

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)

State-Level Complaint 2023:532
Mesa County Valley School District 51

DECISION

INTRODUCTION

On April 3, 2023, Disability Law Colorado (“Complainant”) filed a state-level complaint (“Complaint”) on behalf of the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ against Mesa County Valley School District 51 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified five 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”)² and its implementing regulations, the Rules for the Administration of the Protection of Persons from Restraint Act (the “Rules”).³ Therefore, the SCO has jurisdiction to resolve the Complaint.

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). Accordingly, this investigation will be limited to the period of time from April 3, 2022 through the present for the purpose of determining if a violation of the IDEA or the PPRA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

¹ 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.

² 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.

³ The Rules are codified at 1 C.C.R. 301-45.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to permit Parent to inspect and review Student’s education records within 45 days of Parent’s request, which was made on or about January 20, 2023, in violation of 34 C.F.R. § 300.613.
2. Failed to follow the IDEA’s least restrictive environment (“LRE”) provisions, specifically by:
 - a. Determining Student’s educational placement from August 2022 through February 2023 outside of a properly convened Individualized Education Program (“IEP”) meeting, in violation of 34 C.F.R. §§ 300.116(a), 300.327, and 300.501(c) and ECEA Rule 4.03(8).
 - b. Failing to educate Student in the LRE required by his IEP from August 2022 through February 2023 by shortening his school days and removing him from the regular educational environment, in violation of 34 C.F.R. §§ 300.114, 300.117, and 300.323(c).
 - c. Failing to provide Parent with prior written notice of the Student’s change of placement from August 2022 through February 2023, in violation of 34 C.F.R. §§ 300.503(a).
3. Failed to conduct a manifestation determination review (“MDR”) within ten school days of the District’s decision to change Student’s placement for disciplinary reasons from August 2022 through February 2023, in violation of 34 C.F.R. § 300.530(e).
4. Failed to properly implement Student’s IEP from August 2022 through February 2023, specifically by failing to provide the social/emotional, speech/language, occupational therapy, and early math services required by Student’s IEP from August 2022 through February 2023, in violation of 34 C.F.R. § 300.323(c).

And whether the District violated the PPRA because the District:

5. Improperly restrained Student on or about January 13, 2023, specifically by:
 - a. Failing to use only the amount of force necessary, in violation of Rule 2620-R-2.02(2)(c) and C.R.S. § 26-20-103(2)(c).

- 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(1)(b)(I)-(II);
- c. Failing to comply with the documentation and notification requirements for restraint, in violation of Rule 2620-R-2.04 and C.R.S. § 26-20-106.

FINDINGS OF FACT

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

A. Background

1. Student attended kindergarten in a District elementary school (“School”) from August 12, 2022 through January 13, 2023. *Exhibit O*, p. 1; *Exhibit I*, p. 67; *Interviews with Parent and Special Education Teacher*. He began attending a separate District school for students with challenging behaviors in February 2023, and is currently enrolled at that school. *Complaint*, p. 1; *Interviews with Parent, Special Education Teacher, and Special Education Coordinator*.
2. Student is eligible for special education and related services under the disability category of Autism Spectrum Disorder. *Exhibit A*, p. 1.
3. Student is an intellectually curious five-year-old who loves to be around people. *Id.* at p. 59; *Interviews with Parent and Special Education Coordinator*. He enjoys learning, reading, and making new friends. *Id.* He has trouble trusting adults, and he has a hard time taking and following directions. *Id.* He craves attention, particularly from adults, and will do or say things to elicit attention—positive or negative—even if that means giving an incorrect answer or acting out. *Id.*
4. Complainant’s allegations primarily concern the District’s placement of Student on a shortened school day, during which he had limited access to the special education services required by his IEP. *Complaint*, p. 8. The District largely concedes this. *Response*, pp. 1-4. Complainant also alleges that School staff violated the PPRA during a restraint of Student on the final day that he attended School—an allegation that the District does not concede. *Complaint*, p. 4; *Response*, p. 4. Finally, Complainant alleges that the District failed to provide Student’s school records, which is another concern conceded by the District. *Complaint*, pp. 1, 4; *Response*, p. 2. Accordingly, this Decision begins by documenting the events leading to Student’s shortened day, the education he received during that time, and the incident of restraint on his last day at School before turning to the records issue.

⁴ The appendix, attached and incorporated by reference, details the entire Record.

B. The April 2022 IEP: Preparing for Kindergarten

5. On April 15, 2022, when Student was still in preschool, a properly constituted IEP Team convened to develop his IEP (the “April 2022 IEP”) ahead of his enrollment in kindergarten for the 2022-2023 school year. *Exhibit A*, p. 1.
6. The IEP reports that although Student was generally friendly and sociable in preschool, he had difficulty controlling his emotions and regulating his behavior. *Id.* at p. 3. He was unable to meet his goals of staying on task, identifying feelings, and playing appropriately with his peers. *Id.* He also received services from a speech language therapist and occupational therapist to work on language concerns and fine motor control. *Id.* at pp. 3-4. He was responding well to those therapies and showing progress on his verbal language skills and in the use of fine-motor skills like writing and coloring. *Id.* at p. 4.
7. Student continued to need occupational and speech therapy, and his disability resulted in social-emotional delays that would “make it difficult for him to attend and engage in rules, routines, and tasks.” *Id.* at p. 5. His mother reported that he was “defiant and oppositional.” *Id.*
8. The IEP Team set seven goals for Student:
 - Goal 1 – Social/Emotional Wellness: Improve his compliance for completing tasks he did not like.
 - Goal 2 – Social/Emotional Wellness: Express his feelings and see that others had feelings.
 - Goal 3 – Social/Emotional Wellness: Recognize social conflicts and converse appropriately with his peers.
 - Goal 4 – Speech/Language: Answer who, what, where, when, and why questions.
 - Goal 5 – Speech/Language: Take turns in both activities and conversations with his peers.
 - Goal 6 – Writing: Write the letters of the alphabet.
 - Goal 7 – Mathematics: Quantify objects.

Id. at pp. 6-9.
9. The IEP provided seventeen classroom accommodations intended to help Student remain engaged in proper social interactions with self-regulation, such as giving him additional time in speaking situations and teaching him to calm himself down in a space dedicated to self-regulation. *Id.* at p. 10.

10. The IEP provided specialized instruction and related services. *Id.* at p. 13. Student's services for the 2022-2023 school year were:

- Social-Emotional Learning: 150 minutes per week inside the general education environment and 180 minutes per week outside the general education environment.
- Speech/Language: 90 minutes per month outside the general education environment.
- Occupational Therapy: 60 minutes per month outside the general education environment.
- Early Math: 60 minutes per week outside the general education environment.

Id. at p. 13. These services were to be provided directly to Student rather than indirectly by specialists working with his teachers. *Id.*

11. The SCO finds that the IEP Team agreed that Student would spend at least 80% of his time in the general education environment—meaning that his “least restrictive environment” (“LRE”) would be “80% or more”—even though the IEP states LRE as “100%.” *Id.* at p. 14. The SCO finds that “100%” is a clerical error because most of Student’s services were to be provided outside the general education classroom. *See id.* at pp. 12-13. It was impossible for Student to spend 100% of his time in the regular classroom and still receive his services. *Id.* Indeed, immediately underneath the 100% number, the IEP calculates his time in the general education classroom as 86.3% with this schedule of services. *Id.* at p. 15. The Record and investigation make it clear that the IEP Team agreed LRE would be 80% or more. *See id.* at pp. 12-15; *Interviews with Parent, Special Education Teacher, and Special Education Coordinator.*

C. The First Four Days of Kindergarten and Placement on a Shortened Schedule

12. Student began attending School on August 12, 2022, the first school day for kindergarten. *Exhibit O*, p. 1; *Exhibit I*, p. 3; *Interview with Special Education Teacher*.

13. On each of his first four days, Student exhibited physical aggression toward staff and his peers. *Exhibit I*, pp. 9-17; *Interview with Special Education Teacher*. Each day, he kicked and hit staff and other students, threw objects at staff and other students, and acted out vocally. *Id.*

14. On the fourth day, during an extended behavioral cycle, Student threw a chair at Special Education Teacher. *Exhibit I*, p. 17; *Interviews with Parent and Special Education Teacher*. Her hands were injured when she tried to block it, and she went to the hospital for treatment and x-rays. *Interviews with Parent and Special Education Teacher*. Although none of her bones were broken, it took weeks for her hands to heal. *Interview with Special Education Teacher*.

15. Student was sent home, suspended for the remainder of that day, and suspended for the next two days. *Exhibit I*, p. 68. Per District policy, School counted this as three days of suspension because the District tracks each partial-day suspension as a full-day suspension. *See id.; Interviews with District Compliance Officer ("Compliance Officer") and Special Education Coordinator.*
16. During Student's absence, Special Education Coordinator, who works for the District, determined, in consultation with School's special education staff, that Student lacked the stamina for a full day of kindergarten and should be placed on a reduced school day. *Interviews with Special Education Teacher and Special Education Coordinator.* She and Special Education Teacher determined that Student should begin with one hour of school per day, with that time to increase as he gained stamina and exhibited fewer unsafe behaviors. *Id.* Student's behavior was tracked using daily worksheets. *See Exhibit G*, pp. 1-41. School did not track Student's behavior when he was brought late to school or left early—and there were many of these days—such that there was insufficient time to evaluate his behavior. *Interview with Special Education Teacher.*
17. Special Education Teacher and Special Education Coordinator decided to shorten Student's schedule to accommodate his stamina and behavioral needs caused by his disability, and they did not intend it as a form of discipline. *Interviews with Special Education Teacher and Special Education Coordinator.* They intended for the shorter day to allow him to succeed in school for short periods rather than developing a dislike for school by trying to force him to do more than he was able. *Id.* They intended that his days would be lengthened as he gained stamina and exhibited fewer threats to his and others' safety. *Id.* His day was, in fact, lengthened in this manner. *See below*, FF # 30.
18. Special Education Teacher verbally informed Parent of this decision on August 22, 2022, when Student returned following his suspension. *Interviews with Special Education Teacher and Parent; Exhibit I*, p. 62. The District issued a prior written notice ("PWN") that same day to inform Parent of the modified school days. *Exhibit D*, p. 1. The decision was made without first getting Parent's agreement. *Interviews with Special Education Teacher and Parent.*
19. The District has indicated that Parent verbally agreed with the new placement on August 22, 2022. *Interview with Special Education Teacher; Response*, p. 2. Parent did not agree with it, but she did not express her objection to School or District staff. *Interviews with Special Education Teacher and Parent.*
20. The decision was not made by the IEP Team, Student's IEP was not revised to reflect the shortened day, and the PWN was the only document created by the District regarding Student's shortened day. *Interviews with Special Education Coordinator, Special Education Teacher, Compliance Officer, and Parent.*

21. The District's decision to change Student's placement was finalized on August 22, 2022—when it informed Parent of the change—yet the District did not conduct an MDR by September 7, 2022, which was school ten days later. *Exhibit O*, p. 1. The District did not begin a formal assessment of Student's behaviors at that time, and it was not until October 27, 2022 that the District asked Parent for consent to begin a functional behavioral assessment ("FBA"), which is the first step to develop a behavioral intervention plan ("BIP") for students with behavioral needs. *Exhibit D*, p. 3; *Interview with Special Education Coordinator; Consultations with CDE Content Specialists 1 and 2*.
22. The District has conceded that it did not follow the IDEA or its own policies. *Id.; Response*, pp. 2-4. The District's written policies should have governed the changes to Student's setting and schedule, and the District acknowledges that these policies were not followed in this case. See *Exhibit U*. Specifically, the District's policy mandates the following procedures that should have been, but were not, followed in Student's case:
- An IEP Team meeting is preferred in all cases, even when the law would allow a written amendment with Parent's agreement, but an amendment is acceptable if (1) the parent agrees not to meet, and (2) the parent signs the amendment paperwork. *Id.* at p. 7.
 - The IEP Team must meet to review and revise an IEP any time that a student's LRE will be changed and when services will be added or removed. *Id.* at p. 8.
 - The IEP Team must at least consider reevaluating a student before adding or removing a related service, such as speech/language services or occupational therapy, or making a "significant change in placement," defined as adding or terminating any service, making any change that would result in the student having different opportunities to participate in nonacademic and extracurricular activities, changing the Student's LRE, or transferring a student from a brick-and-mortar school to online learning or vice-versa. *Id.*
 - A student with an IEP may be placed on a shortened day schedule only after the IEP Team determines it would serve the student's unique disability-related needs. *Id.* at p. 15.
 - If a student's schedule is shortened because of behavioral issues, the IEP must identify steps for transitioning the student to a longer day, including a process for behavioral tracking and the provision of direct specialized instruction that will help the student develop the skills to undertake a longer day. *Id.*
 - The IEP must explain why a student's day should be shortened, what the student's schedule will be on that day, and how the student will be able to transition back to a full day, including a plan for more frequent IEP Team meetings to review the student's data and consider lengthening the student's day. *Id.* at pp. 15-16. The IEP must include

the specific data and plan, as well as goals and services addressing the disability-related needs that prompted the need for a shortened day. *Id.* at p. 17.

- A student's day may not be shortened solely to manage a student's behavior or as a means of discipline. *Id.* at p. 16.

23. School's psychologist was responsible for overseeing the process for changing Student's setting and schedule consistent with District policy and the IDEA, but failed to do so, although the District also acknowledges that these lapses should have been caught by closer supervision and reporting by and among School and District special education staff. *Interviews with Special Education Coordinator and Compliance Officer.*

24. There are a handful of other students with shortened days in the District, and the students who have both shortened days and IEPs also have IEPs that comply with the above requirements. *Interview with Special Education Coordinator.* Student's situation was a one-time error, and the District views it as an indication of a need for better oversight. *Id.*

D. The Severe Needs Behavioral Room and Special Education Staff

25. Student spent his shortened school days in School's severe needs behavioral ("SNB") classroom. *Exhibit A*, p. 19.

26. The SNB classroom is a special education instruction classroom for students with behavioral challenges, but it is not a separate program. *Interviews with Special Education Teacher, Paraprofessionals 1, 2, and 3, and Special Education Coordinator.* Student was the only student who spent all his time there. *Id.* Other students came into the room as part of their regular schedule to receive specialized instruction for a class period. *Id.* Although School sometimes used it as a "time out" room for students who exhibited disruptive or unsafe behaviors in the general education classroom, this was only an occasional use to allow those students to become regulated and returned to the general education environment. *Id.*

27. The SNB classroom is staffed by Special Education Teacher, who has a generalist special education credential in good standing, and three paraprofessionals who work under her direction. *Id.*

28. Special Education Teacher, a member of Student's IEP Team, kept the paraprofessionals informed of Student's IEP needs, goals, and services. *Interviews with Special Education Teacher and Paraprofessionals 1, 2, and 3.* Student's IEP was also kept on file in the SNB room, where it was accessible to all the special education staff. *Interview with Paraprofessional 1.* Further, the paraprofessionals had access to Student's "snapshot," which was an outline of Student's IEP needs, goals, and services. *Interview with Paraprofessional 2.*

29. Special Education Teacher and her paraprofessionals all have up-to-date training certifications from Quality Behavioral Solutions (“QBS”). *Exhibit N*, pp. 1-4; *Interviews with Special Education Teacher, Paraprofessionals 1, 2, and 3, and Special Education Coordinator*. Specifically, Special Education Teacher and Paraprofessional 2 received 7 hours of safety-care training for a certificate issued on May 25, 2022, Paraprofessional 1 received 11.5 hours of training for a certificate issued on March 2, 2022, and Paraprofessional 3 received 11.5 hours of training for a certificate issued on October 11, 2022. *Exhibit N*, pp. 1-4. This training included non-touch strategies to deescalate behavioral incidents, the understanding that a physical restraint should be used only when using the restraint is safer for the student and others than not using it, and the proper administration of specific restraints such as the “one-person stability hold.” *Interviews with Special Education Teacher, Paraprofessional 1, and Special Education Coordinator; Consultation with CDE Content Specialist 2*.

E. Student’s IEP Services in the Fall Semester

30. Student’s behaviors improved and his time in school was increased to 90 minutes per day beginning on September 27, 2022, and again to two-to-three hours per day—depending on his behavior and his family’s ability to pick him up—on November 15, 2022. *Exhibit I*, pp. 63, 65; *Interview with Special Education Teacher*.
31. In the fall semester, he received a total of 3,778 minutes of specialized instruction in social-emotional learning outside of the general education environment. *Exhibit I*, pp. 1-13.
32. He also received a total of 120 minutes of specialized instruction in social-emotional learning inside the general education environment via close accompaniment by a Special Education Teacher or a paraprofessional during the regular recess or lunch. *Id.* at pp. 1, 9, 10; *Interview with Paraprofessional 1*. After he was placed on three-hour days, he regularly attended a special recess with other children with behavioral challenges under close supervision. *Interview with Paraprofessional 1*.
33. And he received a total of 45 minutes of specialized instruction in math outside of the general education environment over the course of the fall semester. *Exhibit I*, pp. 1, 10.
34. The District concedes and the Record reflects that he did not receive any of his speech/language or occupational therapy services in the fall semester. See *Exhibit F; Response*, p. 4.
35. The SCO, comparing the service minutes provided by his IEP with the minutes he did receive, finds that Student received the required instruction in social-emotional learning outside the general education environment in the fall semester but that the District failed to provide the following services:
 - Social-Emotional Learning: 2,370 minutes inside the general education environment.

- Speech/Language: 450 minutes outside the general education environment.
- Occupational Therapy: 300 minutes outside the general education environment.
- Early Math: 990 minutes outside the general education environment.

F. The December 2022 IEP and BIP: Preparing for Spring Semester

36. Following an FBA that was begun on October 27, 2022, Student's IEP Team convened on December 15 and 16, 2022, to revise Student's IEP (the "December 2022 IEP") and develop a BIP ahead of the spring semester. *Exhibit A*, pp. 17, 33.
37. The IEP reported Student's progress on his IEP goals. He had made little or no progress on his goals related to social-emotional wellness, verbal expression, and the ability to write the letters of the alphabet. *Id.* at pp. 21-22. He had made progress in and met his mathematics goal to quantify objects. *Id.* at p. 22.
38. Assessing Student's needs and the impact of his disability, the IEP Team, based on observations of Student's behavioral issues throughout the semester, wrote that Student's disability resulted in "social-emotional delays," as a result of which "[h]e needs continuous adult safety monitoring" because he was "unsafe with himself, peers, and adults." *Id.* at p. 23.
39. The December 2022 IEP updated his goals by removing his mathematics goal (which he had reached), revising his prior goals in writing and speech, and adding goals to target aggression:
- Goal 1 – Writing: Write the letters of the alphabet.
 - Goal 2 – Social/Emotional Wellness: Use self-regulation and refrain from physical aggression against himself and others.
 - Goal 3 – Social/Emotional Wellness: Use self-regulation and refrain from other inappropriate behavior.
 - Goal 4 – Social/Emotional Wellness: Interact with his peers appropriately.
 - Goal 5 – Speech/Language: Answer who, what, where, when, and why questions.
 - Goal 6 – Speech/Language: Take turns in activities and conversations with peers.
- Id.* at pp. 24-26.

40. The IEP Team added accommodations to target aggression, such as requiring one-on-one instruction, one-on-one testing, always keeping an adult line of sight on him, and closely monitoring his interactions with his peers for safety. *Id.* at p. 27.

41. The IEP Team removed his specialized instruction in mathematics, added writing and mental health services, and increased his specialized instruction in social-emotional learning. *Id.* at pp. 29-30. His services in the revised IEP were:

- Social-Emotional Learning: His services outside the general education environment were increased from 150 minutes per week to 1,802 minutes per week, and his services inside the general education environment were removed.
- Written Expression: 150 minutes per week outside the general education environment.
- Speech/Language: 90 minutes per month outside the general education environment.
- Mental Health Services: 80 minutes per month outside the general education environment.
- Occupational Therapy: 60 minutes per month outside the general education environment.

Id. at pp. 29-30.

42. His LRE was updated to reflect that he would spend no time in the general education environment, because this would allow him to receive specialized services and safety monitoring rather than miss his services because of unsafe behaviors. *Id.* at p. 31.

43. The IEP also notified Parent that Student's schedule would be three hours per day, with an IEP Meeting at the end of January 2023 to discuss whether a longer period of time would be appropriate. *Id.* at p. 32.

44. The IEP Team also developed a BIP to manage and improve Student's behaviors. *Id.* at pp. 33-37. The BIP stated that Student acted out primarily to gain attention and to control his own schedule and environment. *Id.* at p. 33. Accordingly, the BIP provided that staff would respond to Student's behaviors by ignoring inappropriate behaviors unless safety was an issue, giving him concise directives followed by wait time, giving him redirection and prompts for desired behavior, giving him his own space, and maintaining a neutral, nonthreatening demeanor when he was dysregulated. *Id.* at pp. 34-35. The IEP Team's goal was to increase his time at school "without aggression or other significant unsafe behaviors." *Id.* at p. 35.

45. Although the IEP was effective December 16, 2022, Student had excused absences on the remaining three school days in the fall semester, meaning that the District could not implement it until the spring semester. *Exhibit H*, p. 2.

G. Student's IEP Services in the Spring Semester

46. Student attended School for only three full days after returning from Winter Break on January 9, 2023, and then Parent withdrew him from School after a behavioral incident on the morning of the fourth day, January 13, 2023. *Id.* at p. 32.
47. Because the service logs for social-emotional learning and written expression were created weekly, and Student did not finish a full week in the spring semester, there is no log showing his receipt of social-emotional learning and writing services for the three days he attended in the spring semester. *See Exhibit F; Interview with Special Education Teacher.* However, the SCO finds that Student did receive these weekly services during his three days of attendance based on the credible statements of Special Education Teacher. *Interview with Special Education Teacher.*
48. The IEP also states that service delivery would be contingent upon Student's attendance. *Exhibit A*, p. 29. Accordingly, Parent's withdrawal of Student shortly after the beginning of the semester relieved the District of its duty to provide the monthly services—speech/language, mental health, and occupational therapy services—scheduled for January 2023. *Id.*; *Consultation with CDE Content Specialist 3.*
49. Accordingly, the SCO finds that the District did not fail to provide services to Student in the spring semester.

H. The January 13, 2023 Incident and Parent's Withdrawal of Student

50. On the morning of January 13, 2023, Paraprofessional 2 met Student as he arrived at school with the school bus. *Interviews with Special Education Teacher, Paraprofessional 2, and Paraprofessional 3; Exhibit K*, p. 16. One of the special education staff always met Student to escort him from the bus to the SNB room because he would otherwise act unsafely toward other students. *Interviews with Special Education Teacher, Paraprofessional 1, Paraprofessional 2, and Paraprofessional 3 ("Interviews with Special Education Staff")*.
51. Student was unhappy to see Paraprofessional 2, as he preferred Paraprofessional 3. *Interview with Paraprofessional 2.* She brought him to the cafeteria where he yelled at her and the other students in the cafeteria to get away from him. *Id.* Paraprofessional 2 took his breakfast back to the SNB room, where Paraprofessional 1 helped him open his carton of milk. *Interviews with Paraprofessional 1, Paraprofessional 2, and Paraprofessional 3.* He became more upset because he wanted Paraprofessional 3 to help him instead. *Id.*

52. At this point, Student became dysregulated. *Id.* He yelled at the staff to “get back,” and yelled “I hate you,” “I’m warning you,” and “get out of the room.” *Id.* He removed his jacket and pretended to shoot the staff with his hands. *Id.* Special Education Teacher, who had been temporarily out of the SNB room, returned at this point. *Interviews with Paraprofessional 1, Paraprofessional 2, and Paraprofessional 3.* The paraprofessionals moved objects and the other students from the area while Special Education Teacher attempted to calm Student down by telling him “it’s all right” and “okay we’re going to get busy doing our day now.” *Interviews with Special Education Staff; Exhibit K, pp. 1-4, 16-17.*
53. Student then “got pretty physical” by kicking the furniture and stepping on Special Education Teacher’s and Paraprofessional 1’s feet while growling. *Id.* Paraprofessional 3 kept working with several other students on the other side of the room behind a whiteboard that he used as a screen. *Id.* Paraprofessional 2 took herself quietly off to the side of the room where she began to monitor and take notes. *Id.* Special Education Teacher and Paraprofessional 1 tried to talk calmly to Student while maintaining a neutral demeanor. *Id.*
54. Student bit himself on the arm and looked at Special Education Teacher and Paraprofessional 1, who kept their faces and body language neutral. *Id.* Special Education Teacher asked Student to begin his schoolwork and gave him a worksheet. *Id.* He pushed it back across the table and said, “No.” *Id.* He bit himself again and looked at Special Education Teacher, who again maintained a neutral demeanor. *Id.* He put his feet on the table and refused to remove them when asked. *Id.* He then began running around the room before running at Paraprofessional 1 and hitting her. *Id.* Special Education Teacher and Paraprofessional 1 asked him to please stop hitting the staff; however, he continued to hit and kick Special Education Teacher and Paraprofessional 1, who attempted to back away, and he began “roaring.” *Id.*
55. After he continued to punch and kick Paraprofessional 1 and Special Education Teacher in the stomach and shins, Paraprofessional 1, at Special Education Teacher’s direction, placed him in a “one-person stability hold” for about one minute. *Id.* This involved Paraprofessional 1 holding Student’s hands and arms with her hands and arms while they both remained in an upright posture. *Id.; Exhibit L, p. 1.* He was calm while he was being held. *Special Education Staff Interviews; Exhibit K, pp. 1-4, 16-17.* Special Education Teacher told him he needed to keep his hands to himself, and that they would give him his space and he needed to give them their space. *Id.*
56. Paraprofessional 1 released Student, and he was calmer for a few minutes. *Id.* Then he became agitated again and started making fists, growling, and screaming. *Id.* He removed his shirt, socks, and shoes. *Id.* He said he was the comic book character The Hulk and started lunging at Special Education Teacher and Paraprofessional 1, hitting the walls, and trying to grab and head-butt Special Education Teacher and Paraprofessional 1. *Id.* He began barking like a dog. *Id.* Special Education Teacher and Paraprofessional 1 backed away to give him space. *Id.* He began hitting the floor with his fists while yelling “Hulk smash.” *Id.*

57. Special Education Teacher and Paraprofessional 1 were concerned that he would hurt his hands. (*Id.*) They spoke to him, saying that it was time to begin the school day, that they wanted to work with Student and not Hulk, and that it was time for Hulk to leave. *Id.* They attempted to wait out the behavior and keep their engagement minimal. *Id.* However, Student began to attack Special Education Teacher and Paraprofessional 1 again by kicking their shins, stepping on their feet, and hitting Paraprofessional 1 hard in the stomach. *Id.* She again used the one-person stability hold, this time for two minutes. *Id.* He initially cried, kicked her, headbutted her, and tried to bite her, but then calmed down. *Id.*
58. Paraprofessional 1 again released Student, and she and Special Education Teacher backed away to give him space. *Id.* Special Education Teacher asked Student to put his clothes back on and have a seat. *Id.* He became upset again and yelled at her to do what he said. *Id.* He again began to hit furniture, “roar,” and try to kick Special Education Teacher and Paraprofessional 1, who kept backing up. *Id.* He charged at them low to the ground and began pounding his head into Special Education Teacher’s and Paraprofessional 1’s legs and feet. *Id.* They kept backing up, and Student kept trying to grab and headbutt their legs, until Paraprofessional 1 backed up and Student missed a headbutt, failed to catch himself, and hit his face on the floor. *Id.*
59. Student immediately “came out of this place that isn’t really reality . . . snapped out of it and then he seemed like just a kid again,” and “went from being violent to a normal reaction of crying” because he had split his lip, which was bleeding. *Interview with Paraprofessional 3.* The staff got him wet paper towels and notified the school nurse, who came with an ice pack. *Id.* The staff also notified school administration, and the Vice Principal came and spoke to Student. *Interviews with Special Education Staff; Exhibit K*, pp. 1-4, 16-17. Student calmed down. *Id.* Vice Principal called Parent, who took Student home. *Interview with Parent.*
60. When Vice Principal called Parent, he explained the incident to her and told her about Student’s injury. *Id.* That afternoon, Special Education Teacher submitted a written report to the school administration explaining the antecedent to Student’s behavior, a description of the incident and efforts to deescalate the situation, alternatives to restraint that were attempted, the type and duration of the restraint, and the identity of the staff present and involved in the restraint. *Exhibit K*, pp. 1-4. She also emailed Parent explaining what happened, including how Student hurt his lip, and she attached a copy of the formal restraint report. *Exhibit Q*, pp. 44-45, 69-79. *Id.*
61. Student told Parent that Special Education Teacher pushed him, and Complainant has alleged the same. *Id.* at p. 69; *Complaint*, pp. 3-4. When Parent responded to Special Education Teacher’s email at the time, she noted that Student sometimes engaged in “intentional vagaries.” *Exhibit Q*, pp. 44. She noted that Student, in becoming “physical,” led her to discuss “with him once again, that he had used superheroes in a not so heroic way.” *Id.* She wrote that he “has become increasingly blunt about his agenda to intimidate as the means of forcing

his way" and wrote that Student's "refusal to empathize with anyone as another person compounded with his understanding of which button to press to get his desired outcome is shocking." *Id.* at p. 44.

62. She discussed the measures Student's family and professional caregivers were taking to "reset his expectation of authority and social engagement." *Id.* She wrote that the family had been reluctant to withdraw Student from school but that, "in understanding the scope of his escalating so far past what a traditional school can provide, it might be time to deprive him of the punishment practice sessions he seems to approach school as." *Id.* Parent said that Student was keenly interested in getting "the big reaction," that "if he thinks he can use language to get a big reaction then it'll become a problem," and that he specifically went through a bout of saying that he would hurt himself and "now he has latched onto that," even though he does not truly want to hurt himself, because "he'll cling to anything that gets a big reaction." *Interview with Parent.*
63. Based on this evidence, the SCO finds that School staff's only physical contact with Student was Paraprofessional 1's uses of the one-person stability hold two times for a total duration of no more than three minutes.
64. Student was suspended for the remainder of January 13 and one additional day. *Exhibit I*, pp. 4, 69.
65. This was his only formal suspension since the three-day suspension in his first week at School. *Id.* at pp. 68-69.
66. Although School staff were open about the use of restraint, details of the incident, and Student's injury in their communications with Parent and internal documentation, the restraint report form states, in the area reserved for recording injuries, "none." *Exhibit K*, pp. 1-4. The District interprets the law to mean that, for purposes of restraint reports under the PPRA, an injury related to a restraint must occur in connection with the restraint itself. *Interview with Compliance Officer.* The District's position is that, when a student injures himself in the overall course of behavior during which the restraint occurs but not because of or during the restraint, then that injury should not be reported on the restraint report. *Id.*
67. It is common practice, however, to report student injuries even when the injury is self-inflicted and occurs in the course of the behavioral cycle but not during or because of the restraint. *Consultations with CDE Content Specialists 1 and 2.* In such a situation, the report should include a narrative indicating that the student's injury was self-inflicted. *Id.* The report should not be viewed as a negative mark against the involved staff, and any injuries reported are not assumed to have been the result of improper behavior by the staff. *Id.*
68. Paraprofessional 1 followed her training as well as best practices: She and Special Education Teacher first attempted to de-escalate Student by using strategies from Student's BIP such as

talking to Student and giving him space while keeping a neutral demeanor before using the hold. *Interviews with Special Education Staff; Consultation with CDE Content Specialist 2*. They then waited to use the hold until Student posed an imminent risk of injury to himself, Paraprofessional 1, and Special Education Teacher. *Interviews with Special Education Staff and Special Education Coordinator; Exhibit L, p. 1; Consultation with CDE Content Specialist 2*. The use of a stability hold always carries some risk of injury to both the person using the hold and the person being held. *Exhibit L, p. 1; Consultation with CDE Content Specialist 2*. It is only appropriate to use a hold when there is a greater risk of injury by *not* using the hold than by using it. *Interviews with Paraprofessional 1 and Special Education Coordinator; Exhibit L, p. 1; Consultation with CDE Content Specialist 2*.

69. After Student's two-day suspension was finished on January 18, Parent determined that School was not equipped to address Student's needs and formally withdrew him rather than return him to classes. *Exhibit I, p. 44; Interviews with Parent, Special Education Teacher, and Special Education Coordinator*.
70. Student began attending District's separate therapeutic day school the next month. *Exhibit A, p. 42; Interviews with Parent and Special Education Coordinator*. He is, by all accounts, thriving in that specialized environment. *Interviews with Parent and Special Education Coordinator*.

I. Complainant's Requests for Student's Records

71. Complainant, an advocacy organization who attempted to investigate Parent's allegations prior to filing this Complaint on her behalf, alleges that the District did not produce Student's records as required by the IDEA. *Complaint, p. 1*.
72. The District has policies and procedures that address records requests by parents and guardians. *CDE Exhibit 1, p. 10*. Under District policy and procedure, a parent or guardian must submit a written request to the administration of the school attended by the student to review the student's records. *Id.* A parent or guardian may also submit an email request to records personnel at the District. *CDE Exhibit 2, p. 1*.
73. Complainant emailed a written request for Student's records—broken into a list of 17 specific categories of records—directly to the District's Director of Education Services on Parent's behalf on January 20, 2023. *Exhibit 1, p. 1*. Complainant included a release of information agreement signed by Parent. *Id.*
74. The District provided some, but not all, of Student's records. *Exhibit 3, pp. 1-2; Complaint, p. 1; Response, p. 2*. Complainant sent a follow-up request on February 2, 2023, to which the District did not respond. *Id.*

75. The District does not argue that Complainant followed an improper procedure to request records but instead concedes that the District improperly failed to provide Student's records. *Response*, p. 2. The District blames a mix-up wherein the two District personnel handling the request each thought the other had followed up with Parent. *Response*, p. 2.

76. Complainant suggests that the District has a "pattern of noncompliance" and alleges that the District has also failed to provide unspecified records in response to Parent's requests on other, unspecified occasions for reasons unrelated to the IDEA. *Reply*, p. 1.

J. The District's Annual Restraint Review

77. As part of this investigation, the District provided, at the SCO's request, the District's Annual Restraint Review for the 2021-2022 school year. *Exhibit M*.

78. The Annual Restraint Review is two pages, and is composed of 10 charts, graphs, and tables without any narrative or analysis:

- A table showing how many holds were performed throughout the District as an undifferentiated whole, and whether the hold durations were less than or greater than five minutes;
- A bar chart with that same information;
- A table showing the nature and number of de-escalation techniques used throughout the District as a whole;
- A table showing the number of restraints used for various student-to-staff ratios, e.g., restraints were used only twice in 25-to-1 student-to-staff settings and six times in 2-to-1 student-to-staff settings;
- A table showing the number of times each different type of hold was used, e.g., the "one-person stability hold" was used 12 times;
- A table showing the total number of injuries throughout the District as a whole, and whether the injuries were to staff or to students;
- A table showing the number of holds performed by month, for all the elementary schools within the District, as well as a corresponding line graph; and
- A matching table for all the middle and high schools (combined) within the District, as well as a corresponding line graph.

Id.

79. The Annual Restraint Review contains no other information, narrative, or discussion. *Id.*

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 provide Parent with access to Student's education records after her January 20, 2023 and February 2, 2023 requests, in violation of 34 C.F.R. § 300.613. This violation did not result in a denial of FAPE. No systemic violation is found.

Parent's first concern is that the District failed to provide all of Student's records that she requested.

A. A Parent's Right to Inspect Records

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 C.F.R. § 300.613(a). Accordingly, a school district "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency." *Id.* A district must comply with a request from a parent to review his or her child's education records "without unnecessary delay and before any meeting regarding an IEP," and in no case more than 45 days after the request. *Id.* The right of parents to inspect education records includes a "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records." 34 C.F.R. § 300.613(b). The IDEA borrows the definition of "education records" from the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). FERPA defines education records as those records that are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3. A record means "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." *Id.*

Here, Parent, through her representative, requested essentially all of Student's records from the District on January 20, 2023, and she followed up with a second request on February 2, 2023 for those records that had been requested but not disclosed. (FF #s 71-75). The District never provided all of the requested records, and it never explained its failure or responded to Parent's follow-up request. (FF # 74). The District concedes that it improperly failed to provide the records. (FF # 75). The SCO accordingly finds and concludes that the District failed to provide Parent access to Student's educational records consistent with the IDEA, resulting in a procedural violation of 34 C.F.R. § 300.613(a).

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if the violation (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); see *Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

In this case, Parent requested Student's records via her legal representative to allow the representative to evaluate whether the District had violated Parent's and Student's rights under the IDEA. (FF # 71). The request was made approximately the same day that Parent withdrew Student from School. (FF #s 69, 73). Nothing in the Record suggests that the District's failure to provide these records impeded Student's right to a FAPE, impeded the parent's opportunity to participate in the decision-making process, or deprived Student of any educational benefit. Accordingly, the SCO finds and concludes that the District's procedural violation did not result in a substantive denial of FAPE.

B. No Systemic Violation Is Found

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 Educational 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, nothing in the Record indicates that this violation is systemic in nature. There is no evidence to support the bare assertion that the District has failed, on unspecified occasions, to give Parent other Student records that she requested for purposes unrelated to the IDEA. (FF # 76). The SCO finds and concludes that a thorough and careful investigation does not demonstrate that the District systemically fails to produce records in accordance with 34 C.F.R. § 300.613(a).

Conclusion to Allegation No. 2: The District failed to educate Student consistent with the LRE in his IEP and improperly changed Student's placement, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.117, 300.323(c), 300.327, 300.501(c), and ECEA Rule 4.03(8). The District failed to provide Parent with prior written notice of the Student's change of placement a reasonable time before that change, in violation of 34 C.F.R. § 300.503(a). These violations resulted in a denial of FAPE. No systemic violation is found.

Parent's concern is that the District improperly placed Student in the SNB room on a shortened school day without convening the IEP Team, getting Parent's agreement beforehand, or providing prior written notice of the change.

A. The District Failed to Educate Student Consistent with the LRE in his IEP

"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. v. Nebo*

Sch. Dist., 379 F.3d 966, 976 (10th Cir. 2004). This means that children with disabilities receive their education in the general education setting with typical 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 placed in separate schooling, or otherwise 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).

Under the IDEA, an IEP must include “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. § 300.320(a)(5). This statement describes a student’s recommended placement in the LRE. *Id.* Students with disabilities must be educated consistent with the LRE described in their IEP. *Id.* §§ 300.320(a)(5), 300.323(c)(2).

Here, Student’s April 2022 IEP required him to spend at least 80% of his time in the general education classroom. (FF # 11). On his fourth day of school, however, the District moved him from the general education classroom to the SNB room, where he spent nearly all his time until Parent withdrew him from School in January 2023. (FF #s 16). The SNB room is a space dedicated to the education of students with disabilities, behavioral issues, or both. (FF # 26). After his placement in the SNB room, Student’s total time in the general education environment was 120 minutes over the course of the fall semester under close supervision. (FF # 32).

Thus, the SCO finds and concludes that the District failed to educate Student in the educational placement required by the April 2022 IEP from the time that he was placed in the SNB room with a shortened day until the December 2022 IEP took effect, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.117, and 300.323(c).

B. The District Failed to Comply with Placement Determination Requirements

A child’s placement must be determined by the IEP Team (including parents), must be individualized, and must be based on the IEP. *Id.* § 300.116; ECEA Rule 4.03(8)(a); U.S. Dept. of Ed., *Questions and Answers (Q&A) on Endrew F. v. Douglas County Sch. Dist. Re-1*, 71 IDELR 68 (Dec. 7, 2017). The IEP must include evidence that supports the student’s LRE placement. *See H.L. v. Downingtown Area Sch. Dist.*, 624 Fed. Appx. 64, 68-69 (3d Cir. 2015) (mem.). The IEP Team must first consider placing a student with disabilities in the regular classroom. *Letter to Cohen*, 25 IDELR 516 (OSEP 1996). Before a student’s LRE may be changed to a more restrictive setting, the IEP Team must consider any supplemental aids and services that could facilitate the student’s placement in a less restrictive setting. *Id.* Any significant change in placement—such as the addition or termination of services, or a changed opportunity to participate in nonacademic activities—must be made upon consideration of reevaluation. ECEA Rule 4.03(8)(b)(ii)(B).

Prior written notice must be provided to a parent a reasonable amount of time before any proposed change of placement. 34 C.F.R. § 300.503(a). If an IEP Team has already had its annual

meeting, a district and parent may agree in writing to amend the student's IEP without another meeting. *Id.* § 300.324(a)(4)(i); ECEA Rule 4.03(8)(b)(ii)(B). The district must then inform the IEP Team of the amendment. 34 C.F.R. § 300.324(a)(4)(ii).

Here, the SCO finds and concludes that the change of Student's placement failed to comply with these procedures for at least five reasons.

First, the District could change Student's placement only through the IEP Team or by a written agreement with Parent documenting exactly how the IEP would be amended. 34 C.F.R. § 300.324(a)(4)(i). Here, the decision was made by Special Education Coordinator and Special Education Teacher, and the District did not seek Parent's written agreement. (FF #s 16-21).

Second, nothing in the Record shows that the District considered whether supplemental aids or services could make a less-restrictive placement viable for Student. But this consideration was necessary prior to removing him entirely from the general education environment. *Id.* § 300.314(a)(2)(i)-(ii); *Letter to Cohen*, 25 IDELR 516.

Third, there is no evidence that reevaluation was considered, although consideration of reevaluation is a necessary step prior to making a significant change of placement. ECEA Rule 4.03(8)(b)(ii)(B).

Fourth, the change of placement was not based on Student's IEP. His IEP was never amended to justify (or reflect) the change of placement with evidence and appropriate services to enable progress. (FF #s 16-21). But the District must amend the IEP with evidence-based justification prior to putting Student in a more restrictive LRE. 34 C.F.R. § 300.116; *Downington*, 624 Fed. Appx. at 69. Nor was the change tailored to Student's individualized needs as recorded in his IEP. Indeed, the shortened schedule and move to the SNB room conflicted with Student's IEP because this new placement was more restrictive than his LRE, it terminated most of his services, and it was based on stamina and behavioral issues not recorded in his IEP. (FF #s 6, 11, 16-21).

Finally, although the District issued a PWN to notify Parent of the move, it was issued the same day that Student's schedule was shortened. (FF # 18). This was not a reasonable time before the change of placement as required by 34 C.F.R. § 300.503(a).

For these reasons, the SCO finds and concludes that the District failed to follow the IDEA's and ECEA's procedures for making a change of placement, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.503(a), and ECEA Rule 4.03(8)(b).

C. These Violations Constituted a Denial of FAPE

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory

remedies if the violation (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); *see Knable*, 238 F.3d at 765-66.

In this case, moving Student to a shortened schedule in the SNB room deprived him of several educational benefits: He did not receive most of his services, which the IEP considered necessary to enable him to progress. (FF # 35). His time was spent almost entirely with other children with disabilities or behavioral issues in a more restrictive setting, meaning that he lost a semester of social advancement. (FF # 32). And his academic education consisted of 45 minutes of specialized instruction in math. (FF # 33). The SCO accordingly finds and concludes that the District's procedural violation resulted in a denial of FAPE. To remedy this denial of FAPE, the SCO has ordered compensatory education, as explained below in the discussion of Allegation 4.

D. No Systemic Violation is Found

The 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).

Here, nothing in the Record indicates that this violation is systemic in nature. The District conceded its violation and acknowledged that both the law and District's written procedures forbid school districts from unilaterally shortening a student's day or otherwise changing a student's placement. (FF #s 22-23). No other students are in the SNB room full-time. (FF # 26). The few other students in the District who have shortened schedules have IEPs justifying that schedule and providing a plan for monitoring their progress and lengthening their days as soon as is appropriate. (FF # 24). The District's written procedures comply with the IDEA and the requirements just discussed. (FF # 22). The failure to follow these procedures in Student's case was a one-time error arising from both School's psychologist's failure to oversee the process, as was her responsibility, and from a lack of supervision by and among the other special education staff in School and District. (FF #s 23-24). The District concedes this error and is treating it as an opportunity to identify and correct weaknesses in its supervisory structure. (*Id.*).

The SCO accordingly finds and concludes that a thorough and careful investigation does not demonstrate that the District systemically places students in separate settings or shortens students' school days without following the procedures required by the IDEA and ECEA.

Conclusion to Allegation No. 3: The District failed to conduct an MDR within ten days of the decision to change Student's placement on August 18, 2022, in violation of 34 C.F.R. § 300.530(e). This violation resulted in a denial of FAPE. No systemic violation is found.

Parent is concerned that the District failed to conduct an MDR following the District's decision, at the time of Student's August 17, 2022 suspension, to shorten Student's school day.

A. Requirements for an MDR

Discipline of a student with a disability may result in a change to the child's placement and entitle the student to procedural protections under the IDEA. See 34 C.F.R. §§ 300.530, 300.536. Within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of conduct, a school district must perform an MDR to determine whether the behavior at issue was a manifestation of the student's disability or a direct result of the school district's failure to implement the IEP. *Id.* § 300.530(e)(1).

B. Determining Whether a Change of Placement Is Disciplinary

Before analyzing whether the District was obligated to conduct an MDR, the SCO must determine whether a disciplinary change of placement occurred and, if so, the date the District decided to make that change. A disciplinary change of placement occurs if: (1) a student has been removed from his current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of short-term removals that total more than 10 school days and constitute a pattern. *Id.* § 300.536(a). A series of removals may constitute a pattern, but this is determined on a case-by-case basis; this determination is inherently subjective. *Id.* § 300.536(b)(1); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities* ("Assistance"), 71 Fed. Reg. 46715 (Aug. 14, 2006).

The IDEA's disciplinary procedures apply to a unilateral removal arising from a violation of a code of conduct unless all three of the following factors are met: (1) The child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child's IEP; and (3) the child continues to participate with nondisabled children to the extent the student would have in the student's current placement. *Assistance*, 71 Fed. Reg. 46715. Federal guidance has also restated the first of these requirements as affording the student "the opportunity to continue to be involved in and make progress in the general education curriculum." *Dear Colleague Letter*, 68 IDELR 76 (OSERS 2016).

School districts must consider both formal removals (such as suspensions) and informal removals. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions* ("Discipline Q&A"), 122 LRP 24161, Question C-6 (OSEP 2022).⁵ Informal removals include "action[s] taken by school personnel in response to a child's behavior that excludes the child for part or all of the school day, or even an indefinite period of time." *Id.* at p. 54. Administratively shortened school days—when school districts unilaterally reduce a student's school day—constitute informal removals. *Id.* The Department of Education cautioned that the use of administratively shortened school days to address problematic behavior "if implemented repeatedly, could constitute a disciplinary removal from the current placement." *Letter to Mason*, 118 LRP 32230 (OSEP 07/27/18).

⁵ Available at <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>.

C. Student's New Placement Was a Disciplinary Change of Placement

In this case, the SCO acknowledges that District and School staff did not intend to discipline Student by changing his placement. (FF # 17). Yet his removal to the SNB room on a shortened day was effectively disciplinary under the IDEA for the following reasons: First, the District changed his setting and schedule—placing him the SNB room and shortening his day to between one and three hours—after he violated the school code of conduct for four days straight. (FF # 15-22, 30). His new setting and schedule began the day he returned from being suspended. (FF # 18). Accordingly, the change was made because of Student's violations of the code of conduct, which is the first requirement to trigger the IDEA's disciplinary protections. 34 C.F.R. § 300.530(e)(1). Second, his new placement significantly reduced his opportunity to be involved in the general curriculum, resulted in the termination of most of his specialized instruction, and prevented him from participating with nondisabled children to the same extent as when he was in the regular classroom. (FF #s 30-35). Any one of these new limitations would be enough to invoke the IDEA's disciplinary safeguards. *Assistance*, 71 Fed. Reg. 46715. Finally, the District shortened his school day, excluding him from school as effectively as if he were formally suspended or sent home for disciplinary reasons. (FF #s 16-21). A shortened school day is an informal removal that must be treated like a suspension for purposes of the IDEA. *Discipline Q&A*, Question C-6. Indeed, the District's own practice is to treat a partial-day suspension—when a student is sent home early for disciplinary reasons—as a full day of suspension for purposes of the IDEA. (FF # 15).

For these reasons, the SCO finds and concludes that changing Student's setting from the regular classroom to the SNB room and reducing his daily schedule to one hour at School constituted a disciplinary change of placement under the IDEA.

D. The District Failed to Conduct an MDR by September 7, 2022

A school district is required to conduct an MDR within ten school days of its decision to make a disciplinary change of placement. 34 C.F.R. § 300.530(e)(1). Here, the District's decision to change Student's placement was finalized on August 22, 2022, when it informed Parent of Student's new setting and schedule and, in its view, gained her verbal agreement. (FF #s 19, 21). Accordingly, the District was required to conduct an MDR within ten school days, i.e., on or before September 7, 2023. (FF # 21). The SCO finds and concludes that the District's failure to do so was a violation of 34 C.F.R. § 300.530(e)(1).

Student's case illustrates why the IDEA's disciplinary procedures are important. Conducting an MDR would have required Student's IEP Team to convene and consider all relevant information regarding Student's unsafe and disruptive behaviors. *Id.* If the IEP Team concluded that his behaviors stemmed from his disability, the IEP Team would have been required to conduct a functional behavioral assessment at that time rather than three months later in December. (FF # 36). *Id.* § 300.530(f).

The Department of Education has emphasized the importance of using positive behavioral interventions rather than discipline, and it has explained that the failure to timely consider a student's behavioral needs, as occurred here, may result in the misuse of exclusionary discipline and a violation of the student's LRE, as also occurred here:

[T]he failure of the IEP Team to consider and provide for needed behavioral supports through the IEP process may result in a child not receiving a meaningful educational benefit or FAPE. In addition, [a district's] failure to make behavioral supports available throughout a continuum of alternative placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the least restrictive environment. The failure of the IEP Team to consider and provide for needed behavioral supports could also lead to behavior that is inconsistent with the school's code of student conduct. To the extent a child's behavior, including its impact and consequences (e.g., violations of a school's code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures), impede the child's 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 C.F.R. § 300.324(a)(2)(i). . . It is critical that IDEA provisions designed to support the needs of children with disabilities and ensure FAPE are appropriately implemented so as to avoid an overreliance on, or misuse of, exclusionary discipline in response to a child's behavior.

Discipline Q&A, Question A-6.

For these reasons, the SCO finds and concludes that the District failed to conduct an MDR within 10 school days of deciding to change Student's placement for disciplinary reasons, in violation of 34 C.F.R. § 300.530(e).

E. This Violation Resulted in a Denial of FAPE

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if the violation (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); see *Knable*, 238 F.3d at 765-66.

Here, the District's violation deprived Student of an educational benefit. Conducting an MDR would have meant reviewing Student's IEP and considering the use of positive behavioral

supports, rather than a restrictive placement. Even if the IEP Team concluded that Student's behavior did not stem from his disability, the MDR process would have required the District to, at a minimum, continue to provide Student's services. 34 C.F.R. § 300.530(b)(2). For this reason, the SCO finds and concludes that the District's violation resulted in a denial of FAPE.

F. No Systemic Violation is Found

The 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).

Here, nothing in the Record indicates that this violation is systemic in nature. Although the District incorrectly indicated that Student's new placement did not trigger the IDEA's disciplinary protections, the District's existing written procedures for shortened school days would have, if followed, prevented this violation. (FF # 22). Student's disciplinary change of placement was his shortened school day, as just discussed. Although he was also placed full-time in the SNB room, he was the only student who spent his entire time in such a setting, and School staff increased his time outside of the SNB room as was appropriate once his school day was extended. (FF #s 26, 30). Thus, the SNB room was ancillary to the shortened schedule, and it was used as a full-time setting only in Student's case and no others. (*Id.*). The District's written procedures for shortened school days require a detailed process that would begin with an IEP Team meeting and an evidence-based amendment to the IEP coupled with a plan for adding behavioral supports with the goal of increasing the student's time at school. (FF # 22). Further, there are only a handful of students in the District who have both IEPs and shortened schedules, and those students' IEPs are in compliance with the District's procedures. (FF # 24).

The SCO accordingly finds and concludes that a thorough and careful investigation does not demonstrate that the District systemically fails to timely conduct MDRs after imposing a disciplinary change of placement by shortening students' school days.

Conclusion to Allegation No. 4: The District failed to fully implement Student's IEP, in violation of 34 C.F.R. § 300.323. This violation resulted in a denial of FAPE. No systemic violation is found.

Parent's concern is that the District failed to implement Student's IEP by failing to provide the services required by his IEP while he was in the SNB room on a shortened schedule.

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. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 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. Student’s IEP Was Accessible to His Teachers

The SCO must first determine whether the District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, the Findings of Fact demonstrate that Special Education Teacher and the three paraprofessionals working under her direction were aware of their responsibilities under Student’s IEPs and had access to those IEPs. (FF # 29). As a result, the SCO finds and concludes that the District complied with 34 C.F.R. § 300.323(d).

C. Student Did Not Receive All His Services

Here, Student’s IEP required the District to provide social-emotional learning both inside and outside the general education environment, as well as speech/language services, occupational therapy, and math instruction outside the general education environment. (FF # 10).

District failed, across Student’s entire time at School, to provide the following total service minutes:

- Social-Emotional Learning: 2,370 minutes (39.5 hours) inside the general education environment.
- Speech/Language: 450 minutes (7.5 hours) outside the general education environment.
- Occupational Therapy: 300 minutes (5 hours) outside the general education environment.
- Early Math: 990 minutes (16.5 hours) outside the general education environment.

(FF #s 10, 30-35, 41, 48-49). The SCO accordingly finds and concludes that the District failed to implement Student’s IEP in violation of 34 C.F.R. § 300.323(c).

D. The Failure to Implement Student’s IEP Was Material

The definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, and the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP’s requirements results

in a denial of FAPE. Only the failure to implement a “material,” “essential,” or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn*, 502 F.3d at 822.

Here, there was more than a minor discrepancy between the services required and the services provided. The District failed to implement most of Student’s IEP. Instead of educating Student in the general education classroom for an entire school day, it educated him in the SNB room for one to three hours per day. (FF # 30). The District failed to provide the entirety of Student’s speech/language services and his occupational therapy. (FF #s 34-35). It failed to provide nearly the entirety of his social-emotional learning services inside the general education environment and his specialized instruction in mathematics outside the general education environment. (*Id.*).

These violations—a near-complete failure to implement Student’s IEP—undoubtedly impacted Student’s ability to make progress in the general education environment. The SCO accordingly finds and concludes that the District’s failure to provide services was a material failure amounting to a denial of FAPE. This denial of FAPE entitles Student to an award of compensatory services. *See Colo. Dept. of Ed.*, 118 LRP 43765 (Colo. SEA June 22, 2018).

E. 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. The guide for any compensatory award should be the stated purposes of the IDEA, which 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).

Here, when Student’s IEP Team met in December 2022, it agreed that he had met his April 2022 IEP goal in mathematics despite the District’s failure to provide the specialized instruction that had been required by his April 2022 IEP. (FF #s 39-42). The IEP Team removed that goal and decided not to include a new mathematics goal or specialized instruction in mathematics on his revised IEP. (*Id.*). The SCO accordingly finds and concludes that compensatory services in mathematics are unnecessary to bring Student to the place he would have been in if not for the violation.

In consultation with CDE Content Specialists 1, 2, and 3, 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 learning inside the general education environment, which may be fulfilled through a summer program involving behavioral support, such as an extended school-year program with nondisabled peers or another suitable option.
- 7.5 hours of speech/language services outside the general education environment.
- 5 hours of occupational therapy outside the general education environment.

G. No Systemic Violation is Found

The 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).

Here, for the same reason that the SCO did not find a systemic violation for Allegations 2 and 3, the evidence does not demonstrate that the District systemically fails to provide services required by students' IEPs: Student did not receive his services because he was placed on a shortened day in the SNB room, and that violation appears, after a thorough and careful investigation, to have been a one-time error resulting from a failure to follow the District's written special education procedures.

Conclusion to Allegation No. 5: The District's use of restraint was proper under the PPRA. The District properly documented and reported the restraint of Student. However, the District's Annual Restraint Review lacks sufficient analysis to satisfy the requirements of the PPRA, resulting in a violation of Rule 2620-R-2.05(2).

Parent has alleged that School staff restrained Student using more force than was necessary and without trying or considering less restrictive alternatives, and that the restraint report should have included Student's injury but did not.

As a preliminary matter, the SCO notes that the rules applicable to the PPRA have not yet been updated to reflect conflicting changes to the pertinent statutes, which became effective in May and August 2022. *Compare* Westlaw, C.R.S.A. §§ 26-20-102 (PPRA definitions, effective May 26, 2022), 26-20-103 (PPRA allowed uses of restraint, effective August 10, 2022), 26-20-111 (PPRA provisions for restraint and seclusion in schools, effective May 26, 2022), and 22-32-147 (incorporating PPRA's definition of restraint and delegating enforcement authority to the CDE,

effective May 26, 2022) (all current through May 12, 2023) *with* 1 C.C.R. 301-45:2620-R-1.00 *et seq.* (rules effective November 30, 2017).⁶

When there is a conflict between a statute and a rule, the statute governs. *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1156 (10th Cir. 2019) (“[W]hen a statute and a regulation are in conflict, the statute ‘renders the regulation which is in conflict with it void and unenforceable.’”) (quoting *Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977)). Accordingly, where the statutes and rules are in conflict, the SCO discusses and relies upon the statutes.

A. Student Was “Restrained” Under the PPRA

As used in the PPRA, “restraint” means “any method or device used to involuntarily limit freedom of movement, including bodily physical force, mechanic devices, or chemicals.” C.R.S. § 26-20-102(6). “Restraint” does not include “[t]he holding of an individual for less than one minute by a staff person for protection of the individual or other persons.” *Id.* “Physical restraint” means “the use of bodily, physical force to involuntarily limit an individual’s freedom of movement for more than one minute” but does not apply to “the holding of a child by one adult for the purposes of calming or comforting the child.” C.R.S. § 26-20-102(5).

Here, Paraprofessional 1 held Student two times for the purpose of protecting herself, Student, and Special Education Teacher. (FF # 55-58). The first time, she held him for less than one minute. (FF # 55). Because she held him for less than one minute for the purpose of protecting him and others, it was not a “restraint” under the PPRA. C.R.S. § 26-20-102(6). The second time, however, she held him for more than one minute, meaning that it was a “restraint” unless an exception applies. (FF # 57).

No exception applies. The exception for the holding of a child to calm and comfort the child does not apply here. A stability hold always carries a risk of injury to both the person using the hold and the person being held. (FF # 68). Paraprofessional 1 followed her training and used the hold only when the safety risk of *not* using the hold was greater than the safety risk of using it. (*Id.*). In other words, the use of a stability hold does not fall within the exception for calming or comforting a child because the only purpose for using the hold is to ensure physical safety, and the hold cannot be administered merely to calm or comfort someone. (*Id.*).

For these reasons, the SCO finds and concludes that Paraprofessional 1’s second use of the stability hold was a physical “restraint” under the PPRA. C.R.S. § 26-20-102(6).

B. The Restraint Was Proper

Under the PPRA, the District must have an appropriate basis for the use of restraint. The PPRA requires that restraint may:

⁶ The most current PPRA rules are available from the Colorado Secretary of State at <https://www.sos.state.co.us/CCR/NumericalDeptList.do>, as rules for the Department of Education, the Colorado State Board of Education, at 1 CCR 301-45.

- Only be used in an emergency with extreme caution after the failure of less restrictive alternatives (or a determination that such alternatives would be inappropriate or ineffective);
- Never be used as a punitive form of discipline or as a threat to gain control of a student's behavior; and
- Be used only for the period of time necessary and using no more force than necessary.

C.R.S. § 26-20-103(1.5)-(2); Rule 2620-R-2.01. The District must satisfy each of these requirements to show that it had an appropriate basis to restrain Student. Here, the District does satisfy each requirement.

Restraint may be used in cases of emergency. *Id.* "Emergency" means "serious, probable, imminent threat of bodily injury to self or others with the present ability to effect such bodily injury." Rule 2620-R-2.00(4). "Bodily injury" includes "physical pain" and "any impairment of physical or mental condition." Rule 2620-R-2.00(1); C.R.S. § 18-1-901(3)(c). Here, Student posed an immediate risk to himself, Paraprofessional 1, and Special Education Teacher. (FF #s 50-58). By hitting the floor and objects with his hands, and by running, lunging, and headbutting, Student risked hurting himself—and, indeed, did ultimately hurt himself. (*Id.*) He was also hurting Special Education Teacher and Paraprofessional 1 by kicking their legs and punching them hard in the stomach. (*Id.*) Thus, the SCO finds and concludes that Student's behavior constituted an emergency under the PPRA.

Even in an emergency, the PPRA permits the use of restraint only after the failure of less restrictive alternatives (or a determination that those alternatives would be inappropriate or ineffective). Rule 2620-R-2.01(1). Less restrictive alternatives include positive behavior supports, de-escalation, and restructuring the environment. *Id.* Here, Paraprofessional 1 and Special Education Teacher attempted several less restrictive alternatives to restraint. (FF #s 52-58). These attempts mirror the strategies in Student's BIP. (See FF # 44). They first attempted to make the environment safer by moving objects and other students, and by giving Student his own space. (FF #s 52-58). Then, they tried to talk to him using concise directives followed by a wait time. (*Id.*). They ignored his inappropriate behavior to the extent possible, such as not reacting to him when he bit himself and instead maintaining a neutral, nonthreatening demeanor. (*Id.*) They continued to try to talk him out of his superhero fantasy, although without success. (*Id.*). Thus, the SCO finds and concludes that District attempted less restrictive alternatives consistent with the PPRA.

The PPRA precludes the use of restraint as a punitive form of discipline or as a threat to gain control over a student's behavior. Rule 2620-R-2.01(2). Here, Paraprofessional 1 and Special Education Teacher did not use the one-person stability hold to punish Student for his behavior, but, rather, Paraprofessional 1 used it to protect the staff and Student himself when he reached a violent, dysregulated state. (FF #s 52-58). Nor did they use it as a threat to control Student's behavior, as shown by their waiting until Student was hurting himself by attacking the floor and furniture and hurting them by escalating from grabbing and hitting to punching them hard and

kicking their shins. (*Id.*). Thus, the SCO finds and concludes that the restraint was not used as a punitive form of discipline or as a threat to gain control over Student's behavior.

Finally, the PPRA requires that the use of restraint last no longer and use no more force than necessary. Rule 2620-R-2.01(3). Here, Paraprofessional 1 held Student for less than one minute the first time and two minutes the second time, which, given the absence of any hurt or ill effect on Student and the fact that he became dysregulated again, was not longer than necessary. (*See id.*). Nor is there any evidence that Paraprofessional 1 used too much force; after each hold, Student was calmed and then, after a brief period of time, became active (and dysregulated) again, which indicates that Paraprofessional 1 did not injure him. (*Id.*). Thus, the SCO finds and concludes that this restraint did not last longer than necessary or use more force than necessary.

For these reasons, the SCO finds and concludes that Paraprofessional 1's use of restraint was proper under the IDEA.

C. The District Properly Documented the Restraint

The use of restraint must be documented:

- The school principal or designee must verbally notify the parent as soon as possible but no later than the end of the school day that any restraint is used.
- Any school employee or volunteer who uses any type of restraint on a student must submit a written report of the incident to the school administration within one school day of the incident.
- If a physical restraint is between one and five minutes, the school must give the parent written notice on the day of the restraint and include the date, name of student, and number of restraints that lasted between one and five minutes.
- For any use of restraint,⁷ the school must mail, fax, or email a report to the student's parent or guardian within five calendar days of the restraint and include the antecedent to the student's behavior, if known; a description of the incident; any efforts made to de-escalate the situation; any alternatives to restraint that were attempted; the type and duration of the restraint used; any injuries that occurred; the identity of staff who were present; and the identity of the staff involved in administering the restraint.

C.R.S. § 22-32-147(3)(a)-(c); Rule 2620-R-2.04(4).

Here, the District complied with these requirements—but perhaps only by chance:

- Vice Principal called Parent and gave her verbal notification, including information about Student's injury. (FF # 60).

⁷ The PPRA statutes require this report only for restraints that last more than five minutes, but the Board of Education's implementing rules require it for every use of restraint. Compare C.R.S. § 22-32-147(c) with Rule 2620-R-2.04(4). Because the rules are more stringent, they are not in conflict with the statute. Cf. C.R.S. § 26-20-108 (requiring agencies to promulgate rules that meet at least the minimum requirements of the statute).

- Special Education Teacher submitted a written report to school administration the same day. (*Id.*).
- Special Education Teacher then emailed Parent with the report attached; although the report did not explain Student's injury, the body of the email did. (*Id.*).

Special Education Teacher's email and the attached report, together, provided all the required information, i.e., the antecedent to Student's behavior, a description of the incident and efforts to deescalate the situation, alternatives to restraint that were attempted, the type and duration of the restraint, the injury, and the identity of the staff present and involved in the restraint. (FF # 60).

The District's position is that an injury does not need to be included in the restraint report if the injury was self-inflicted and occurred within the behavioral cycle but not during or as a result of the restraint. (FF # 66). This is incorrect and contravenes both best practices and the PPRA. (FF # 67). Rule 2620-R-2.04(4). The report must describe "the incident" and include "[a]ny injuries that occurred." C.R.S. § 22-32-147(c); Rule 2620-R-2.04(4)(f). If the intent were to restrict the report to the restraint itself, and any injuries that occurred during or as a result of the restraint, then the statute and rules would require a report of "the restraint or seclusion" rather than "the incident," and the requirement to include "any injuries" would be qualified as only "injuries during or as a result of the restraint or seclusion." Furthermore, the purposes behind the PPRA's reporting requirements go beyond identifying staff error and include "minimizing and preventing the use of restraint by increasing the use of positive behavior interventions," monitoring "[f]ollow up communications with the student and his/her family," and evaluating "[s]taff to student ratios" as well as "[e]nvironmental considerations, including physical space, student seating arrangements, and noise levels." C.R.S. § 22-32-147(3)(b), Rule 2620-R-2.05(2).

Because Vice Principal spoke to Parent shortly after the incident and Special Education Teacher's email to Parent later that day included all the required information—including Student's injury—the SCO finds and concludes that the District complied with the PPRA's reporting requirements. However, the SCO cautions the District that its PPRA reports should include any injury that occurred during "the incident," which means the entire behavioral cycle in which the restraint occurs, whether or not the injury occurred during or as a result of the restraint.

D. The District's Annual Review Lacks the Required Analysis

Under the PPRA, a school district must conduct an annual review of the use of restraint within the school district. Rule 2620-R-2.05(2). The purpose of the review is to:

- Determine whether the district is properly administering restraints;
- Analyze the procedures used during the restraint, preventative or alternative techniques tried, the documentation, and follow-up activities;
- Identify additional training needs;
- Minimize and prevent the use of restraint by increasing positive behavioral interventions;

- Identify staff-to-student ratio in incidents; and
- Identify relevant environmental considerations, such as the physical space, student seating arrangements, and noise levels in incidents.

Id.

As part of this investigation, the SCO requested and reviewed the District's annual restraint review for the 2021-2022 school year. The District's Annual Restraint Review is composed solely of ten tables, charts, and graphs. (FF #s 77-79). These tables, charts, and graphs present summaries of data. (*Id.*) Specifically, the charts and tables present summarized data of:

- How many holds were performed throughout the District as a whole, and whether their duration was less than or greater than five minutes;
- The nature and number of de-escalation techniques used throughout the District as a whole;
- The number of restraints used for various student-to-staff ratio settings;
- The number of times each different type of hold was used throughout the District as a whole;
- The total number of injuries throughout the District as a whole, and whether the injuries were to staff or to students;
- The number of holds performed by month, for all the elementary schools within the District;
- The number of holds performed by month, for all the middle and high schools (combined) within the District.

(FF # 78). But the Annual Restraint Review contains no analysis; it is merely a collection of data. (FF #s 77-79). Further, the data could not be used to conduct an analysis and accomplish the purposes of an annual review. (*Id.*). Rule 2620-R-2.05(2). Specifically, the data contains neither any measurement nor analysis of whether the restraints are being administered properly. (See FF #s 78-79). Although it has a summary of raw numbers of the restraint procedures used and alternative techniques attempted, it does not contain an analysis of that data, the documentation created, or the follow-up activities conducted after incidents. (See *id.*). It does not identify training needs. (See *id.*). It does not have an analysis of how restraints might be minimized by increasing positive behavioral interventions. (See *id.*). Although it contains a table of staff-to-student ratios and the number of incidents within each ratio group, it does not contain an analysis of why that number of incidents is occurring within each ratio group or what might be improved. (See *id.*). And it neither tracks nor analyzes the environments in which restraints occur or how environmental considerations might play into the number of incidents involving restraint. (See *id.*).

For these reasons, the SCO finds and concludes that the District's Annual Restraint Review, as currently prepared, fails to satisfy the requirements of the PPRA, resulting in a violation of Rule 2620-R-2.05(2).

REMEDIES

The CDE has the authority to order the District to take remedial actions to bring the District into compliance with the IDEA. 34 C.F.R. §§ 300.149, 300.151(b); CDE, *State-Level Complaint Procedures*, ¶ 12 (2010). Under C.R.S. § 22-32-147(5), the CDE has the same enforcement authority for PPRA investigations.

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

- a. Failing to provide Parent access to Student's educational records, in violation of 34 C.F.R. § 300.613.
- b. Failing to educate Student in the LRE, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.117, and 300.323(c).
- c. Making a significant change to Student's educational placement without involving Parent or Student's IEP Team and consideration of reevaluation, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.501(c), and ECEA Rule 4.03(8)(b).
- d. Failing to provide Parent with PWN regarding the change to Student's placement a reasonable amount of time prior to the change of placement, in violation of 34 C.F.R. § 300.503(a).
- e. Failing to conduct an MDR within ten school days of the decision to change Student's placement, in violation of 34 C.F.R. § 300.530(e).
- f. Failing to implement Student's IEP, in violation of 34 C.F.R. § 300.323.

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

- a. Failing to establish and complete an adequate annual review process, in violation of Rule 2620-R-2.05(2).

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

1. Corrective Action Plan

- a. By **Friday, June 23, 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. Compliance Officer, Special Education Coordinator, and Special Education Teacher must review this Decision, as well as the requirements of 2620-R-2.05(2). This review must occur no later than **Friday, July 14, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, July 21, 2023**.

3. Compensatory Education Services for Denial of FAPE

- a. Student shall receive the following compensatory services provided by appropriately trained and credentialed District staff or through a contract between the District and a suitable provider at the District's expense:
 - i. **15 hours of social-emotional learning inside the general education environment**, which may be fulfilled through a summer program involving behavioral support, such as an extended school-year program that includes nondisabled peers or another suitable option, to be completed by **the last day of the 2023-2024 fall semester**.
 - ii. **7.5 hours of speech/language services outside the general education environment**, to be completed by **the last day of the 2023-2024 fall semester**.
 - iii. **5 hours of occupational therapy outside the general education environment**, to be completed by **the last day of the 2023-2024 fall semester**.
- b. These services should be provided over the summer, if possible, to prepare Student for the 2023-2024 school year and minimize the amount of time that would be added to his school day.
- c. By **Friday, June 23, 2023**, the District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. The District shall submit the schedule of compensatory services, to include the dates, times, and durations of planned sessions, to the CDE no later than **Tuesday, June 27, 2023**. If the District and Parent cannot agree to a schedule by June 27,

2023, the CDE will determine the schedule for compensatory services by Tuesday, July 11, 2023.

- i. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with the District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parent and documents such efforts. A determination that the District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with the CDE.
- ii. Parent may opt out of some or all of the compensatory services if she wishes.
- c. Monthly consultation between the provider(s) delivering compensatory services and Special Education Coordinator shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. District must submit documentation that these consultations have occurred by the second Monday of each month, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- d. To verify that Student has received the services required by this Decision, the District must submit records of service logs to the CDE by the second Monday of each month until all compensatory education 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.
- e. These compensatory 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. 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 compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consultation with Parent and notify the CDE of any change in the appropriate service log.
- f. These compensatory services must be provided to Student outside of the regular school day (preferably on weekends or during school breaks) to ensure Student is

not deprived of the instruction Student is entitled to receive during the school day (including time in general education).

4. Procedure Development

- a. The District must develop written procedures to strengthen the annual restraint review process and ensure it complies with the PPRA's requirements, as set forth in Rule 2620-R-2.05(2), as well as the requirements of C.R.S. § 22-32-147. Such procedures must outline the required content of the annual restraint review and how the District will conduct the analysis required by the PPRA. The District must develop these procedures and submit them to the CDE for approval by **Friday, August 4, 2023.**

5. 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* (2010). 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* (2010); 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 2nd day of June, 2023.

A handwritten signature in black ink, appearing to read "Nicholaus Podsiadlik".

Nicholaus Podsiadlik
State Complaints Officer

APPENDIX

Complaint, pages 1-2

- Exhibit 1: Records Request
- Exhibit 2: Student's Records
- Exhibit 3: Emails
- Exhibit 4: Suspension Letter
- Exhibit 5: Emails
- Exhibit 6: Restraint Report
- Exhibit 7: Photograph

Response, pages 1-5

- Exhibit A: IEPs
- Exhibit B: BIP
- Exhibit C: Evaluations
- Exhibit D: Notices
- Exhibit E: IEP Documentation
- Exhibit F: Service Logs
- Exhibit G: Level System
- Exhibit H: Attendance Records
- Exhibit I: Behavior
- Exhibit J: Report Cards
- Exhibit K: Restraint
- Exhibit L: Training
- Exhibit M: Restraint Review
- Exhibit N: Training Certifications
- Exhibit O: Calendar
- Exhibit P: Policies
- Exhibit Q: Communications
- Exhibit T: Transportation
- Exhibit U: District Procedural Guidelines
- Exhibit V: Text Message

Reply, pages 1-3

Telephone Interviews

- Parent: May 9, 2023
- Special Education Teacher: May 11, 2023
- Paraprofessional 1: May 11, 2023

- Paraprofessional 2: May 11, 2023
- Paraprofessional 3: May 11, 2023
- Special Education Coordinator: May 12, 2023
- Compliance Officer: May 12, 2023