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October 4, 2016

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Mr. Nicolas Shockney  
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Carroll County Public Schools  
125 North Court Street  
Westminster, Maryland 21157

RE: XXXXX  
Reference: #17-017

Dear Parties:

The Maryland State Department of Education (MSDE), Division of Special Education/Early Intervention Services (DSE/EIS), 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 August 5, 2016, the MSDE received a complaint from Leslie Seid Margolis, Esq., Disability Rights Maryland, hereafter, “the complainant,” on behalf of the above-referenced student and Mr. XXXXXXXXXX and Mrs. XXXXXXXXXX, the student’s foster parents,<sup>1</sup> who serve as his parents under the IDEA. In that correspondence, the complainant alleged that the Carroll County Public Schools (CCPS) violated certain provisions of the Individuals with Disabilities Education Act (IDEA) with respect to the student.

The MSDE investigated the allegations listed below.

1. The CCPS did not ensure that proper procedures were followed when physical restraint was used with the student between September 1, 2015 and November 18, 2015, in accordance with COMAR 13A.08.04.

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<sup>1</sup> The foster parents are referred to as the “parents” throughout this document.

2. The CCPS did not ensure that proper procedures were followed when seclusion was used with the student between September 1, 2015 and November 18, 2015, in accordance with COMAR 13A.08.04.
3. The CCPS did not ensure that the Individualized Education Program (IEP) addressed the student's social, emotional, and behavioral needs from August 6, 2015<sup>2</sup> to November 18, 2015, in accordance with 34 CFR §300.324.

**INVESTIGATIVE PROCEDURES:**

1. On August 8, 2016, the MSDE sent a copy of the complaint, via facsimile, to Ms. Chris Wittle, former Acting Director of Special Education, CCPS.
2. On August 15, 2016, 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 the CCPS of the allegations and requested that the CCPS review the alleged violations.
3. On August 29 and 31, 2016, the MSDE requested documentation from the CCPS.
4. On September 12, 21, and 23, 2016, the CCPS provided documentation to the MSDE for consideration.
5. On September 21, 2016, Ms. K. Sabrina Austin, Education Program Specialist, MSDE, and Ms. Anita Mandis, Section Chief, Complaint Investigation Section., MSDE, conducted a site visit at XXXXXXXXXXXXXXXXXXXXX to review the student's educational record, and interviewed the following school system staff:
  - a. Ms. Filipa Gomes, Supervisor of Health Services, CCPS;
  - b. Ms. Tammy Halter, Behavior Support Specialist, CCPS;
  - c. Ms. XXXXX, Nurse CCPS;
  - d. Mr. XXXXXXXXXXXX, Principal, XXXXXXXXXXXXXXXXXXXX;
  - e. Ms. Gretchen Rockafellow, Supervisor of Special Education, CCPS;

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<sup>2</sup> While the facts presented by the complainant indicated that violations occurred prior to this time period, the complainant was informed, in writing, that this office can only resolve violations that are alleged to have occurred within one (1) year of the date that the State complaint is received (34 CFR §300.153).

- f. Ms. XXXXXXXXXXXX, Special Education Teacher, XXXXXXXXXXXXXXXXXXXX  
XXXX; and
- g. Mr. XXXXXXXXX, Assistant Principal, XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

Mr. Wayne Whalen, Instructional Consultant for Secondary School, CCPS, and Rochelle Eisenberg, Esq., legal counsel for the school system, attended the site visit as representatives of the CCPS and to provide information on the CCPS policies and procedures, as needed.

- 6. On September 26, 2016, Ms. Austin discussed the allegations with the student's foster mother, who serves as the student's parent under the IDEA.
- 7. The MSDE reviewed documentation, relevant to the findings and conclusions referenced in this Letter of Findings, which includes:
  - a. IEP, dated January 15, 2015;
  - b. Amended IEP, dated April 15, 2015;
  - c. Prior Written Notices, dated April 17, 2015, November 11, 2015 and January 12, 2016;
  - d. Correspondence from the CCPS to the student's parents documenting the approval of Home and Hospital Teaching (HHT) services, dated January 12, 2016;
  - e. Correspondence from XXXXXXXXXXXX to the CCPS documenting the student's acceptance, dated February 19, 2016;
  - f. Amendment to IEP, dated June 4, 2013;
  - g. Behavior Intervention Plan, dated June 4, 2013, revised April 15, 2015, and revised January 12, 2016;
  - h. The student's daily behavior charts, from August 2015 to November 2015;
  - i. The reports of the use of restraint, CPI transport, and seclusion, dated September 2015 to November 2015;
  - j. Reports of the student's progress towards master of the annual IEP goals, dated October 6, 2016, November 11, 2015, and December 11, 2015;
  - k. Reports of the student's involvement in disciplinary incidences, from September 2015 to November 2015;
  - l. Consent for Functional Behavior Assessment, signed by the student's parent on November 11, 2015;
  - m. Surveillance camera recordings of the use of seclusion on November 18, 2016;
  - n. The summary of the student's visit to the health room on November 18, 2015;
  - o. Accident report, dated November 18, 2015;
  - p. The reports of the student's visits to the health room, September 2015 to November 2015;
  - q. The report of a private neuropsychological evaluation, dated August 10, 2015;
  - r. Amended IEP, dated January 12, 2016;

- s. Correspondence from the school system to XXXXXXXXXXXX, XXXXXXXXX XXXXXXXXXXXX, and XXXXXXXXXXXXXXXXXXXX requesting admission for the student, dated January 14, 2016; and
- t. Correspondence from the complainant alleging allegations of violations of the IDEA, received by the MSDE on August 5, 2016.

### **BACKGROUND:**

The student is ten (10) years old and is identified as a student with Multiple Disabilities under the IDEA, including a Traumatic Brain Injury; an Other Health Impairment related to XXXXX Syndrome, XXXXX Syndrome, and Attention Deficit Hyperactivity Disorder (ADHD); a Speech/Language Impairment; and an Emotional Disability (Docs. a, b, and r).

During the time period covered by this investigation, the student attended XXXXXXXX XXXXXXXXXXXX. On November 18, 2015, the student's parents refused to return him to school after he sustained an injury at the school. The student received Home and Hospital Teaching (HHT) services for a short period of time thereafter as a result of receipt of verification of need from a private psychologist. On February 29, 2016, the CCPS placed the student at XXXXXXXX, a nonpublic separate special education school (Docs. a – e, and t).

### **FINDINGS OF FACTS:**

1. The IEP in effect on September 1, 2015 was developed on April 15, 2015. The IEP includes the following information about the student's social, emotional and behavioral functioning:
  - He is "highly" impulsive and needs constant reminders to demonstrate safety, consider positive behavior choices, remain on task, and follow classroom and school rules.
  - He often seeks adult attention by making requests and demands.
  - When angry, frustrated or sad, he will kick, hit, pinch, scratch and spit on staff. He will also use classroom materials as weapons towards staff.
  - His behaviors includes cursing, being disrespectful towards school staff and peers, and making verbal threats that include comments about harming staff and/or peers, and brining weapons to school.
  - He requires frequent breaks, positive feedback and consistency to maintain safe behavior.
  - He has been referred over forty (40) times for physical and verbal threats, physical attacks on staff, unsafe behaviors, disrespect, classroom disruption, insubordination and destruction of property (Docs. b and c).
2. In order to address the student's behavioral needs, the April 15, 2015 IEP includes two (2) behavioral goals. One (1) goal requires the student to demonstrate safety by refraining

from the use of physical aggression and verbal threats; the other goal requires him to comply with staff directives through the use of coping strategies when he is angry, sad or frustrated (Docs. b and c).

3. The April 15, 2015 IEP requires numerous accommodations and supplementary supports, including reduced distractions, positive feedback throughout the school day with rewards, and preferential seating, as well as counseling as a related service. The IEP also requires that the student receive the support of a one-to-one (1:1) assistant “at all times during the school day due to his unsafe behaviors” (Docs. b and c).
4. The April 15, 2015 IEP states that the Least Restrictive Environment (LRE) in which the IEP can be implemented is a separate special education classroom due to the student's need for intensive behavioral supports (Doc. b).
5. At the time of the April 15, 2015 IEP team meeting, the school staff were not using seclusion with the student based on a 2013 recommendation from the student's private therapist that it not be used. However, the April 15, 2015 IEP states that the student requires a Behavior Intervention Plan (BIP) and the use of crisis intervention services that “may include therapeutic restraint, seclusion room, support room or calming room.” The BIP specifically identifies that physical restraint and seclusion may be used with the student, but neither the IEP nor the BIP describes the specific behaviors and circumstances in which the interventions may be used and how often the IEP team must meet to review the IEP to determine the effectiveness of the interventions (Docs. a – c and f).
6. The written summary of the April 15, 2015 IEP team meeting documents that seclusion is to be used as an initial response when the student demonstrates the behaviors of hitting, spitting, kicking, and throwing objects. The school system staff report that the use of seclusion was added to the IEP at the request of the student's parent, who allegedly reported that the student is able to regain control more quickly at home when sent to his room and ignored at the parent's request. However, the student's parent strongly denies that she made any request, and reports that she strongly disagreed with the IEP team's decision to require the use of seclusion with the student.<sup>3</sup> Additionally, the written summary of the April 15, 2015 IEP team meeting does not identify the basis for the IEP team's decision to add the use of seclusion (Doc. c and interviews with the school system staff and the student's parent).

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<sup>3</sup> There is documentation that the student's parent reported that she has never used restraint or seclusion with the student in the home (Doc. c).

7. There is documentation that, as early as September 1, 2015, and continuing into October 2015, the school staff frequently used physical restraint and seclusion with the student<sup>4</sup> (Docs. h and i).
8. On October 6, 2015, the school staff prepared progress reports documenting that the student was not making sufficient progress towards mastery of either of the behavioral goals (Doc. j).
9. On November 11, 2015, the IEP team convened to consider the student's progress. The IEP team discussed that the student's interfering behaviors were escalating and that he was not making sufficient progress. At that time, reports prepared by the school staff documented approximately ten (10) incidents of restraint and forty-nine (49) incidents of seclusion had occurred.<sup>5</sup> There is no documentation that the IEP team met following any of those incidents in order to determine whether the interventions remained appropriate (Docs. c and i, and interview with the school system staff).
10. At the November 11, 2015 IEP team meeting, the student's parent's expressed concern about the student's aggressive behaviors and the number of times seclusion had been used. The IEP team agreed to conduct a Functional Behavior Assessment (FBA), and the student's parent provided written consent. The written summary of the meeting reflects the statement by the school staff that they "may need to consider other [placement] options at his annual IEP meeting" (Docs. c, h – j, and l).
11. The student's last day of attendance at XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX was November 18, 2015. The student's parent did not return the student to school following the use of seclusion on this date (Docs. i and j, and interviews with the parties).
12. Between September 1, 2015 and November 18, 2015, during which time the student attended school on forty-one (41) days, the school staff prepared reports documenting that physical restraint and seclusion were used on thirty-four (34) days. The documentation further reflects that, on numerous days, seclusion occurred more than once (Doc. i).
13. The documentation reflects that, on numerous occasions during the use of seclusion, the student was observed "banging his head," "hitting head on door," "tapping head on door," engaging in "self-injurious head banging" and "trying to give himself a nose bleed" (Doc. i).

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<sup>4</sup> The documentation also reflects that the use of restraint and seclusion continued in November 2015 (Doc. i).

<sup>5</sup> The documentation also reflects that, as of November 11, 2015, the student was involved in a disciplinary incident thirty (30) times (Doc. k).

14. The documentation of some of the incidences of physical restraint does not describe an emergency situation in which the intervention was needed to protect the student or others from imminent, serious, physical harm (Docs. h and i).
15. The documentation of some of the incidents of seclusion reflect that they lasted in excess of 30 minutes in duration, and in at least five (5) cases, exceeded more than one (1) hour (Doc. i).
16. On November 18, 2015, the student was escorted to the seclusion room after “hitting staff, spitting on staff, throwing materials, attempting to bite, [and] grabbing staff (Doc. i).
17. The documentation reflects that the seclusion began at 9:45 a.m. While in the seclusion room, the student sustained an injury (Docs. i and m - o).
18. The seclusion room at the XXXXXXXXXXXXXXXXXXXXXXX has a door that cannot remain closed unless a staff member standing outside of the room holds the spring loaded door handle. There is a window in the seclusion room door through which the school staff can observe a student in the room while holding the door handle. If the school staff release the door handle, the door to the seclusion room opens. This is intended to ensure that the school staff remain at the door viewing the student from the window at all times (Review of the seclusion room).
19. A surveillance camera is placed inside the seclusion room that provides a view of the seclusion room door from inside the seclusion room. This permits the school staff to observe a student who is sitting up against the inside of the seclusion room door, which is an area that cannot be fully viewed from the window in the door. A second surveillance video camera that covers the rest of the seclusion room is monitored by another school staff member in another room. Another video camera records activity that occurs in the hallway outside of the seclusion room (Review of the seclusion room, rooms adjoining and across from the seclusion room, hallway leading into the seclusion room, and interview with the school system staff).
20. The school system staff report that the video surveillance cameras operate continuously, and cannot be turned off by the school staff. When there is a certain amount of movement inside of the seclusion room, the surveillance cameras record the activity. However, while the cameras continue to operate and provide live streaming of the room, the recording of the camera images stops when movement in the room stops, and smaller movements inside the room do not always trigger the recording to begin (Interview with the school system staff).
21. When the student was placed in the seclusion room on November 18, 2015, a cover was placed over the window to the room preventing the school staff from viewing the student

- through the window in the seclusion room door. The school staff report that this was done because, without the cover, the student could see that someone was viewing him even with a privacy screen on the glass, which increased his agitation (Doc. m and interview with the school staff).
22. The video of the hallway outside of the seclusion room reflects the student being escorted into the room at 9:45 a.m. and the door was closed. Two (2) minutes later, at 9:47 a.m., a staff member from the monitoring room next to the seclusion room brought the laptop into the hallway. At that time, the staff member from the monitoring room relieved the staff member who was holding the door handle, and began to view the laptop in order to observe the video recording of the seclusion room door from inside the seclusion room. The video of the hallway reflects that the door was not opened to check on the student, nor was there a check of the student through the window door, until 9:55 a.m., ten (10) minutes after the start of seclusion. During this time, the only monitoring of the student was via viewing of the laptop (Doc. m).
23. The movement that was recorded inside the seclusion room reflects the student being escorted into the room at 9:45 a.m., the door being shut, and the student sitting on the floor directly in front of the door with his head bent over so that you could not see his face or hands. Twelve (12) minutes later, at 9:57 a.m., the recording reflects the seclusion room door opened by the school staff, the student assisted off of the floor, and blood on the floor where the student was sitting. At 10:00 am, while still in the seclusion room, the school nurse assessed the student, and documented that he had “blood to the nose.” Similarly, the report of the use of seclusion on November 18, 2015 reflects that the student had a nose bleed during the seclusion<sup>6</sup> (Docs. i and m - o).
24. The school staff report that they do not know how the student injured himself. The school staff also report that they have discontinued the practice of covering the window to the seclusion room (Interview with the school staff).
25. The health room records document that, prior to November 18, 2015, the student was seen in the health room on eleven (11) occasions due to nose bleeds. There is also documentation that, on two (2) occasions during the use of seclusion, the student was observed to be “trying to give himself a nose bleed” (Docs. i and p).
26. On January 12, 2016, the IEP team reconvened and reviewed the results of the FBA. The written summary of the meeting reflects that the IEP team discussed that the results of the FBA indicate that the student’s behaviors escalate when he receives “low adult

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<sup>6</sup> The school nurse documented that the student had “a purple area to the nose,” that it was “shifted,” and that there was a possible fracture for which he required medical attention. There is documentation that the student sustained a bruised septum, not a fracture to his nose (Docs. n and o).

attention,” is physically prompted or when non-preferred demands are placed on him. Because there was insufficient information in the report of the FBA and the staff member who conducted the FBA was no longer working for the school system, the IEP team members were required to supplement information in the FBA. The student’s parent also expressed her belief that the school staff’s use of seclusion and restraint has resulted in an escalation of the student’s behaviors (Doc. c and interview with the school staff).

27. At that January 12, 2016 IEP team meeting, the IEP team reviewed the report of a neuropsychological evaluation that included a recommendation from the private psychologist that restraint not be used with the student “unless he is in imminent danger of physically harming himself or others.” Based on the student’s “history of aggressive and physically violent behaviors towards staff,” the IEP team rejected the recommendation. However, the IEP team determined that, while the student requires daily access to crisis intervention that may include the use of a calming room, support room or other designated break area, they decided that seclusion and restraint would only be used if there is an emergency situation involving the need to protect the student or others from imminent, serious physical harm<sup>7</sup> (Docs. c, g, q and r).
28. At the January 12, 2016 IEP team meeting, the IEP team discussed the student’s present levels of performance. Based on this information they revised the student’s IEP including revisions to the instructional and testing accommodations, additions to the supplementary aids, services and program modifications and supports, and increased counseling services in order to address his current needs. In addition, the IEP team revised the annual IEP goals, including both of the behavioral goals (Doc. r).
29. At the January 12, 2016 IEP team meeting, the IEP team decided, that even with the provision of supplementary aids and supports, the IEP could not successfully be implemented in a separate special education classroom. The team determined that the Least Restrictive Environment (LRE) in which the IEP can be implemented is a nonpublic separate special education school (Docs. c and r).
30. On January 14, 2016, the CCPS made applications for the student to nonpublic separate special education schools. On February 19, 2016, the application was approved by XXXXXX where the student has been attending school since February 29, 2016 (Docs. e and s, and interview with the school staff).

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<sup>7</sup> The IEP team revised the IEP to clarify that the use of restraint or seclusion may be used “as a last [resort] when [the student] is a danger to self or others” (Doc. r).

## **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).

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 Behavioral Intervention Plan (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 Fact Sheet, The Use of Restraint and Seclusion*, January 14, 2014).

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 Functional Behavioral Assessment (FBA), developing appropriate behavioral interventions, and implementing a BIP. If the IEP or BIP include the use of restraint or seclusion, it must specify how often the IEP team must meet to review the IEP or BIP (COMAR 13A.08.04.05).

When an IEP team meets to review a student's IEP or BIP, it must consider the following:

- (a) Existing health, physical, psychological, and psychosocial information;
- (b) Information provided by the parent;
- (c) Observations by teachers and related service providers; and
- (d) The student's current placement (COMAR 13A.08.04.05).

When using seclusion, the public agency must ensure that the school staff view the student at all times and ensure that the room is free of objects and fixtures with which a student could self-inflect bodily harm. In addition, the use of seclusion must be appropriate to the student's developmental level and the severity of the behavior, and may not exceed thirty (30) minutes in duration (COMAR 13A.08.04.05).

The COMAR specifically states that the requirements for the use of behavior interventions, such as physical restraint and seclusion, do not prohibit the school staff from initiating appropriate student disciplinary actions (COMAR 13A.08.04.03).

In order to provide a student with a Free Appropriate Public Education (FAPE), the public agency must ensure that an IEP is developed that addresses all of the needs that arise out of the student's disability that are identified in the evaluation data. In the case of a student whose behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (34 CFR §§300.101, .320, and .324).

The MSDE has issued guidance that frequent use of behavioral interventions such as physical restraint and seclusion raises concerns about the efficacy of the student's BIP. Repeated challenging behaviors that lead to an emergency situation can be anticipated and should be addressed through positive behavior interventions, strategies, and supports. Any determination that such supports cannot address the behavior and that physical restraint and seclusion are addressing the behavior must be based on data (*MSDE Fact Sheet, The Use of Restraint and Seclusion*, January 14, 2014).

If the IEP team determines that a reevaluation is needed to ensure that all of the student's needs have been identified and addressed, the IEP team must review the existing data, and on the basis of that review and input from the parents, identify what additional data, if any, is needed to determine the student's eligibility and educational needs. If the IEP team determines that additional data is required, the public agency must ensure that results of assessment procedures

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are used by the IEP team in reviewing and as appropriate, revising the IEP within ninety (90) days (34 CFR §300.305 and COMAR 13A.05.01.06).

The public agency must obtain informed parental consent prior to conducting any reevaluation. This consent need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent and that the parent failed to respond to the requests. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue a reevaluation through a due process hearing (34 CFR §300.300).

### **DISCUSSION/CONCLUSIONS:**

#### **Allegation #1            Use of Physical Restraint**

In this case, the complainant alleges that, while physical restraint was included on the IEP, it did not describe the specific behaviors and circumstances for which it should be used. The complainant further alleges that physical restraint was used in response to actions that did not arise to the level of an emergency situation in which the intervention is necessary to protect the student or others from imminent, serious physical harm after other less intrusive, nonphysical interventions have failed or been determined inappropriate (Doc. t).

Based on the Finding of Fact #5, the MSDE finds that neither the IEP nor the BIP described the specific behaviors and circumstances for which physical restraint could be used. Based on the Finding of Fact #14, the MSDE further finds that there was no documentation of the type of emergency situation that is required for every incident during which physical restraint was used. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

The complainant further alleges that the IEP team did not review and revise the Behavior Intervention Plan (BIP) as a result of the excessive use of physical restraint (Doc. t).

Based on the Findings of Facts #5, #9, #12 and #27, the MSDE finds that there is no documentation that the IEP team convened to reconsider the use of physical restraint until January 12, 2016 despite the fact that the student was not making sufficient progress towards achieving the annual behavior goals even with the frequent use of behavior interventions. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

The complainant also asserts that the school system was in violation of the COMAR requirements when discipline referrals were made for the incidents that prompted the use of physical restraint (Doc. t). Because COMAR specifically indicates that disciplinary action can be taken for behavior that results in the use of interventions such as physical restraint, this office does not find that a violation occurred with respect to this aspect of the allegation.

## **Allegation #2            Use of Seclusion**

In this case, the complainant alleges that the IEP in effect at the start of the 2015-2016 school year included the use of seclusion to address the student's behavior despite the fact that a private neuropsychological assessment provided to the school staff prior to the start of that school year documented that he had a history of extreme trauma that contraindicated its use (Doc. t).

Based on the Findings of Facts #5 and #6, the MSDE finds that there is no documentation of the basis for the IEP team's April 15, 2015 decision to use seclusion with the student despite the recommendation of the private therapist against its use. Therefore, this office cannot find that the decision to include seclusion as part of the student's program was consistent with the data.

The complainant further alleges that, while the IEP was revised to include the use of seclusion, it did not describe the specific behaviors and circumstances for which it should be used, and that it was inappropriately used to address behaviors such as throwing objects, including a notebook and shoes (Doc. t).

Based on the Findings of Facts #5 and #16, the MSDE finds that neither the IEP nor the BIP described the specific behaviors and circumstances for which seclusion could be used and there was no documentation of the type of emergency situation that is required for every incident during which seclusion was used. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

The complainant alleges that the school staff did not view the student at all times while he was placed in seclusion, and that he was allowed to injure himself as a result (Doc. t).

Based on the Findings of Facts #16 - #24, the MSDE finds that the CCPS did not ensure that the student was within view of the school staff at all times during the use of seclusion on November 18, 2015. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

In addition, the complainant alleges that the student was placed in seclusion in excess of thirty (30) minutes on several occasions (Doc. t).

Based on the Finding of Fact #15, the MSDE finds that the documentation reflects that seclusion was used with the student in excess of thirty (30) minutes per incident. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

The complainant also alleges that the IEP team did not review and revise the Behavior Intervention Plan (BIP) as a result of the excessive use of seclusion (Doc. t).

Based on the Findings of Facts #5, #9, #12 and #27, the MSDE finds that there is no documentation that the IEP team convened to reconsider the use of restraint until

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January 12, 2016 despite the fact that the student was not making sufficient progress towards achieving the annual behavior goals even with the frequent use of behavior interventions. Therefore, this office finds that a violation occurred with respect to this aspect of the allegation.

The complainant also asserts that the school system was in violation of the COMAR requirements when discipline referrals were made for the incidents that prompted the use of seclusion (Doc. t). As stated above, because COMAR specifically indicates that disciplinary action can be taken for behavior that results in the use of interventions such as seclusion, this office does not find that a violation occurred with respect to this aspect of the allegation.

### **Allegation #3            Addressing the Student's Social, Emotional, and Behavioral Needs**

The complainant alleges that seclusion and physical restraint were used excessively, and that the CCPS did not ensure that the IEP team obtained the data needed to determine the efficacy of the use of these interventions and the student's BIP in order to ensure that the student's social, emotional, and behavioral needs were properly addressed. The complainant further alleges that, while an FBA was conducted on November 20, 2015, it was conducted without parental consent, and did not result in the collection of the data needed to ensure that the IEP addressed the student's needs (Doc. t).

Based on the Finding of Fact #10, the MSDE finds that the documentation does not support the allegation that the FBA was conducted without parental consent.

Based on the Findings of Facts #1 - #4, #10, and #26 - #30, the MSDE finds that the IEP team considered the required data and developed a program to address the social, emotional, and behavioral needs identified in the data.

However, as stated above, based on the Findings of Facts #5 and #6, the MSDE finds that there is no documentation of the basis for the IEP team's April 15, 2015 decision to use seclusion with the student despite the recommendation of the private therapist against its use. Therefore, this office cannot find that the decision was consistent with the data.

In addition, based on the Findings of Facts #7 - #9 and #11 - #13, #25, and #27, there is no documentation that the IEP team convened to reconsider the use of seclusion and physical restraint until January 12, 2016 despite the fact that the student was not making sufficient progress towards achieving the annual behavior goals even with the frequent use of behavior interventions, and the fact that he demonstrated self-injurious behavior during the use of seclusion. Therefore, this office finds that a violation occurred with respect to the allegation between April 15, 2015 and January 12, 2016.

**CORRECTIVE ACTIONS/TIMELINE:**

**Student-Specific**

The MSDE requires the CCPS to provide documentation by December 1, 2016 that the IEP team has determine the compensatory services needed to remediate the violations identified in this investigation, and has developed a plan for the provision of those services within one (1) year of the date of this Letter of Findings.

**School-Based**

The MSDE requires the CCPS to provide documentation by December 1, 2016 of the steps taken to ensure that the XXXXXXXXXXXXXXXXXXXX staff comply with the requirements related to the use of behavioral interventions and ensuring that the IEP addresses students' social, emotional, and behavioral needs.

The documentation of all corrective actions taken is to be submitted to this office to the attention of the Chief of the Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE.

**TECHNICAL ASSISTANCE:**

Technical assistance is available to the complainants and the CCPS by Dr. Nancy Birenbaum, Compliance Specialist, MSDE. Dr. Birenbaum may be contacted at (410) 767-0255.

Please be advised that both the complainants and the CCPS 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 facts 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 conclusions.

Questions regarding the findings of facts, conclusions and corrective actions contained in this letter should be addressed to this office in writing. The student's 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 FAPE for the student, including issues subject to this State complaint investigation, consistent with the IDEA. The MSDE recommends

Leslie Seid Margolis, Esq.  
Mr. Nicolas Shockney  
October 4, 2016  
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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 Special Education/  
Early Intervention Services

MEF/am

c:       XXXXXXXXX  
          Stephen H. Guthrie  
          Wayne Whalen  
          XXXXXXXXX  
          Dori Wilson  
          Anita Mandis  
          K. Sabrina Austin  
          Nancy Birenbaum