are contraindications to the use of the interventions based on the student's documented past trauma.
12. On November 30, 2018, the IEP team reconvened to continue the discussion about the student's placement and to review and revise the IEP. The school therapist reported that for 13 weeks of school for the 2018-2019 school year, the student had 133 visits to the support room with the average time to deescalate being 54 minutes. The documentation states that the student had 121 physical restraints. The student was offered 57 breaks and refused 30 of them. The FCPS behavioral therapist reported that "typically the student refuses doing things he enjoys." The parents rescinded their consent for the student to have physical restraint and seclusion as part of the BIP.
13. At the IEP team meeting, the parents shared their concern that "the student's school environment may be contributing to the behaviors." The documentation states that the "student's behaviors are pervasive across multiple settings, including school and at home." The documentation also states that "the student has experienced trauma that may have continued effects on his ability to self-regulate and be successful in the school setting." The documentation also states that the IEP team determined that the student was being referred for a non-public placement.
14. The documentation of each use of seclusion and physical restraints identifies other less intrusive interventions that had failed or had been determined inappropriate, includes a description of the precipitating event immediately preceding the behavior that prompted the use of seclusion and the physical restraints, the behavior that prompted the use of seclusion and physical restraints, and the names of the school personnel who observed the behavior that prompted the use of seclusion and physical restraint. The documentation

also includes the type of seclusion and physical restraint used, the length of time in seclusion and physical restraint, the student's behavior and reaction during the seclusion and physical restraint, and the name and signature of the administrator informed of the use of seclusion and physical restraint. There is documentation that the school system staff who implemented seclusion and physical restraint with the student have current certifications of training in the use of nonviolent crisis intervention. There is also documentation that the school staff provided the parents with notification of the use of seclusion and physical restraint within the required timeline.

CONCLUSIONS:

Allegation #1 The Use of Seclusion and Physical Restraint

Based on the Findings of Facts #1 - #5, #7, #8 and #14, the MSDE finds that there is documentation that there were incidences when the student's behavior unreasonably interfered with his learning and that of other students, and that it constituted an emergency that made it necessary for the use of seclusion and physical restraint after less intrusive interventions were attempted.

However, based on the Findings of Facts #12 and #13, the MSDE finds that the school staff's use of seclusion and physical restraint was excessive due to the total amount of time that the student was removed from the classroom during the months of September, October, November, and December 2018, for instances that were not deemed of last resort, emergency situations and to protect others from imminent, serious, physical harm, in accordance with COMAR 13A.08.03 and .05.

Further, based on Finding of Fact #11, the MSDE finds that the IEP team did not document the consideration of contraindications to the use of physical restraint based on past trauma that the student experienced. Therefore, the MSDE finds violations occurred with respect to this aspect of the allegation.

Allegation #2 Addressing the Student's Behavioral Needs

Based on the Findings of Facts #5 and #6, the MSDE finds that the IEP team did not review the Behavior Intervention Plan as required, in accordance with 34 CFR §300.324. Therefore, the MSDE finds a violation occurred with respect to this allegation.

CORRECTIVE ACTIONS/TIMEFRAME:

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, the MSDE requires the public agency to provide documentation of the completion of the corrective actions listed below.

The MSDE has established reasonable timeframes below to ensure that noncompliance is corrected in a timely manner.² This office will follow up with the public agency to ensure that it completes the required actions consistent with the MSDE Special Education State Complaint Resolution Procedures.

If the public agency anticipates that any of the timeframes below may not be met, or if either party requires technical assistance they should contact Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action.³ Dr. Birenbaum can be reached at (410) 767-7770.

Student Specific:

The MSDE requires the FCPS to convene an IEP team to review the student's progress and provide documentation until the end of the 2019-2020 school year that the IEP team has considered the student's progress in his educational placement and revised the IEP as appropriate to address any lack of expected progress.

The MSDE requires the FCPS to also provide documentation by February 1, 2020, that the IEP team has convened and determined the amount and nature of compensatory services or other remedy to redress the violations, and developed a plan for the provision of those services within a year of the date of this Letter of Findings.

School Based:

The MSDE requires the FCPS to provide documentation by March 2020, of the steps it has taken at [REDACTED] School to ensure that the staff properly implements the requirements for reviewing available data to identify any contraindications to the use of behavioral interventions based on past trauma, document the emergency circumstances and imminent, serious, physical harm requirement when using seclusion and physical restraint and review Behavior Intervention Plans consistent with IEP team determinations. The documentation must include a description of how the FCPS will evaluate the effectiveness of the steps taken and monitor to ensure that the violations do not recur.

² The United States Department of Education, Office of Special Education Programs (OSEP) requires that the public agency correct noncompliance in a timely manner, which is as soon as possible within one (1) year from the date of identification of the noncompliance, unless providing additional time is appropriate, such as for example when it is appropriate to provide compensatory services to a student over a period of more than one (1) year. 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.

³ 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. Tacha Marshall
Ms. Linda Chambers
November 22, 2019
Page 8

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.

The parent and the school system maintain the right to request mediation or to file a due process complaint, if they disagree with the identification, evaluation, placement, or provision of a Free Appropriate Public Education (FAPE) for the student, including issues subject to this State complaint investigation, consistent with the IDEA.



The MSDE recommends that this Letter of Findings be included with any request for mediation or a due process complaint.

Sincerely,

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

MEF:sf

c:


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