



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

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January 28, 2019

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Ms. Christina Harris  
Director of Special Education Services  
Calvert County Public Schools  
1305 Dares Beach Road  
Prince Frederick, Maryland 20678

RE: XXXXX  
Reference: #19-072

Dear Parties:

The Maryland State Department of Education (MSDE), Division of Early Intervention and Special Education Services, 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 29, 2018, the MSDE received a complaint from Ms. XXXXXXXX, hereafter “the complainant,” on behalf of the above-referenced student. In that correspondence, the complainant alleged that the Calvert County Public Schools (CCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the student.

The MSDE investigated the following allegations:

1. The CCPS has not ensured that the student has been provided with an Individualized Education Program (IEP) that addresses all of his social, emotional and behavioral needs, since November 29, 2017, in accordance with 34 CFR §§300.101, .320 and .324.
2. The CCPS has not ensured that the student’s Behavior Intervention Plan (BIP) has been implemented, since November 29, 2017, in accordance with 34 CFR §§300.101 and .323.

3. The CCPS has not ensured that proper procedures were followed when using seclusion with the student, since November 29, 2017, in accordance with COMAR 13A.08.04.04 and .05.

**BACKGROUND:**

The student is ten (10) years old, is identified as a student with an Intellectual Disability under the IDEA, and has an IEP that requires the provision of special education and related services. The student is in the fifth (5th) grade and attends XXXXXXXXXXXXXXXXXXXX.

**ALLEGATION #1**

**IEP DEVELOPMENT**

**FINDINGS OF FACTS:**

1. The IEP in effect at the start of the investigation period identifies that the student has behavioral needs relating to his social interaction skills, and documents that he exhibits “significant adaptive behavior delays in all areas.”
2. The IEP includes the following descriptive information about the student’s behavioral functioning:
  - He “rarely visually attends to instruction.”
  - He “has difficulty following instructions to do a simple motor activity, go to a specific person and do an action or retrieve an object,” and with multi-step directions
  - He “has a difficult time attending and focusing on what is being asked of him.”
  - He requires “extensive prompting and repeated offers of preferred reinforcers.”
  - He will approach peers but does not attempt to engage in interaction.
  - He does not request items, but will “grab” an item that he wants, or stand next to peers and whine or cry until he is redirected to move by a staff member.
3. The IEP reflects that in small group instruction, consisting of one (1) staff to two (2) peers, the student will “usually” sit for ten (10) minutes with “minimal disruption.” However, in groups of four (4) or more, the student “easily becomes disruptive,” and will jump, yell, run around and cry, and requires an adult within close proximity to assist with his behavior. The IEP also reflects that the student has difficulty with transitions, needing prompting and “physical guidance.”
4. The IEP states that the student “exhibits non-compliant behaviors, failure to comply with teacher directives and disruptive classroom behaviors and eloping from the classroom.” With respect to the impact of the student’s disability on his involvement in the general education curriculum, the IEP states that the student’s communication deficits in receptive and expressive language, impulsivity and lack of self-control adversely affects his educational performance.”
5. The IEP also documents that the student is non-verbal and does not communicate his

needs. While the IEP reflects that the student has a speech generating device for communication, and is “quick and efficient” with the use of his device, it also documents that he “is resistant” to using the device.

6. To address the student’s behavioral needs, the IEP includes an annual goal requiring him to participate for twenty (20) minutes in a small group activity without demonstrating “disruptive” behaviors, with verbal prompting. The goal was expected to be achieved by March 2018.
7. The IEP also requires supplementary supports to assist the student, including a small teacher to student ratio, a picture schedule, frequent changes in activities and opportunities for movement, adult support, and reinforcement of positive behavior, all of which are required on a daily basis.
8. The IEP also documents that the student requires a Behavioral Intervention Plan (BIP). The BIP targets aggression towards the school staff, failing to respect peer and adult personal space, and leaving a designated area or classroom.
9. In January 2018, the school staff developed progress reports documenting that the student was not making sufficient progress towards mastery of some of the IEP goals, including the behavioral goal. The progress reports state that the student “spends most of the day screaming and disrupting instruction,” and as a result was “unable to participate in small group instruction on a regular basis.” The IEP team did not convene to address the student’s lack of progress.
10. In March 2018, the school staff documented that the student was continuing to not make sufficient progress towards mastery of some of the IEP goals, including the behavioral goal. The progress reports document that the student’s difficulty with focus, attending, and using appropriate behavior in the classroom was continuing, and that he was also exhibiting work refusal. In addition, the progress reports state that the student “screams loudly disrupting instruction and is removed from the group,” and that “when he is quiet he is brought back and usually within minutes he is screaming again.”
11. On March 16, 2018, the IEP team convened to address the student’s lack of progress and to conduct the annual review of his education program. The IEP team discussed that the student was “screaming” in order to communicate and that he needs to use his communication device “more proactively.” The complainant reported that the student was scheduled for a private evaluation at The Children’s National Hospital the following month.
12. The IEP team also discussed the student’s high number of absences due to a chronic health condition, and that the periods of absence make it difficult for him to follow routines upon his return. The IEP team discussed that the student is eligible to receive home teaching through the Chronic Health Impaired Program for Students (CHIPS) due to his medical condition, but that the complainant had not contacted the CHIPS instructor to start home teaching, as required.

13. The IEP team decided to continue the same behavioral and speech and language expressive language goals with the same services and supports, and extended the time to achieve them to March 2019 without explanation.
14. On April 12, 2018, the complainant informed the school staff that the student received new diagnoses of Autism and Attention Deficit Hyperactivity Disorder (ADHD) following evaluation by The Children's Hospital. However, there is no documentation that the IEP considered the information.
15. On April 23, 2018, the school system staff met to review the student's BIP. They discussed that the student continued to exhibit "aggressive behavior" and "rarely" remains in the assigned area in the classroom. They also discussed that the student was screaming in close proximity to his peers, and disrupting instruction by "very frequently" calling out. The school system staff decided to update the student's FBA and BIP based on his current behaviors.
16. On May 1, 2018, the school system staff met, without the participation of the complete IEP team, and completed an FBA without parental consent.<sup>1</sup> The FBA documents that, on average, the student was "calling out/making noises with elevated tone and volume" 148 times per day, failing to respect peer and adult personal space four (4) to five (5) times per day, and is out of his seat running around the classroom "multiple" times per hour. At this time the school system staff also documented that the student's reading comprehension skills and math counting skills had regressed.
17. On May 17, 2018, the school system staff revised the BIP, again, without convening the IEP team, adding calling out and screaming as new target behaviors requiring specific interventions.
18. In June 2018, the school staff documented that the student was continuing to not make sufficient progress towards mastery of some of the IEP goals, specifically noting that he was "not available for learning" due to behavior and work refusal.
19. On September 6 and 14, 2018, the IEP team convened to address the student's lack of progress, communication and behavior, as well as the complainant's concerns that the student was not receiving behavior interventions and support in the classroom. The IEP team reviewed the results of the May 2018 FBA and the May 2018 revised BIP that were not previously reviewed by the team. The IEP team agreed to provide the student with increased support by an adult dedicated to him exclusively, and considered options for an updated communication device.

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<sup>1</sup> In September 2018, the school system developed a draft FBA and BIP Manual to clarify the process for conducting FBAs and developing BIPs using a "team approach." The September 2018 draft Manual states that an FBA is a formal assessment that requires parental consent. On September 13, 2018, the school system conducted a training session on FBAs and BIPs for IEP chairpersons.

## **CONCLUSIONS:**

Based on the Findings of Facts #1 - #8, the MSDE finds that the IEP addressed the student's social, emotional, and behavioral needs consistent with the data at the start of the time period covered by this investigation, in accordance with 34 CFR §§300.300 and .324

However, based on the Findings of Facts #9 - #19, the MSDE finds that the CCPS did not ensure that the IEP addressed the student's social, emotional, and behavioral needs from January 2018 to September 14, 2018, in accordance with 34 CFR §§300.300 and .324 because the IEP team did not consider all of the data, and did not address the student's interfering behavior and lack of expected progress in a timely manner. Therefore, this office finds that a violation occurred for this time period.

Notwithstanding the violation, based on the Finding of Fact #16, the MSDE finds that the CCPS has taken steps to ensure that the school staff obtain parental consent before conducting an FBA and that the IEP is revised through the IEP team process. Therefore, no additional school-based corrective action is required to remediate this aspect of the violation.

## **ALLEGATION #2 BIP IMPLEMENTATION**

### **FINDINGS OF FACTS:**

20. The BIP requires that the student be provided with interventions and strategies to assist with managing his behaviors in the classroom. The BIP requires quarterly reviews.
21. The BIP "proactive interventions" include the following:
  - Token economy of earning points for appropriate behavior;
  - Encouragement to take self-directed and teacher-directed breaks when student is "feeling anxious and/or angry;"
  - Frequently review class and school rules and discuss consequences of aggression, and set limits by giving clear and reasonable choices;
  - Social stories to reinforce positive ways of coping with frustration and anger;
  - Having a designated space when working in a group, as well as visual reminders for designated areas, such as carpet squares, tape on the floor, stop signs;
  - Walks to the de-escalation room when the student "presents as anxious, stressed or angry," to provide a quiet space away from others to work or as a break.
  - When working independently, provide the student with familiar work, and when given new tasks or that are difficult, provide one-on-one to ensure understanding, reduce stress and for proactive interventions if behavior escalates; and
  - Using proximity control and frequent eye contact to remind the student that the adult is available to assist him.
22. The BIP "reactive interventions" include the following:
  - Speaking with the student away from peers, and reminders of positive strategies

- to use instead of aggression;
  - Using verbal and nonverbal cues for redirection and reminders for the student to respect others' personal space, and to return to the group or designated area;
  - Moving peers away from the student, and moving the student away from peers, as attempts to isolate the situation;
  - Walks to the de-escalation room; and
  - Asking the student to take a break in a designated area of the classroom.
23. From January 2018 through May 2018, the school staff documented through the daily summary reports that the student was regularly displaying disruptive behavior, including "screaming" and "yelling," staring off," crying, "whining," refusing to complete tasks, not focusing, refusing to use his communication device, hitting, kicking, spitting, and running around. The daily reports also document several occasions when the student was removed from the classroom due to his disruptive behavior.
24. The daily behavior charts from September 2018 through December 2018 document that the student continues to display interfering behaviors. At times, the behaviors occur at a frequency in excess of fifty-five (55) times per day.
25. There is no documentation that the BIP was reviewed each quarter, as required. There is also no documentation that the student has been provided with the support strategies required by the BIP.

### **CONCLUSION:**

Based on the Findings of Facts #20 - #25, the MSDE finds that the CCPS has not ensured that the BIP has been implemented as written, in accordance with 34 CFR §§300.101 and .323. Therefore, this office finds a violation occurred.

### **ALLEGATION #3 USE OF SECLUSION**

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

26. On March 15, 2018, the student was removed from the classroom to the "time out" room due to kicking and screaming behavior.
27. The documentation indicates that interventions were attempted prior to the removal, and states that the student walked to the "time out" room "on his own."
28. The school staff documented that, while in "time out," the student was screaming, pacing and tearful. The documentation reflects that of the total fifteen (15) minutes that the student was in the "time out" room, the school staff used seclusion for one (1) minute. However, there is no documentation that the student's behavior created an emergency situation in which the intervention was necessary to protect him or others from imminent, serious, physical harm.

29. There is no other documentation of the use of seclusion with the student.

**CONCLUSION:**

Based on the Findings of Facts #26 - #29, the MSDE finds that seclusion was used with the student for one (1) minute on March 15, 2018 without evidence of an emergency situation in which the intervention was necessary to protect him or others from imminent, serious, physical harm, in accordance with COMAR 13A.08.04. Therefore, this office finds that a violation occurred.

**CORRECTIVE ACTION/TIMELINES:**

**Student-Specific**

The MSDE requires the CCPS to provide documentation by April 1, 2019 that the BIP is being implemented as written. The CCPS must also provide documentation that the IEP team considered information about the student's diagnoses of Autism and ADHD, and has reviewed and revised, as appropriate, the IEP.

The CCPS must also ensure that the IEP team has determined, based on the data, whether the student achieved the annual goals by March 2019.

If the student achieved the goals, the IEP team must determine whether the violations identified through this investigation had a negative impact on his ability to benefit from the education program, taking into consideration the amount of time that he was available for instruction given his frequent absences from school for health reasons. If a negative impact is found, the team must determine the amount and nature of compensatory services or other remedy for the violations.

If the student has not achieved the goals, the IEP team must determine the services needed to expedite the student's progress towards achieving those goals, and must review the student's progress on a quarterly basis and revise the IEP, as appropriate, until the goals are achieved.

**School-Based**

The MSDE requires the CCPS to provide documentation by the end of the 2018-2019 school year, of the steps it has taken to ensure that the XXXXXX ES staff follow proper procedures for IEP development, BIP implementation, and use of seclusion. The documentation must include a description of how the CCPS will evaluate the effectiveness of the steps taken and monitor to ensure that the violations do not reoccur.

Documentation of all corrective action taken is to be submitted to this office to: Attention: Chief, Family Support and Dispute Resolution Branch, Division of Early Intervention and Special Education Services, MSDE.

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**TECHNICAL ASSISTANCE:**

Technical assistance is available to the parties by contacting Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE at (410) 767-7770.

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. 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/ksa

c: Daniel Curry  
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