



October 25, 2021

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Mr. Philip A. Lynch  
Director of Special Education Services  
Montgomery County Public Schools  
850 Hungerford Drive, Room 225  
Rockville, Maryland 20850

RE: ██████████ and Similarly-Situated Students  
Reference: #22-018

Dear Parties:

The Maryland State Department of Education, Division of Early Intervention/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.

**ALLEGATION:**

On August 26, 2021, the MSDE received a complaint from Maria Ott, Esq., hereafter, “the complainant,” on behalf of the above-referenced student. In that correspondence, the complainant alleged that the Montgomery County Public Schools (MCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the above-referenced student.

The MSDE investigated the allegation that the MCPS has not ensured that proper procedures were followed when physical restraint and seclusion were used with the student and similarly-situated students, since August 26, 2020,<sup>1</sup> in accordance with COMAR 13A.08.04.

**BACKGROUND:**

The student is twenty (20) years old, is identified as a student with Autism under the IDEA, and has an Individualized Education Program (IEP) that requires the provision of special education

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<sup>1</sup> During this investigation, it was determined that the incidents involving physical restraint and seclusion that are the subject of this State complaint, occurred on April 20, 2021 and April 27, 2021.

instruction and related services. He is placed by the MCPS at the [REDACTED] a non-public, separate, special education school in [REDACTED]

**FINDINGS OF FACTS:**

1. On March 12, 2021, the IEP team convened for a review of the student's IEP. The meeting summary reflects that the student's mother revoked consent for the use of physical restraint and seclusion as a requirement of the student's IEP and Behavior Intervention Plan (BIP).
2. The MCPS' Physical Restraint or Seclusion report and the Report of a Serious School Incident, both dated April 20, 2021, reflect that the school staff utilized physical restraint and seclusion in response to the student's physical attack on the school staff. However, the documentation does not reflect that the use of physical restraint and seclusion were needed to protect the student or others from imminent, serious, physical harm.
3. The MCPS' Physical Restraint or Seclusion report and the Report of a Serious School Incident, both dated April 27, 2021, reflect that the school staff utilized physical restraint in response to the student's physical attack on the school staff. However, the documentation does not reflect that the use of physical restraint was needed to protect the student or others from imminent, serious, physical harm.
4. On April 29, 2021, the IEP team convened to discuss the two (2) incidents related to the use of physical restraint and seclusion with respect to the student. The IEP meeting summary reflects that the team reviewed the incidents, including behaviors exhibited by the student and interventions utilized by school staff prior to the use of physical restraint and seclusion with respect to the student, and behaviors exhibited by the student during the use of physical restraint and seclusion. The team decided that the student's Functional Behavior Assessment (FBA) and the BIP would be reviewed at another IEP team meeting to determine if revisions were required.
5. On May 5, 2021, the IEP team convened to discuss the need to update the student's FBA. The team reviewed the student's recent behavior and existing FBA, and determined that the student's behavior was "very likely impacted from having virtual instruction for almost a year and attending school on a hybrid schedule." The IEP team also determined that there was a need to address how to assist the student with managing his "maladaptive" behaviors, and decided to reconvene at the end of the 2020 - 2021 school year to review any additional data related to the student's behavior, and to determine whether an updated FBA was appropriate for the student.
6. There is no documentation that the IEP team has reconvened to consider whether an updated FBA is needed to address the student's "maladaptive" behaviors, and to consider behavior interventions, as determined by the IEP team on May 5, 2021.

### **LEGAL REQUIREMENTS:**

Physical restraint means the use of physical force, without the use of any device or material, that restricts the free movement of all or a portion of a student's body. Physical restraint does not include holding a student's hand or arm to escort the student safely from one area to another or intervening in a fight (COMAR 13A.08.04.02).

Seclusion means the confinement of a student alone in a room from which the student is physically prevented from leaving (COMAR 13A.08.04.02).

The use of physical restraint and seclusion may only be used as follows:

1. After less restrictive or alternative approaches have been considered and attempted or determined to be inappropriate;
2. In a humane, safe, and effective manner;
3. Without intent to harm or create undue discomfort; and
4. Consistent with known medical or psychological limitations and the student's BIP (COMAR 13A.08.04.03).

The use of physical restraint and seclusion with students with disabilities is prohibited unless:

1. There is an emergency situation and the intervention is necessary to protect a student or another person after less intrusive interventions have failed or been determined to be inappropriate; or
2. The student's IEP or BIP describes the specific behaviors and circumstances in which the intervention may be used. In this case, the IEP or BIP must also specify how often the IEP team must meet to review and revise, as appropriate, the IEP or BIP (COMAR 13A.08.04.05).

In addition, physical restraint and seclusion may only be used if the emergency situation involves the need to protect a student or other person from imminent, serious, physical harm (COMAR 13A.08.04.05). The MSDE has issued guidance that imminent, serious, physical harm has the same meaning as serious bodily injury, which involves:

1. A substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement; or
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty (*MSDE Technical Assistance Bulletin 19-02, Student Behavior Interventions: Physical Restraint and Seclusion*, July 2019).

If restraint or seclusion is used and the IEP or BIP does not include the use of these interventions, the IEP team must meet within ten business days of the incident to consider the need for a FBA, developing appropriate behavioral interventions, and implementing a BIP (COMAR 13A.08.04.05).

### **CONCLUSION:**

Based on the Findings of Facts #1 - #4, the MSDE finds that the documentation does not reflect that the use of physical restraint and seclusion were needed to protect the student or others from imminent, serious, physical harm, in accordance with COMAR 13A.08.04.05. Therefore, this office finds that a violation occurred with respect to the allegation.

Further, based on the Findings of Facts #4 - #6, the MSDE finds that there is no documentation reflecting that the IEP team has reconvened to consider whether an updated FBA and behavior interventions are needed to address the student's behavior, in accordance with COMAR 13A.08.04.05. Therefore, this office finds that a violation occurred.

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

The MSDE has established reasonable time frames below to ensure that noncompliance 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 the MSDE Special Education State Complaint Resolution Procedures.

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 Dr. Nancy Birenbaum, Compliance Specialist, Family Support and Dispute Resolution Branch, MSDE, to ensure the effective implementation of the action.<sup>3</sup> Dr. Birenbaum can be reached at (410) 767-7770 or by email at [nancy.birenbaum@maryland.gov](mailto:nancy.birenbaum@maryland.gov).

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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.

<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.

### **Student-Specific**

The MSDE requires the MCPS to provide documentation that the IEP team has convened to consider the need for appropriate behavior interventions to address the student's behaviors, as determined by the IEP team.

### **School-Based**

The MSDE requires the MCPS to provide documentation of the steps taken to ensure that the [REDACTED] staff follow proper procedures when implementing the use of physical restraint and seclusion on Maryland students placed by the MCPS in the non-public, out-of-state school. The documentation must include a description of how the MCPS will evaluate the effectiveness of the steps taken and monitor to ensure that the violation does not recur.

### **Similarly-Situated Students**

The MSDE requires the MCPS to provide documentation of the steps it has taken to determine if the violation of not ensuring that proper procedures were followed when determining whether physical restraint and seclusion were needed to protect the student or others from imminent, serious, physical harm is unique to this case or if they represent a pattern of noncompliance for Maryland student's place by MCPS at the [REDACTED] in [REDACTED] during the 2020 – 2021 school year. Specifically, a review of student records, data, or other relevant information must be conducted in order to determine if the regulatory requirements are being implemented and documentation of the results of this review must be provided to the MSDE. If compliance with the requirements is reported, the MSDE staff will verify compliance with the determinations found in the initial report.

If the regulatory requirements are not being implemented, actions to be taken in order to ensure that the violation does not recur must be identified, and a follow-up report to document correction must be submitted within ninety (90) days of the initial date of a determination of non-compliance. Upon receipt of this report, the MSDE will re-verify the data to ensure continued compliance with the regulatory requirements.

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 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

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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/Special Education Services

MEF:ac

c: Monifa B. Mcknight  
Diana Wyles  
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