

Colorado Department of Education  
Decision of the State Complaints Officer  
Under the Individuals with Disabilities Education Act (IDEA) and  
the Protection of Individuals from Restraint and Seclusion Act (PPRA)

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**State-Level Complaint 2023:545  
Durango School District 9-R**

**DECISION**

**INTRODUCTION**

On May 4, 2023, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Durango School District 9-R (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153, as well as the Protection of Individuals from Restraint and Seclusion Act (“PPRA”)<sup>2</sup> and its implementing regulations, the Rules for the Administration of the Protection of Persons from Restraint Act (the “Rules”). Therefore, the SCO has jurisdiction to resolve the Complaint.

On May 10, 2023, upon the agreement of the parties, the SCO extended the 60-day investigation timeline to allow the parties to participate in mediation. However, mediation resulted in an impasse and, on May 26, 2023, the SCO resumed the investigation.

**RELEVANT TIME PERIOD**

The Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c); Rule 2620-R-2.07(2)(f).<sup>3</sup> Accordingly, this investigation will be limited to the period of time from May 4, 2022 through the present for the purpose of determining if a violation of the IDEA or the PPRA occurred. Additional information outside this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to violations occurring after May 4, 2022.

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400 *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1 *et seq.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

<sup>2</sup> The Protection of Individuals from Restraint and Seclusion Act, C.R.S. § 26-20-101 *et seq.*, was previously titled the Protection of Persons from Restraint Act and referred to as the “PPRA.” This acronym lives on despite amendment of the Act’s title.

<sup>3</sup> The Rules were amended in June 2023; however, because the alleged conduct occurred prior to that date, the previous version of the Rules is cited herein.

## **SUMMARY OF COMPLAINT ALLEGATIONS**

Whether District denied Student a Free Appropriate Public Education (“FAPE”) because the District:

1. Failed to develop, review, and revise an Individualized Education Program (“IEP”) that was tailored to meet Student’s individualized needs, from May 2022 to present, because behavioral strategies and supports did not adequately address Student’s behavioral needs, in violation of 34 C.F.R. § 300.324(a)(2)(i).
2. Failed to properly implement Student’s IEP, from November 2022 to present, specifically by failing to follow Student’s behavior intervention plan (“BIP”) and provide a safe space for regulation, in violation of 34 C.F.R. § 300.323.

And whether the District violated the PPRA because the District:

3. Improperly restrained Student on or about November 4, 2022 and February 9, 2023, specifically by:
  - a. Restraining Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a) and C.R.S. § 26-20-103(1)(a);
  - b. Restraining Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective under the circumstances, in violation of Rule 2620-R-2.01(1)(b) and C.R.S. § 26-20-103(b)(I)-(II);
  - c. Restraining Student as a punitive form of discipline or as a threat to control or gain compliance of Student’s behavior, in violation of Rule 2620-R-2.01(2) and C.R.S. § 26-20-103(1.5); and
  - d. Failing to comply with the documentation and notification requirements for restraint, in violation of Rule 2620-R-2.04 and C.R.S. §§ 22-32-147(3)(b5)-(c), 26-20-106, and 26-20-111(7).

## **FINDINGS OF FACT**

After thorough and careful analysis of the entire Record,<sup>4</sup> the SCO makes the following FINDINGS OF FACT (“FF”):

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<sup>4</sup> The appendix, attached and incorporated by reference, details the entire Record.

## **A. Background**

1. Student attended kindergarten at a District elementary school (“School”) from the start of the 2022-2023 school year, on August 23, 2022 through April 26, 2023, when Parent disenrolled him from School. *Exhibit A*, p. 1; *Exhibit N*, p. 1; *Exhibit P*, pp. 622-623.
2. Student is eligible for special education and related services under the disability category of Serious Emotional Disability; he was previously found eligible under the category of Speech or Language Impairment. *Exhibit A*, pp. 1, 18.
3. Student is an imaginative six-year-old who enjoys science and art, and who seeks connections with trusted adults. *Exhibit B*, p. 9; *Interview with Principal*. He has a history of complex medical diagnoses and must frequently visit healthcare providers. *Exhibit A*, p. 10. He has difficulty regulating his emotional state; when he becomes upset, he exhibits physical and verbal aggression against people and property, and he will attempt to elope from difficult social situations and from the school grounds. *Exhibit B*, pp. 9-11; *Interview with Principal*.
4. Parent’s concerns are that the District did not offer an IEP with sufficient behavioral supports or timely revise the IEP to add additional supports, and that staff did not give Student a “safe space” to regulate as required by his IEP. *Complaint*, pp. 7-9. She is also concerned that School staff inappropriately restrained Student on November 3, 2022<sup>5</sup> and February 9, 2023. *Id.* at p. 8. The District responds that the IEP was appropriately designed in light of the information available when Student began kindergarten, and, although not formally revised until March 2023, fully implemented as early as September 2022. *Response*, pp. 1-2, 8; *Interview with Principal*. The District denies that School staff improperly restrained him. *Response*, pp. 9-10.

## **B. The May 2022 IEP and BIP – Preparation for Kindergarten**

### The May 2022 IEP

5. On May 20, 2022, a properly composed IEP Team, including Parent, met and developed an IEP (“the May 2022 IEP”) that would govern Student’s education when he entered kindergarten for the 2022-2023 school year. *Interviews with Parent and Special Education Teacher*; see *Exhibit A*, p. 1.
6. The IEP documented Student’s levels of academic achievement and functional performance, drawing from a comprehensive reevaluation that included Parent’s input, observational assessments and cognitive, academic, and social-emotional evaluations. *Exhibit A*, pp. 3-8; *Exhibit C*, pp. 1-18; *Consultation with CDE Content Specialist*.

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<sup>5</sup> Parent originally indicated that Student was restrained on November 4, 2022, but the investigation has shown that the incident occurred on November 3, 2022, which Parent does not dispute. See *Exhibit I*, pp. 13-14; *Interview with Parent*.

7. Student had “substantial difficulty . . . with behaviors or characteristics related to aggression, depression, anger and emotional control, bullying, and negative emotionality across home and school contexts” to the degree that he would benefit from supports related to emotional and behavioral regulation. *Exhibit A*, p. 6. Although his communication skills were adequate for his academic needs, he struggled to communicate when he became dysregulated. *Id.* at p. 7. Based on the assessments in Student’s evaluation, which incorporated Parent’s input, the IEP Team determined that Student’s social and emotional development was delayed, resulting in deficits to his social-emotional regulation, ability to build relationships, and ability to cooperate. *Id.* at p. 8.
8. The IEP Team noted that, although he was “able to engage in turn-taking games with peers and can participate in joint focus-interactive play with peers,” he also “engaged in unsafe behaviors including physical aggression and property destruction.” *Id.* at pp. 7-8. Neither the IEP nor underlying behavioral assessment showed he attacked adults; his aggression arose from social conflicts with his peers. *See id.; Exhibit C*, pp. 1-2. Parent reported that he played with the other children at home without exhibiting aggressive behaviors. *Exhibit A*, p. 9.
9. Student’s disabilities resulted in a need for supports that would enable him to regulate his emotions and behaviors, to interact and cooperate with his peers, and to communicate his needs and wants rather than acting out. *Id.*
10. The IEP Team set two annual goals. *Id.* at pp. 10-11. Goal 1 was for Student to independently regulate himself when upset, with a target of being able to regulate himself 100% of the time for a duration of one month, from a baseline of being able to regulate himself only 20% of the time. *Id.* at p. 10. Goal 2 was to develop self-regulation skills that would allow him to focus on and participate in classroom tasks and teacher-led activities, with a target of being able to complete 2-3 steps of a task or participate appropriately for longer than 5 minutes, from a baseline of completing only the first step of a task and participating for only 1-2 minutes. *Id.* at p. 11. Progress on these goals was to be reported with his report cards. *Id.* at p. 10.
11. The IEP provided twelve classroom accommodations. *Id.* at p. 11. Nine were requirements that School staff would “[e]xplicitly teach” social-emotional skills, such as “social problem-solving strategies” and “play planning skills.” *See id.* Staff were also to “[a]llow rest time throughout the day as needed to regulate behavior,” model appropriate peer interactions, provide positive feedback, and give him one-on-one time as needed. *Id.*
12. The IEP provided specialized instruction and related services, including occupational therapy targeting “regulation, sensory and fine motor supports.” *Id.* at pp. 14-15. The services were:
  - Social-Emotional Instruction: 300 minutes per week inside the general education environment and 30 minutes per week outside the general education environment, to be provided directly to Student.

- Occupational Therapy: 240 minutes of direct instruction per semester outside the general education environment and 30 minutes per month of indirect support inside the general education environment.
- Behavioral Services: 360 minutes per semester of indirect support outside the general education environment.

*Id.*

13. The IEP Team agreed that his “least restrictive environment” (“LRE”) was “80% or more,” meaning he would spend at least 80% of his time in general education. *Id.* at p. 16.

#### The May 2022 BIP

14. Student’s IEP incorporated a BIP to address behavioral issues and enable him to access the general education environment. *Exhibit A*, p. 10; *Exhibit B*, p. 1; *Response*, p. 5.

15. The BIP was developed based on information gained from an appropriately comprehensive evaluation that included a functional behavioral assessment, formal and informal observations, and the results of the Questions about Behavioral Function (QABF) diagnostic, an indirect assessment tool designed to identify potential reasons for a child’s negative behaviors. *Exhibit B*, p. 1; *Consultation with CDE Content Specialist*.

16. The BIP stated he engaged in challenging behaviors such as refusing teachers’ instructions, throwing objects, and acting with physical aggression toward his peers. *Exhibit B*, p. 1.

17. The BIP determined that his unsafe and noncooperative behaviors were motivated by a desire for attention and to avoid non-preferred environments and activities. *Exhibit B*, p. 2. Over the course of the school year, School staff came to understand that Student’s primary motivation was to avoid non-preferred activities, such as attending school. *Interview with Principal*.

18. The BIP provided individualized strategies to prevent and respond to behavioral issues. *Exhibit B*, pp. 2-3. These strategies required staff to monitor Student’s physical needs, such as hunger and fatigue, to provide constant positive feedback and direction to keep him engaged in schoolwork, and to avoid responding to negative behavior with attention. *Id.*

19. The section for a crisis intervention plan stated, “the student’s behavior does not have the potential to produce harm to self or others therefore a crisis plan is not required.” *Id.* at p. 5.

#### Making the IEP and BIP Accessible to Teachers

20. Before the school year began, special education staff as well as Principal met to discuss the special education caseload, students, and the students’ needs. *Interview with Principal*.

21. Special Education Teacher met with Student's teachers at the beginning of the year to explain Student's needs, accommodations, services, and goals. *Interviews with Special Education Teacher and General Education Teacher*. Student's IEP and BIP were also available electronically for teachers to review. *Id*
22. Throughout the year, Student's teachers and service providers continually emailed the group of all staff who worked with Student to share updates regarding Student's behavior, health, and accommodations, as well as additional behavioral strategies and accommodations that everyone needed to follow. *Interviews with Principal, Special Education Teacher, and General Education Teacher; see, e.g., Exhibit P, pp. 247, 258, 302, 317, 611, 712, 721, 1215.*

**C. August 2022 to March 2023 – Behavioral Issues and School's Response**

**Student's Behavior, Non-Attendance, and Lack of Progress**

23. The first few weeks of kindergarten went well, and Student did not exhibit significant negative behaviors. *Exhibit P, p. 1051; Interviews with Special Education Teacher and Parent.*
24. In early September, however, this changed, and he began regularly becoming dysregulated and engaging in aggressive, violent, and unsafe behaviors. *See Exhibit I, pp. 4-16.* School's incident log shows he engaged in severe, aggressive behavior against staff and other students twelve times in the fall semester and six times from January through March of the spring semester. *See id.* Of the twelve incidents recorded for the fall semester, three were in September, one in October, seven in November, and one in December. *Id.* at pp. 9-15.
25. Student's cycles of behavioral dysregulation included physically hitting and kicking staff and his peers, destroying and throwing objects, throwing objects directly at staff, cursing at the staff, making rude gestures at them, and threatening them with harm. *See id.*
26. Staff were forced to evacuate classrooms four times. *See id.* at pp. 5, 9, 12, 15. Student was given one-day, out-of-school suspensions three times. *Id.* at pp. 5, 14, 15.
27. Student repeatedly attempted to elope from the school campus, requiring Principal and other staff to chase him to attempt to contain, deescalate, and talk to him until he would return to the school building. *Id.* at pp. 5, 7, 10.
28. Parent asked School to call her when staff had difficulty bringing Student back into a regulated emotional state. *Exhibit P, p. 398; Interview with Special Education Teacher, General Education Teacher, and Parent.* School staff did call Parent at times because Student could not be deescalated or presented concerning behaviors. *See Exhibit I, pp. 2, 4, 7, 10-11; Exhibit S, pp. 2-6.* Parent often chose to pick Student up. *E.g., Exhibit I, p. 2.* On three occasions, School sent him home. *Exhibit I, pp. 3, 11-12.* On other occasions, however, School staff

managed to deescalate Student and continue with his day rather than send him home. See *Exhibit I*, pp. 2, 4, 7, 10-11; *Exhibit S*, pp. 2-6.

29. In addition to absences stemming from his behaviors, Student, who suffers from several complex and rare health issues, was frequently absent to attend medical appointments. *Interviews with Special Education Teacher and Parent*.
30. In total, Student, who was enrolled full time, was absent 37 half-days in the fall semester and 88 half-days in the spring semester. *Exhibit H*, p. 1. He was tardy a total of 14 times in the fall semester and 16 times in the spring semester. *Id.* Of these absences, five half-days were due to out-of-school suspension. *Id.* at pp. 1, 5. He had one half-day of in-school suspension. *Id.* at p. 5.
31. As a result of absences and removal from the regular classroom for unsafe behaviors, he was rarely in the regular classroom with his peers. *Interview with General Education Teacher*. General Education Teacher “did not really know him as a learner,” and he did not attend class often enough to allow her to meaningfully grade his schoolwork. *Id.*; see *Exhibit F*, p. 5.
32. To the extent he received academic instruction, it came primarily from Special Education Teacher outside of the regular classroom, as well as from a reading interventionist on days when Student was regulated enough to attend small-group instruction. *Interviews with Special Education Teacher, General Education Teacher, and Assistant Principal*.
33. Student’s absences and removals also meant that he did not, for the most part, receive service minutes inside general education as required by his IEP. See *Exhibit G*. Specifically:
  - Social-Emotional Instruction: Service logs show only that Student received 60 minutes of direct social-emotional instruction inside the general education environment on December 2, 2022. *Exhibit G*, p. 15.
  - Occupational Therapy: The logs show that that the occupational therapist provided 70 minutes of direct services and 90 minutes of indirect support, in the spring semester. *Id.* at pp. 14-15. The service logs reflect no occupational therapy services for the fall semester. See *id.* They show that Student missed three sessions because he was absent or dysregulated. *Id.*
  - Behavioral Services: The logs contain six entries from a behavioral specialist, but they are all administrative and do not show any delivery of services. *Id.* at pp. 11-12.
34. The service logs do not reflect all the specialized instruction provided to Student, because Special Education Teacher, Behavioral Interventionist, and other School staff worked intensively on social-emotional and behavioral needs when he was unable to participate in general education, which was most of the time. *Interviews with Special Education Teacher,*

*Behavioral Interventionist, and General Education Teacher; Exhibit G; see Exhibit V.* Accordingly, the SCO finds that Student received more than the required minutes of social-emotional instruction and behavioral support outside the regular classroom. *Id.*

35. The finding that Student missed services is supported by the lack of progress reporting; in response to the SCO's request for report cards and progress reports or data on progress toward annual goals, the District disclosed a progress report with blank areas where progress would be reported and a final 2022-2023 report card with grades only for the second quarter. *Exhibit F, pp. 2-7.*
36. The SCO calculates missed services as follows: Student was enrolled at School for 16 weeks in the fall semester and 14 weeks in the spring semester. *See Exhibit N.* However, his absences—not including suspensions—totaled about 4 weeks in the fall semester and 9 weeks in the spring semester. *Exhibit H, p. 1.* Subtracting his absent weeks from his total weeks of enrollment, he should have received services for 12 weeks in the fall semester and 5 weeks in the spring semester. Accordingly, comparing the minutes required to the minutes provided (see above, FF #s 12 and 33), he should have received a total of 85 hours of direct social-emotional instruction (300 minutes per week multiplied by 17 weeks) inside the general education environment, but he received only 1 hour. *Compare FF # 12 and 33.* And he should have received a total of 480 minutes of direct occupational therapy services outside the general education environment (240 minutes multiplied by 2 semesters), but he received only 70 minutes. *Id.*

#### Creation of a Crisis Plan

37. At the end of September, following “three significant incidents within a week that resulted in unsafe behavior,” Special Education Teacher proposed a team meeting to review Student's BIP and discuss the need for a crisis plan. *Exhibit P, pp. 705, 1020.*
38. The District's Special Education Procedural Manual, although generally comprehensive and granular, provides no guidance regarding situations where a case manager should convene the IEP Team sooner than for the annual review. *See Exhibit O, pp. 10-116.* The District has a practice that encourages staff to communicate with each other and with parents, and to conduct progress monitoring and reporting, but it has no formal policy or procedures for reviewing and revising IEPs in between annual reviews. *Interview with Executive Director of Student Support Services (“Executive Director”).* The District also has a practice of trying out new strategies and making intentional decisions to try something new without putting it in the IEP. *Id.*
39. The team that Special Education Teacher convened included the District behavioral analyst who had crafted Student's BIP, Behavioral Interventionist (who helped implement plans created by the analyst), School's psychologist, the School student counselor, a District social



worker who worked in School, General Education Teacher, a reading teacher who worked with Student, Principal, and Assistant Principal. *Exhibit P*, pp. 705-06, 709, 1020.

40. The team included all the individual members of Student's IEP Team except Parent, who was not given notice of the meeting or invited to attend. *Compare id. with Exhibit A*, p. 20; *Interviews with Parent and Special Education Teacher*. The meeting resulted in the creation and implementation of a crisis plan to supplement the BIP. *Exhibit P*, p. 705; *Exhibit C*, p. 29.
41. Like Student's BIP, the crisis plan was comprehensive and individualized to Student's behavioral issues and needs. *See Exhibit T; Consultation with CDE Content Specialist*. It was four pages and broken into categories: Green, describing proactive actions intended to maintain a stable emotional state; Yellow, describing strategies for deescalating moderately negative behaviors; and Red, providing steps to follow when he engaged in "high magnitude continuous physical aggression," "property destruction with high risk of bodily injury," or self-injury with the "imminent threat of causing harm to [Student] or others." *Exhibit T*, pp. 1-3. These steps included the use of Crisis Plan Institute ("CPI") restraint holds ("holds") as a last resort. *Id.* at pp. 2-3. A fourth category, coded in blue, described post-crisis procedures intended to orient and debrief Student, and to determine how he should spend the remainder of his day. *Id.* at p. 3.
42. Among its many procedures and strategies, the plan required staff to give Student "access to predetermined safe spaces throughout the building" where he could elope in lieu of running outside the building. *Id.* at p. 2. Allowing students access to predetermined safe spaces is a common and accepted behavioral strategy to minimize risk for students who tend to elope. *Consultation with CDE Content Specialist*.
43. The plan had a start date of October 6, 2022. *Id.* at p. 4. All staff were directed to follow the plan, and School administration expected staff to follow the plan. *Exhibit P*, pp. 705, 709, 721.
44. The plan was not adopted or discussed by the IEP Team (which would include Parent). *Interview with Special Education Teacher and Parent*. Parent was not given notice before the plan's implementation. *Id.* The parties disagree about when Parent was informed of the crisis plan. *Id.*; *Interview with Principal*.
45. Special Education Teacher said she discussed the plan with Parent and, at some point, left a hardcopy for Parent to pick up, but Parent states that she did not see the plan until it was disclosed as part of this investigation. *Interviews with Special Education Teacher and Parent*.
46. The Record—which includes 1,219 pages of emails—has only two documents suggesting that the plan was communicated to Parent: A lengthy email from December 5, 2022, and a notation in School's contact log dated that same day. *Exhibit P*, p. 675; *Exhibit S*, p. 4.

47. In the December 5 email, which was from Special Education Teacher to Parent, Special Education Teacher conveyed, along with other news and information, some of the basic aspects of the crisis plan. *Exhibit P*, p. 675. This included, as a single bullet point, the plan's contingency for using holds as a last resort:

. . . Please review the following bullet points:

- We will be conducting a threat screener after every major incident that involves verbal and/or physical threats. You will be immediately notified via email or a phone call when this occurs and/or other unsafe behavior (running off campus) is observed.
- He will go home: when he causes physical harm to others/self, or we are unable to regulate after 2-3 cycles of extreme dysregulation.
- We will utilize appropriate CPI (Crisis Prevention Institute) approved holds if and when he is an immediate threat to himself or others.
- We'd like to start and share with you a Google Doc which will be a back and forth communication plan that you can access daily in order to review his day. Once started I will give you a call in order to go over how to access this.

Please let me know if you have any questions or concerns regarding this.

*Id.* (emphasis in original). The plan was not attached to the email. *See id.* pp. 572 and 675.

48. The contact log reflects that Special Education Teacher called Parent to follow up on the email. *Exhibit S*, p. 4.

49. Despite these communications, when Principal told Parent on February 10, 2023 that staff had used a hold on Student the day before, Parent expressed surprise and outrage that holds were even a possibility. *Exhibit P*, p. 721; *Interview with Parent*.

50. Weighing this evidence, the SCO finds that Special Education Teacher gave Parent a general outline of the crisis plan on December 5, 2022, two months after its implementation, but that the plan—particularly its inclusion of holds—was not fully explained to Parent prior to her conversation with Principal on February 10, 2023.

#### Other Responses by School

51. In addition to developing the crisis plan, School staff—including special education and general education staff as well as School administration and, later, District administration—constantly met as a team to discuss Student's behavior, propose new strategies, and discuss

the effectiveness or ineffectiveness of strategies. *Interviews with Principal, Special Education Teacher, General Education Teacher, and Behavioral Interventionist; see generally Exhibit P.*

52. School staff documented various interventions as well as their success rate. *See Exhibit U.* Interventions included “play-learn-play” cycles to persuade him to apply himself to schoolwork; breaks given at different times, with some success by providing a break between hard transitions (such as from recess to class); a “soft start” where he would enter School 10 minutes late to avoid the noise and stimulation of the general start to the day; teaching the “zones of regulation” method of self-evaluation and self-regulation; providing a physical “tool box” of coping skills, which was built as a craft project and incorporated photographs of him; and employing a visual schedule and giving a clear chronology of what he would be doing and when he would go home. *Exhibit U; Interviews with Principal, Special Education Teacher, and Behavioral Interventionist.* Staff enrolled him in weekly therapy sessions with a local youth-services nonprofit. *Exhibit U, p. 3; Exhibit P, p. 816; Interview with Special Education Teacher.*
53. In response to Student’s repeated eloping, School staff employed a tactic—which was also a “Yellow” strategy in Student’s crisis plan—whereby they would offer a choice of various “safe spaces” for Student to elope to rather than leaving the school campus. *Interviews with Special Education Teacher and Behavioral Interventionist; see, e.g., Exhibit I, pp. 11; Exhibit T, p. 2.* One safe space was the “bean bag room,” an otherwise unused office containing two large bean bag chairs. *Interviews with Special Education Teacher and Behavioral Interventionist.*
54. On several occasions, Parent observed things in the bean bag room—cardboard boxes with books in them, plastic totes, and a stroller—when she dropped Student off. *Interview with Parent; Complaint, p. 8.* School staff began clearing objects from the room, however, after they learned Student’s tendency to throw objects. *Interviews with Special Education Teacher and Behavioral Interventionist.* Student (or any other student) was never left unsupervised in any room. *Id.; Interview with Assistant Principal.*

#### Parent’s Limited Role in the IEP Process

55. Although School staff were in frequent communication with Parent regarding specific incidents and days of severe dysregulation, Parent was not part of the strategy meetings or conversations where behavioral interventions were developed. *Interviews with Special Education Teacher and Parent; see Exhibit S, pp. 2-6.*
56. Parent’s limited role is illustrated by Special Education Teacher’s email and phone call on December 5, 2022. *Exhibit P, p. 675; Exhibit S, p. 4.* Special Education Teacher conveyed some aspects of Student’s crisis plan that had been implemented two months earlier, and the communication went in one direction: The staff decisions and crisis plan were presented as final decisions that Parent should understand, not discuss. *Exhibit P, p. 675.* The email provided information about the success of certain behavioral strategies before presenting

crisis-plan bullet points with the statement, “Hopefully this provides some clarity of what will happen when we see certain behaviors here at school.” *Id.*

57. There were no IEP Team meetings with Parent in the 2022-2023 school year until March 2023. *Interviews with Special Education Teacher and Parent; see Exhibit E, 1-3.* The IEP Team, including Parent, met in an informal capacity in early November, but the purpose of the meeting was to introduce Parent to the IEP Team. *Interviews with Special Education Teacher and Parent.* The crisis plan was not discussed. *Id.* No changes were proposed, and the IEP was not amended. *Id.* From School’s point of view, the meeting was not a formal IEP Team meeting, which is why formal notice was not issued beforehand and notes were not taken. *Interview with Special Education Teacher.*

58. Although School and District staff internally discussed the need to reevaluate Student sometime in the fall semester, reevaluation was not discussed with Parent until January 10, 2023 at the earliest, and she was not asked to give her consent to reevaluation until January 31. *Exhibit P, pp. 271, 614, 734; Interviews with Special Education Teacher and Parent.*

#### **D. The March 2023 IEP, District’s Two-Hour-Day Proposal, and Student’s Disenrollment**

59. On January 31, 2023, Parent was asked for, and provided, consent to reevaluate Student to address behavior through a revised IEP and BIP. *Id.*

60. After conducting another comprehensive reevaluation, including a functional behavioral assessment, the IEP Team, with Parent, convened on March 13, 2023 and again on March 28, 2023 to develop a new IEP. *Exhibit A, p. 18; Interview with Parent.*

61. The resulting IEP and BIP incorporated the elements of the crisis plan and behavioral interventions that School staff had been practicing since October. *See Exhibit B, pp. 8-19.* It changed Student’s LRE to 40-79% of the time in the general education environment, increased his social-emotional and behavioral instruction and services, and added instruction and services for speech-language therapy, access skills, and reading. *Id.* at pp. 38-40. The BIP included the use of holds as part of a crisis plan. *Id.* at p. 17.

62. The new IEP and BIP were never implemented, however, because Parent opposed the BIP’s inclusion of holds; she stopped sending Student to school shortly after the March 28 meeting. *Interview with Parent; Exhibit H, p. 1; Exhibit I, pp. 4-5.* District staff and Special Education Teacher continued to exchange emails with Parent regarding the need for another IEP Team meeting and the status of the draft IEP as late as April 14. *See Exhibit P, p. 1011.*

63. At this time, District administrators became directly involved in the discussion of holds and Student’s IEP and schedule because Parent was concerned that School staff had committed child abuse by using holds on Student. *Interviews with Parent and Executive Director.*

64. Following the March 28 IEP Team meeting, Student attended School for only five partial days. See *Exhibit H*, pp. 1-2. His last day of attendance at School was April 6, 2023. *Exhibit H*, p. 1.
65. On April 11, 2023, Executive Director spoke with Parent and discussed placing Student on a two-hour schedule through which he would work only with preferred staff, increase his stamina, and enjoy a feeling of success at School. *Exhibit P*, p. 1145; *Interviews with Parent and Executive Director*. Parent emailed afterward to ask how and when Student would receive an education if he attended only for two hours. *Exhibit P*, p. 691.
66. On April 12, 2023, Executive Director replied to Parent’s email to say that the District would welcome Student back on April 13 and that “[w]e will use the [two-hour] schedule we discussed.” *Exhibit P*, pp. 690-91. She offered services to be delivered to Student at home. *Id.* Parent responded that they did not have an IEP because the current draft still allowed for restraint. *Id.* Parent said she would keep Student at home until “the whole team including ME [can] make a complete IEP.” *Id.*
67. On April 14, 2023, a District special education coordinator (“Special Education Coordinator”) emailed Parent to say that the IEP Team needed to meet to amend the IEP with the two-hour schedule. *Exhibit P*, p. 1011.
68. On April 18, 2023, Special Education Coordinator emailed Parent again, noting that Student had not been in school since April 6. *Exhibit P*, p. 594. Parent responded that she was still concerned about Student’s safety; the issue of restraint remained unresolved. *Id.*
69. On April 20, 2023, Special Education Coordinator sent Parent prior written notice (“PWN”) that Student’s new LRE would be a two-hour school day. *Exhibit D*, p. 3. Finally, on April 26, 2023, Parent formally disenrolled Student. *Exhibit S*, p. 1.

#### **E. Incidents on November 3, 2022 and February 9, 2023**

70. Parent is concerned School staff improperly restrained Student on November 3, 2022 and February 9, 2023. *Complaint*, pp. 2-3, 4, 8. The incidents on those days are described in detail.

#### **November 3, 2022 Incident**

71. On November 3, 2022, Parent came to School to pick up her other child—Student’s sibling—for an appointment. *Interviews with Parent, Special Education Teacher, and Assistant Principal; Exhibit I*, p. 13.
72. Parent was at School’s entrance, which was of an “airlock” configuration for security, so that visitors walked through a set of unlocked exterior doors into an entry vestibule with a second set of locked doors that guarded entrance to the school proper. *Id.* The vestibule had a window to the main office, and visitors could present themselves at the window and either

wait there for staff to meet them or else be buzzed in through the second set of doors to the school's foyer. *Id.*

73. Staff had just brought Parent's other child to meet her, and Parent stood in the entryway vestibule with that child, ready to leave for their appointment. *Id.*
74. By chance, Student was walking with a teacher in a hallway not far from the entrance to School, and he saw Parent. *Id.* He immediately ran from the teacher back to his classroom to grab his backpack, then he returned and ran through the interior set of entryway doors to cling to Parent and demand to go home. *Id.* He became escalated. *Id.*
75. Parent began to do her best to deescalate Student. *Id.* She explained that she was picking up his sibling but would return later, and she instructed him to return to his school day. *Id.*
76. By this time, Assistant Principal—who had been in the main office and saw Student run back into the school and then return to the entrance—came out to assist. *Id.* The teacher who had been walking with Student had already radioed for Special Education Teacher to come and help. *Id.* Special Education Teacher quickly arrived, and the other teacher left the scene. *Id.*
77. Assistant Principal, Special Education Teacher, and Parent attempted to deescalate Student. *Id.* What happened next is sharply disputed. *Compare Complaint, p. 2 with Response, p. 10.*
78. Parent states that Special Education Teacher rolled up her sleeves, reached down, hooked her hands under Student's armpits, and lifted him back from the entryway vestibule, through the interior set of doors, and into the school foyer. *Interview with Parent; Complaint, p. 2.*
79. However, Special Education Teacher, Assistant Principal, and Principal—who later watched surveillance video of the incident—maintain that Special Education Teacher stepped between Student and Parent and used the height of her body behind him as well as open hands lightly touching his shoulders to prompt him to move back into the school foyer, but without pushing him through physical force. *Interviews with Special Education Teacher, Assistant Principal, and Principal; Exhibit I, p. 13.*
80. The parties agree that Parent then said, "I do not like the way she is handling this," and followed through to the foyer to continue to help deescalate Student. *Exhibit I, p. 13; Interviews with Parent, Special Education Teacher, and Principal.* Although Principal viewed the surveillance footage, he did not save it, and it was automatically deleted after 30 days. *Interview with Principal.*

## February 9, 2023 Incident

81. On February 9, 2023, Behavioral Interventionist brought Student back into the school from recess for his next scheduled activity, which was learning the Zones of Regulation. *Interview with Behavioral Interventionist; Exhibit I, pp. 7-8.*
82. Once he was in the building, however, he ran away and Behavioral Interventionist tracked him to one of his safe spaces, Special Education Teacher's classroom, which was empty. *Id.* He first hid under a table, but then he began throwing pencils around the room. *Id.* He kicked and punched Behavioral Interventionist. *Id.* Special Education Teacher arrived. *Id.* She and Behavioral Interventionist tried verbal de-escalation strategies, such as offering him a choice of activities or a play-work-play cycle, but these were not effective. *Id.* The two decided to try waiting outside the classroom and let Student deescalate by removing themselves as objects of attention and monitoring his safety from outside without talking to him. *Id.*
83. Student did not deescalate. *Id.* He began to engage in louder and more destructive behavior in a manner that seemed designed to draw their attention. *Id.* He began destroying the room, tipping bins, throwing objects, and putting up a "barricade" of sorts. *Id.* When either of the two entered the room, he yelled at them to get out and that it was "his room now." *Id.*
84. After ten minutes, as Student continued to escalate and attack the room—including bookshelves—in a manner that was unsafe to himself, the two decided to enter together. *Id.*
85. The two attempted to use more regulation strategies by offering choices from Student's behavioral "toolbox"—such as fidget toys, nap time, snacks, water, and puppets. *Id.* Student did not accept any of these offers. *Id.*
86. The two used the puppets themselves, and Student calmed down briefly. *Id.* However, he quickly became escalated again and began pulling on the bookcase, yelling, and attacking them. *Id.* At one point, he pulled on the bookcase until it began to tip, and Behavioral Interventionist used a hold. *Id.*
87. Behavioral Interventionist used the "children's control position" hold by standing behind Student, maintaining close body contact, and pulling his arms across each other and up, so that one arm was locked under the other. *Id.* Special Education Teacher timed the hold, per her CPI training, at about 30 seconds. *Id.*
88. He did not calm down, but struggled away from the bookcase, so Behavioral Interventionist released him. *Id.* He stopped attempting to hurt the two staff, but he yelled at them and continued to attack and throw the objects in the room. *Id.* He told the staff to call Parent. *Id.* They offered to do so if he calmed down and helped pick up the room, but he refused and began attacking them again. *Id.* Although he previously responded to their directives not to hurt them, this time he did not and kicked and hit them. *Id.*

89. Behavioral Interventionist used the same hold again, and, because he continued to kick her, Special Education Teacher held his feet on the ground. *Id.* They maintained this position for about 30 seconds and then released him. *Id.* He continued to threaten them with harm. *Id.*
90. After Student escalated, deescalated, and escalated again for two or three more cycles—throwing items, hiding, screaming, and attacking objects, without responding to attempts at de-escalation—staff said they would call Parent if he would keep his body calm and help clean up. *Id.* They called Parent. *Id.* He continued to cycle up and down, and throw objects, until he learned Parent was in the building. *Id.* He helped clean the room and left with Parent. *Id.*
91. Special Education Teacher and Behavioral Interventionist submitted the incident to Principal, Assistant Principal, and District administration for review. *Exhibit P*, pp. 63, 1042. The District has a comprehensive review process for all uses of holds, and all incidents in which a hold is used must be submitted for review by District leadership and a team of District behavioral specialists even if the use would not constitute a “restraint” under the PPRA. *Interview with Executive Director; see Exhibit P*, p. 63. This incident was reviewed by Executive Director, the District Director of Special Education, Principal, and others. *See Exhibit P*, p. 63.
92. The District concluded that the staff’s two uses of the hold did not constitute a “restraint” under the PPRA because of their short duration and necessity for the protection of Student and staff. *Response*, p. 10; *Interview with Executive Director*.

### **CONCLUSIONS OF LAW**

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

**Conclusion to Allegation No. 1: The District failed to: (1) review and revise Student’s IEP to address lack of progress, in violation of 34 C.F.R. § 300.324(b); and (2) provide parent meaningful participation in the IEP process, in violation of 34 C.F.R. §§ 300.321(a)(1), 300.322(a)(1), 300.324(a)(1), 300.324(a)(6), and 300.503. These violations resulted in a denial of FAPE.**

Parent’s concern is that the District did not provide an IEP that sufficiently addressed Student’s behavioral needs. (FF # 4). The SCO agrees with Parent.

#### **A. The May 2022 IEP**

An IEP is “the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the



IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.*

i. IEP Development Process

An IEP must be developed by a team that includes, at a minimum, the parents, a regular education teacher, a special education teacher, a district representative or designee with knowledge of and authority to provide available district resources, and a person with the ability to interpret evaluation results (who may be one of the other members of the team). 34 C.F.R. § 300.321(a). When an IEP Team develops an IEP, it must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." *Id.* § 300.324(a).

Here, Student's IEP was developed by a properly constituted IEP Team on May 20, 2022. (FF # 5). The IEP Team drew on a comprehensive evaluation and functional behavioral assessment. (FF # 6). The IEP considers Student's strengths, Parent's concerns, Student's needs, the impact of his disability, his levels of academic performance, and annual goals. (FF #s 6-10). It also includes services and accommodations designed to help him reach his goals, and a description of his LRE. (FF #s 11-13).

The SCO accordingly finds and concludes that the development of the May 20, 2022 IEP complied with the IDEA's procedures. *Rowley*, 458 U.S. at 206.

ii. Substantive Adequacy of the IEP

An IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 580 U.S. at 399. An IEP must include measurable goals and a statement of the special education and related services designed to "[m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and any other educational needs that result from the child's disability. 34 C.F.R. § 300.320(a)(2). An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. *Id.* § 300.320(a)(4). Also, the IEP team must consider the use of positive behavioral interventions and supports whenever a student's behavior interferes with the student's ability to benefit from his or her educational programming. *Id.* 300.324(a)(2)(i).

"[A] court should determine the appropriateness of an IEP as of the time it was made and should use evidence acquired subsequently to the creation of an IEP only to evaluate the reasonableness of the school district's decisions at the time that they were made." *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564-65 (3d Cir. 2010).

Here, the IEP Team understood, from the evaluation and functional behavioral assessment, that Student engaged in aggressive behaviors and property destruction. (FF #s 7-8, 16). But Student, in preschool, had shown an ability to participate in turn-taking games and joint interactive play with peers. (*Id.*) Parent had reported he was able to play with other children at home without being aggressive toward them. (*Id.*) The IEP Team did not, at the time of the May 2022 IEP's development, have evidence of the extreme behaviors—such as causing classrooms to be evacuated, attacking teachers, and threats of harm—that arose not long after he began kindergarten. (*Id.*).

The May 2022 IEP acknowledged Student's behavioral needs and provided goals, accommodations, and services intended to address those needs. (FF #s 7-8, 18). The IEP emphasized teaching Student social and emotional skills to enable him to learn to interact appropriately with his peers and access the general education curriculum. (*Id.*) The IEP Team anticipated that Student would present some behavioral challenges, and the IEP incorporated a BIP tailored to Student's individualized challenges, needs, triggers, and incentives. (FF #s 7-8, 16-18).

For these reasons, the SCO finds and concludes that the May 2022 IEP was, at the time it was developed, reasonably calculated to enable Student to receive an educational benefit and did not violate the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.324(a).

#### **B. Review and Revision of the May 2022 IEP**

Although the IDEA does not promise a particular educational or functional outcome for a student with a disability, it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. *Andrew F.*, 580 U.S. at 400. To that end, school districts have an affirmative duty to review and revise a student's IEP at least annually. 34 C.F.R. § 300.324(b). The IDEA's procedures contemplate that a student's IEP may need to be reviewed and revised more frequently to address changed needs or a lack of expected progress. *Id.*

The U.S. Department of Education has confirmed a school district's obligation to monitor progress and convene the IEP Team if progress does not occur:

The IEP Team also may meet periodically throughout the course of the school year, if circumstances warrant it. For example, if a child is not making expected progress toward his or her annual goals, the IEP Team **must** revise, as appropriate, the IEP to address the lack of progress. Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. If a child is not making progress at the level the IEP Team expected, despite receiving all of the services and supports identified in the IEP, the IEP Team must

meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious.

*Questions and Answers on Andrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (EDU 2017) (emphasis added).

Here, the SCO finds and concludes that the District failed to review, and as appropriate revise, Student's IEP as soon as it knew he was not making expected progress toward annual goals and in the general education curriculum. 34 C.F.R. § 300.324(b).

The best evidence that the District should have convened the IEP Team to review and revise Student's IEP is that the non-Parent members of the IEP Team *did* convene in early October to review Student's BIP and discuss the need to add a crisis plan. (FF #s 37-43). In one sense, the staff did what they were supposed to do: early in the semester, Special Education Teacher observed that Student was exhibiting severe cycles of dysregulation and behavior that prevented his access to the general education environment, and she responded by convening all of Student's teachers and providers (except Parent) to augment his existing BIP and address the problem. (*Id.*). The resulting crisis plan explained how to work with Student to either maintain a proper state of regulation or else attempt to deescalate and correct a state of dysregulation. (*Id.*)

Nevertheless, the plan had three flaws. First, it was created without Parent's participation, violating the procedural requirements of the IDEA, as discussed below. (FF #s 40, 44). Second, it violated Colorado law by incorporating restraints into Student's behavioral plan, which is also discussed below. (FF # 41). Finally, the crisis plan did not have lasting success: Student's behavior escalated, and in November he had seven recorded, severe behavioral incidents. (FF # 24). He spent so little time with his nondisabled peers in the general education environment that General Education Teacher said she "did not know him as a learner." (FF # 31). He was absent because of both his behavior and his health issues. (FF #s 28-29). He was not receiving the specialized instruction and related services that his IEP Team had determined were necessary to his education. (FF #s 33-36).

The District argues that it did not sit on its hands but, rather, followed up on the crisis plan with additional supports and strategies as well as tracked Student's behavior. (FF # 4; *see* FF #s 51-53). This may be true, but the IDEA required the IEP Team—including Parent—to convene and review the entire IEP. 34 C.F.R. §§ 300.321(a)(1), 300.324(b). An IEP Team meeting would have entailed a broader review of Student's IEP (and potentially a reevaluation)—not just his behavioral plan—including the facts that Student was not being educated in his LRE, not receiving his services, not attending school, and not making progress toward his annual goals. *See* 34 C.F.R. § 300.324(b). It would also have alerted Parent to the fact that School was using holds, which she first learned as late as February 10, 2023, leading to her surprise, distrust, anger, and eventual disenrollment of Student. (FF # 49).

For these reasons, the SCO finds and concludes that the District failed to review and revise Student's IEP to address his lack of progress toward his annual goals, in violation of 34 C.F.R. § 300.324(b)(1). This resulted in a procedural violation of the IDEA.

### **C. Parent's Limited Participation**

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). To that end, parents are mandatory members of the IEP Team whose input must be considered in IEP development. 34 C.F.R. §§ 300.321(a)(1), 300.324(a)(1)(ii). Parents must be given notice of an IEP Team meeting and the opportunity to participate. 34 C.F.R. § 300.322(a)(1). Amendments to the IEP must be made either by the entire IEP Team at an IEP Team meeting or else by written agreement with Parent. 34 C.F.R. § 300.324(a)(6). Parents must also be given written notice prior to changing the provision of FAPE for a student. 34 C.F.R. § 300.503(a)(1). When a district presents an educational decision as a "take it or leave it" position, the agency denies parents their right to meaningful participation. *Ms. S. ex. rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). When parents are prevented from meaningful participation because an aspect of their child's IEP has been predetermined, the resulting procedural violation denies the student a free appropriate public education. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004).

Here, the teachers and staff involved in providing an education to Student met at the end of September to review Student's BIP and discuss the need for a crisis plan. (FF #s 37-43, 56). They acted as an IEP Team and amended his educational program by creating and implementing Student's crisis plan as a supplement to his BIP. (*Id.*). See 34 C.F.R. § 300.324(a)(2)(i) (behavioral interventions are part of the IEP development process). Before convening as an IEP Team, however, they were required to give Parent advance notice of the meeting and the opportunity to participate as an IEP Team member, to comply with 34 C.F.R. §§ 300.321(a)(1) and 300.322(a)(1). They did not. (FF #s 37-43, 56.). They were required to consider Parent's input regarding the revision to Student's IEP, to comply with 34 C.F.R. § 300.324(a)(1)(ii). They did not. (*Id.*). To amend the IEP, they were required either to hold a meeting with Parent or else get her written agreement in compliance with 34 C.F.R. § 300.324(a)(6). They did not. (*Id.*). They were separately required to give Parent advance notice of their intent to change Student's provision of a FAPE, which would have allowed her to understand what was being changed and exercise her procedural safeguards under the IDEA if she disagreed, in compliance with 34 C.F.R. § 300.503. They did not do this, either. (*Id.*).

Additionally, in April 2023, the District predetermined that Student's placement would be a two-hour school day. (FF #s 65-69). On April 11 and 12, Executive Director informed Parent that Student would be placed on a two-hour schedule. (FF #s 65-69). Although Parent responded to this suggestion by asking how and when Student could receive an education in only two hours, Executive Director's answer was that the District welcomed Student to return to School the next

day and “[w]e will use the” two-hour schedule and that homebound support was available if Parent was interested. (FF #s 65-66) (emphasis added). After Parent did not send Student back to School, Special Education Coordinator followed up by first emailing Parent that the IEP Team needed to meet to amend the IEP with the two-hour schedule and, a few days later, by sending Parent a written notice that Student’s new LRE would be a two-hour school day. (FF #s 67-69). The District’s decision to implement a two-hour schedule was presented to Parent as a “take it or leave it” offer with no opportunity for Parent, in collaboration with the rest of the IEP Team, to object or to modify the schedule to account for any concerns she might have. (*Id.*) This unilateral predetermination that Student’s day would be limited to two hours violated Parent’s right to meaningfully participate in the IEP process. *Vashon Island*, 337 F.3d at 1131.

For these reasons, the SCO finds and concludes that the District violated Parent’s right to participate as a member of the IEP Team, in violation of 34 C.F.R. §§ 300.321 and 300.322, Parent’s right to participate in any amendment of the IEP in violation of 34 C.F.R. § 300.324(a)(6), as well as Parent’s right to receive prior written notice, in violation of 34 C.F.R. § 300.503. These resulted in procedural violations of the IDEA.

#### **D. Inclusion of Restraints in a BIP**

School districts are forbidden from writing restraint and seclusion into students’ behavioral plans:

##### **Restraint and seclusion must never be used:**

- (a) As a punishment or disciplinary sanction;
- (b) As part of a treatment plan or behavior modification plan;**
- (c) For the purpose of retaliation by staff; or
- (d) For the purpose of protection, unless:
  - (I) The restraint or seclusion is ordered by the court;
  - or
  - (II) In an emergency, as provided for in subsection (1) of this section.

C.R.S. § 26-20-103(1.5) (emphasis added). The U.S. Department of Education has explained that the use of restraints and seclusion signal the need for a new behavioral plan, and should not be part of the plan itself:

As many reports have documented, the use of restraint and seclusion can have very serious consequences, including, most tragically, death. Furthermore, there continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques. . . . [S]chools must make every effort to

structure safe environments and provide a behavioral framework, such as the use of positive behavior interventions and supports, that applies to all children, all staff, and all places in the school so that restraint and seclusion techniques are unnecessary.

...

When restraint or seclusion is repeatedly used with a child . . . a review of the student’s BIP should occur, the prescribed behavioral strategies should be modified, if needed, and staff training and skills should be re-evaluated. The need for the review is based on the individual needs of the child and the determination should include input from the family; a review could be necessitated by a single application of restraint or seclusion.

Department of Education, *Restraint and Seclusion: Resource Document*, pp. iii, 17 (May 15, 2012).<sup>6</sup>

Here, the District included, in the October 2022 crisis plan and then in the never-implemented March 2023 BIP, the use of holds as part of Student’s behavioral plan. (FF # 41). The SCO cautions the District that, when the IEP Team convenes in accordance with the remedies ordered in this Decision, the District must not plan for a crisis by including the use of restraints in Student’s behavioral plan. The District should instead consider alternatives that will avoid the need for holds and enable Student to make progress appropriate in light of his circumstances. *Andrew F.*, 580 U.S. at 399.

#### **E. Denial of FAPE**

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if it (1) impeded the child’s right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

Here, the SCO finds and concludes that District’s failure to timely review and revise Student’s IEP impeded Student’s right to a FAPE and significantly impeded Parent’s opportunity to participate in the decision-making process. Student did not receive his services and was not educated in the LRE as required by his IEP. (FF # 31). Parent had no opportunity to participate in the decision to develop and implement the crisis plan or to object (or provide input) to its provisions before it was implemented. (FF #s 37-43). For these reasons, the SCO finds and concludes that the District’s violation resulted in a denial of FAPE, allowing for an award of compensatory remedies.

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<sup>6</sup> Available at <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

**Conclusion to Allegation No. 2: The District failed to implement Student’s IEP, to educate Student in his LRE, and to monitor and report his progress in, violation of 34 C.F.R. §§ 300.114, 300.116, 300.320(a)(3), and 300.323(c). These violations resulted in a denial of FAPE.**

Parent’s concern is that the District failed to implement Student’s IEP by failing to provide a safe space for him to regulate himself as required by his IEP. (FF # 4). The SCO identified additional implementation concerns and addresses them now since they are directly related to this IEP and the allegation itself.

#### **A. Legal Requirements for IEP Implementation**

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 580 U.S. at 391 (2017). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of “his or her specific responsibilities related to implementing the child’s IEP,” as well as the specific “accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” *Id.* § 300.323(d).

#### **B. IEP Accessibility**

The SCO must first determine whether the District satisfied its obligation to make Student’s IEP accessible to his teachers and providers. 34 C.F.R. § 300.323(d). Here, the Findings of Fact demonstrate that Special Education Teacher and Student’s other teachers and providers, as well as School administration, were aware of their responsibilities under Student’s IEPs and had access to those IEPs. (FF #s 20-22). As a result, the SCO finds and concludes that the District made Student’s IEP, including its BIP, available in compliance with 34 C.F.R. § 300.323(d).

#### **C. Access to Safe Spaces**

Student’s May 2022 IEP and its incorporated BIP did not require the District or School to give Student access to a safe space. (See FF #s 11). However, when the District amended Student’s BIP by adding a crisis plan at the beginning of October as a supplement to Student’s BIP and a means of providing a FAPE, it committed itself to following the procedures and strategies in the plan. (See FF #s 37-43).

The crisis plan required the District to give Student “access to predetermined safe spaces throughout the building” where he could elope to in lieu of running outside the building. (FF # 42).

Staff regularly allowed Student to elope to his safe spaces. (FF #s 42, 53-54, 82). Although the bean bag room contained boxes, totes, and a stroller at various points in time, and some rooms in School had unanchored bookshelves, Student was supervised whenever he eloped to one of these spaces. (FF # 54). Indeed, when he attempted to pull down a bookshelf during the February 9, 2023 incident, staff intervened. (FF #s 84-86). Further, staff cleared away loose objects in the bean bag room after it became obvious that he would throw and destroy things when he became dysregulated. (FF # 54).

For these reasons, the SCO finds and concludes that the District implemented the “safe spaces” provision of the crisis plan, consistent with 34 C.F.R. § 300.323(c).

#### **D. Specialized Instruction**

However, the District did not provide the specialized instruction and related services required by Student’s IEP. Here, the IEP offered: social-emotional instruction, 300 minutes per week inside the regular classroom and 30 minutes per week outside the regular classroom; occupational therapy, 240 minutes per semester of direct services outside the regular classroom and 30 minutes per month of indirect support inside the regular classroom; and behavioral services, 360 minutes per semester of indirect support outside the regular classroom. (FF # 12). As the SCO calculated in the Findings of Fact, Student missed 84 hours of direct social-emotional instruction inside the regular classroom and 410 minutes of direct occupational therapy services outside the regular classroom. (FF #s 33-36). The SCO therefore finds and concludes that the District failed to implement Student’s IEP in this respect, in violation of 34 C.F.R. § 300.323(c).

#### **E. Student’s LRE**

An IEP must describe a student’s LRE, which is the maximum appropriate participation, for that student, in the regular educational environment. *Id.* §§ 300.114(a), 300.117, 320(a)(5). “Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA’s most important substantive requirements.” *L.B. ex rel. K.B.*, 379 F.3d at 976. This means that children with disabilities receive their education in the general education setting with nondisabled peers to the maximum extent appropriate and that they attend the school they would if not disabled. 34 C.F.R. §§ 300.114, 300.116. Children with disabilities should be removed from the regular educational environment only “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.* § 300.114(a)(2)(ii). Students with disabilities must be educated in the LRE specified by their IEP. *Id.* §§ 300.320(a)(5), 300.323(c)(2).



Here, Student's May 2022 IEP required that he be educated in the general education setting at least 80 percent of the time. (FF # 13). Due to his behavioral issues, however, he rarely spent time with his nondisabled peers in the general education environment. (FF # 31). His general education teacher "did not know him as a learner." (*Id.*). To the extent that he received academic instruction, it came primarily from Special Education Teacher outside of the regular classroom and from a reading interventionist on days when Student was regulated enough to attend small-group instruction. (FF # 32).

For these reasons, the SCO finds and concludes that the District failed to educate Student in the LRE required by his IEP, in violation of 34 C.F.R. §§ 300.114, 300.116, and 300.323.

#### **F. Progress Reporting**

IEPs must include a description of how a child's progress towards their annual goals will be measured, and school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3).

Here, Student had two annual goals, each of which targeted his social-emotional wellness. (FF # 10). His IEP stated that progress on his annual goals would be reported with his report cards. (*Id.*). However, the progress report disclosed by the District has blank areas where Student's progress would be reported, and the report card disclosed by the District has grades only for the second quarter. (FF # 35).

For these reasons, the SCO finds and concludes that the District failed to report Student's progress on his annual goals, in violation of 34 C.F.R. §§ 300.320(a)(3) and 300.323(c). This resulted in a procedural violation of the IDEA.

#### **G. Denial of FAPE**

The failure to implement a "material", "essential", or "significant" provision of a student's IEP amounts to a denial of a FAPE supporting compensatory remedies. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007).

Here, the failure to implement Student's IEP by providing services meant that he missed 84 hours of direct social-emotional instruction inside the general education environment. (FF # 36). The failure to educate him in the LRE required by his IEP meant that he was educated almost entirely outside the general education environment, whereas his IEP required him to spend at least 80% of his time in that environment. (FF #s 31). The failure to report his progress as required by his IEP diminished the opportunity for both School and Parent to understand and respond to the deficits in his education. (FF # 35). Given the amount of specialized instruction missed, and because Student's greatest need is to learn how to socialize with his peers, his removal from those peers and loss of social-emotional instruction alongside those peers was a material failure.

The SCO accordingly finds and concludes that the District’s failures to implement Student’s IEP amounted to a denial of FAPE.

#### **H. Compensatory Services**

Compensatory services are an equitable remedy designed to restore a student to the position they would be in if the violation had not occurred. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory services need not be an “hour-for-hour calculation.” *Colo. Dept. of Ed.*, 118 LRP 43765 (Colo. SEA June 22, 2018). The purposes of the IDEA guide compensatory awards, and those purposes include providing children with disabilities a FAPE that meets the particular needs of each child and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

In consultation with CDE Content Specialist, and given Student’s age and individualized needs, the SCO finds and concludes that the following award of compensatory services is necessary to restore Student to the position he would be in had the violations not occurred:

- 15 hours of social-emotional instruction outside the general education environment.
- 5 hours of direct occupational therapy services outside the general education environment.

#### **Conclusion to Allegation No. 3: Student was not “restrained” within the meaning of the PPRA on November 3, 2022 or February 9, 2023.**

Parent has raised the concern that School staff improperly restrained Student on November 3, 2022 and February 9, 2023. (FF # 4).

#### **A. The PPRA’s Definition of “Restraint”**

The SCO must first determine whether the actions of Special Education Teacher and Behavioral Interventionist constituted “restraint” within the meaning of the PPRA. The PPRA defines restraint, in relevant part, as follows:

“Restraint” means any method or device used to involuntarily limit freedom of movement, including bodily physical force, mechanical devices, or chemicals. . . .

C.R.S. § 26-20-102(6). “Physical restraint” is defined:

“Physical restraint” means the use of bodily, physical force to involuntarily limit an individual’s freedom of movement for more than one minute; except that “physical restraint” does not include

the holding of a child by one adult for the purposes of calming or comforting the child.

C.R.S. § 26-20-102(5) (emphasis added).

**B. November 3, 2022**

The parties agree that on November 3, 2022, Special Education Teacher did not touch Student for more than one minute. (FF #s 78-79). Parent says that Special Education Teacher lifted Student up and back around into the school foyer from the school entry vestibule. (FF # 78). Special Education Teacher, Assistant Principal, and Principal (who watched a video of what happened) all state that Special Education Teacher instead stood closely behind Student and used her height and position, along with a light touch on Student’s shoulders, to direct him to walk back into the school foyer. (FF # 79).

Special Education Teacher’s conduct was not a “restraint” within the meaning of the PPRA. The parties agree that her use of bodily, physical force lasted less than one minute. (FF #s 78-79). Accordingly, her physical contact was not a “physical restraint” under the PPRA. C.R.S. § 26-20-102(5).

For these reasons, the SCO finds and concludes that Special Education Teacher did not restrain Student within the meaning of the PPRA on November 3, 2022.

**C. February 9, 2023**

On February 9, School staff held Student twice, for roughly 30 seconds each time, to protect Student and themselves. (FF #s 81-89). The first time, Behavioral Interventionist held him because he was trying to pull a bookcase down and caused the bookcase to begin to tip, which could have seriously injured him or the staff. (FF #s 86-87). The second time, Student was held because he was trying to hurt Behavioral Interventionist and Special Education Teacher by kicking them and beating them with his fists. (FF # 89).

Because both holds lasted for less than a minute, they were not “physical restraints” under the PPRA. C.R.S. § 26-20-102(5).

The SCO finds and concludes that School staff did not restrain Student within the meaning of the PPRA on February 9, 2023.

**D. The District Did Not Violate the PPRA**

Allegation No. 3, subparts a through d, concern PPRA requirements that apply only when a student has been restrained. Because the SCO does not find that the District “restrained” Student within the meaning of the PPRA, the District did not need to meet these requirements.

For these reasons, the SCO finds and concludes that the District did not violate the PPRA on November 3, 2022 or February 9, 2023.

**Systemic IDEA Violations: This investigation demonstrates a violation that is systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected. 34 C.F.R. § 300.151(b)(2).**

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are “critical” to the State Enforcement Agency’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, the core violation from which other violations flowed was the District’s failure to review and revise Student’s IEP as soon as it knew he was not making expected progress, as required by 34 C.F.R. § 300.324(b). The District does not have a policy or procedure that requires staff to convene an IEP Team meeting to review and revise students’ IEPs when it becomes apparent that students are not making anticipated progress. (FF # 38). To the contrary, the District has a practice of trying out new strategies without putting them in the IEP. (*Id.*) This investigation demonstrates why the IDEA requires the IEP Team, including parents, to review a student’s entire IEP when the student is not making progress. By moving first to the crisis plan rather than considering behavioral supports through the IEP process with Parent as a partner, District overlooked Student’s LRE, services, and goals progress, and missed the opportunity to develop a positive relationship with Parent.

The SCO accordingly finds and concludes that the failure to review and revise Student’s IEP is likely occurring systemically in District. The SCO has ordered the creation of new procedures to remedy this violation.

### **REMEDIES**

The SCO concludes that the District has violated the following IDEA requirements:

- a. Failing to review and revise Student’s IEP to address a lack of anticipated progress, in violation of 34 C.F.R. § 300.324(b);
- b. Failing to notify Parent of an IEP Team meeting, in violation of 34 C.F.R. § 300.322(a)(1);
- c. Failing to include Parent as a member of the IEP Team, in violation of 34 C.F.R. § 300.321(a)(1);

- d. Failing to notify Parent prior to holding an IEP Team meeting, in violation of 34 C.F.R. § 300.322(a)(1);
- e. Failing to amend Student’s IEP through either an IEP Team meeting (including Parent) or else by written agreement with Parent, in violation of 34 C.F.R. § 300.324(a)(6);
- f. Failing to notify Parent prior to changing the provision of FAPE to Student, in violation of 34 C.F.R. § 300.503(a);
- g. Failing to implement Student’s IEP by failing to educate him in his LRE, in violation of 34 C.F.R. §§ 300.114, 300.116, and 300.323(c);
- h. Failing to implement Student’s IEP by failing to provide the required services, in violation of 34 C.F.R. § 300.323(c); and
- i. Failing to monitor and report Student’s progress, in violation of 34 C.F.R. § 300.320(a)3).

To remedy these violations, the District is ORDERED to take the following actions:

**1. Corrective Action Plan**

- a. By **Friday, August 18, 2023**, the District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

**2. Final Decision Review**

- a. Executive Director, Special Education Coordinator, Special Education Teacher, and Principal must review this Decision and the requirements of 34 C.F.R. § 300.324(b). These reviews must occur no later than **Friday, August 18, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than that same day, **Friday, August 18, 2023**.

### **3. IEP Team Meeting**

- a. Convene Student's IEP Team, at a mutually agreeable date and time, by **August 18, 2023**. Student's IEP Team must review, and, as appropriate, revise Student's IEP to enable him to make progress appropriate in light of his circumstances.
- b. A copy of Student's IEP and notes from the IEP meeting must be provided to CDE no later than **Friday, August 25, 2023**. CDE may determine, at its sole discretion, whether the IEP meeting complied with these requirements. If CDE determines that the meeting did not comply, then the IEP Team must convene again upon a timeline to be determined by CDE.

### **4. Training**

- a. Executive Director and any other District administrators supporting or supervising District's obligations under the IDEA, including District's Director of Special Education and its Special Education Coordinators, must attend and complete training provided by CDE on the need to review and revise students' IEPs to enable them to make appropriate progress toward their annual goals. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.324(b).
- b. The District Director of Special Education and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
- c. Such training shall be completed no later than **Tuesday, October 31, 2023**. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **November 7, 2023**.

### **5. Procedure Development**

- a. The District must develop written procedures to require special education administrators and caseworkers to review and revise students' IEPs to ensure students are enabled to make appropriate progress, as required by 34 C.F.R. § 300.324(b). The District must develop these procedures and submit them to the CDE for approval by **Friday, September 8, 2023**.

## 6. Compensatory Services

- a. Student shall receive **15 hours of social-emotional instruction** outside the general education environment provided by a suitable District provider or through a contract between the District and a suitable private provider at the District's expense as well as **5 hours of direct occupational therapy services** outside the general education environment provided by a suitable District provider or through a contract between the District and a suitable provider at the District's expense. All hours must be completed by **December 15, 2023**, though Parent and the District are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.). If Parent and the District cannot agree to a provider by **September 1, 2023**, the CDE will select the provider by September 22, 2023.
- b. To verify that Student has received the compensatory services required by this Decision, the District must submit records of the services provided to the CDE by the **second Monday of each month** until all compensatory services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. The District must communicate with the selected provider to obtain this information.
- c. These services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. These services must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction Student is entitled to (including time in general education). If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent, as well as notify the CDE of the change in the monthly service log.

## 7. Other Remedies

- a. Based on the outcomes of the other remedies, CDE may require additional training, technical assistance, or revision of policy, procedure, or practice to address identified areas of concern. CDE may also request additional records to ensure identified concerns have been addressed.
- b. Any additional findings of noncompliance identified through these remedies must be corrected consistent with 34 C.F.R. § 300.600(e).

Please submit the documentation detailed above to the CDE as follows:

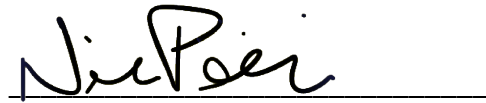
Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant  
1560 Broadway, Suite 1100  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE.

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶ 13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶ 13; *See also* 34 C.F.R. § 300.507(a); 71 Fed. Reg. 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 19th day of July, 2023.



Nicholaus Podsiadlik  
State Complaints Officer



## APPENDIX

### Complaint, pages 1-9

- Exhibit 1: Various Documents

### Response, pages 1-11

- Exhibit A: May 2022 & March 2023 IEPs
- Exhibit B: May 2022 & March 2023 BIPs
- Exhibit C: FBAs & Evals
- Exhibit D: PWNs
- Exhibit E: Notices of Meeting
- Exhibit F: Progress Reports & Report Card
- Exhibit G: Service Logs
- Exhibit H: Attendance
- Exhibit I: Nov 3 Summary & Discipline
- Exhibit K: Restraint Training
- Exhibit L: Annual Restraint Review
- Exhibit M: Restraint Training Certs
- Exhibit N: Calendar
- Exhibit O: Policies-Procedures
- Exhibit P: Emails
- Exhibit S: Contact Log
- Exhibit T: Crisis Plan
- Exhibit U: Behavioral Interventions
- Exhibit V: Various Documents

### Reply, pages 1-76

### Telephone Interviews

- Principal: June 23, 2023
- Parent: June 27, 2023
- Special Education Teacher: June 27, 2023
- General Education Teacher: June 27, 2023
- Assistant Principal: June 27, 2023
- Behavioral Interventionist: June 28, 2023
- Executive Director: June 28, 2023