

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

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**State-Level Complaint 2020:532  
Jefferson County School District R-1**

**DECISION**

**BACKGROUND**

The parents (“Parent”) of a child (“Student”) identified as child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Jefferson County School District R-1 (“District”) on September 4, 2020.

The State Complaints Officer (“SCO”) extended the 60-day investigation timeline to allow the parties to participate in mediation. However, the parties ultimately cancelled mediation, and, on October 14, 2020, the SCO resumed the investigation.

The SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153, as well as the Protection of Individuals from Restraint and Seclusion Act (“PPRA”)<sup>2</sup> and its implementing regulations, the Rules for the Administration of the Protection of Persons from Restraint Act (the “Rules”)<sup>3</sup>. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

The Colorado Department of Education (“CDE”) has authority to investigate alleged violations of the IDEA and the PPRA 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 consider only events that occurred not earlier than September 4, 2019 to determine whether a violation of the IDEA or the PPRA occurred. 34 C.F.R. § 300.153(c); Rule 2620-R-2.07(2)(f). Additional information prior to this date may be considered to fully investigate all allegations

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

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

<sup>3</sup> The Rules are codified at 1 C.C.R. 301-45.

accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

### **SUMMARY OF ACCEPTED ALLEGATIONS**

1. Whether the District denied Student a Free Appropriate Public Education (“FAPE”) because the District:
  - a. Failed to properly implement Student’s IEP, specifically by failing to follow Student’s Behavioral Intervention Plan (“BIP”) on September 13, 2019, in violation of 34 C.F.R. § 300.323.
2. Whether the District improperly restrained Student on September 13, 2019, specifically by:
  - a. Restraining Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a);
  - b. Restraining Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective, in violation of Rule 2620-R-2.01(1)(b);
  - c. Restraining Student as a punitive form of discipline or as a threat to control or gain compliance of Student’s behavior, in violation of 2620-R-2.01(2);
  - d. Failing to ensure that the restraint did not inhibit or impede Student’s breathing or communicating, in violation of Rule 2620-R-2.02(1)(a)(i);
  - e. Failing to ensure that the restraint was administered by staff who have received training, in violation of Rule 2620-R-2.03; and
  - f. Failing to comply with the documentation and notification requirements for the restraint, in violation of Rule 2620-R-2.04.

### **FINDINGS OF FACT**

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

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

### **A. Background**

1. Student attends seventh grade at a District middle school ("School"). During the 2019-2020 academic year, Student received instruction in School's significant support needs ("SSN") classroom.
2. Student is eligible for special education and related services under the disability category of Traumatic Brain Injury ("TBI"). *Exhibit 3*, p. 1; *Exhibit 4*, p. 1. Student has limited verbal communication abilities. *Interview with Parents*. In familiar settings, Student will blurt out one- or two-word answers, but Student is not conversational. *Id.*
3. At the beginning of the 2019-2020 school year, Student was a social and kind young woman. *Interviews with Parents, Learning Specialist and Special Education Paraeducator ("Paraeducator")*. She enjoyed attending School and helping her peers in the classroom. *Id.* Transitions posed the biggest challenge to Student at School. *Id.*

### **B. Student's IEP and BIP**

4. Student's IEP dated November 30, 2018 ("IEP") was effective at the beginning of the 2019-2020 school year. *Exhibit 3*, pp. 1-17. The IEP indicated that Student exhibited behavior requiring a behavior intervention plan. *Id.* at p. 8.
5. At the beginning of the 2019-2020 school year, Student's BIP from February 17, 2019 was in place. *Exhibit A*, pp. 2-5.
6. The BIP identified Student's difficulty with transitions as the target behavior. *Id.* at p. 2. According to the BIP, "[w]hen [Student] is asked to transition from a preferred activity, she may become escalated [yell, cry, and throw items] in order to delay or escape the transition." *Id.*
7. The BIP outlined setting event strategies, such as communication about incidents on the bus and advanced notification from Transportation staff about changes so School staff can help Student prepare. *Id.* at pp. 2-3.
8. Listed antecedent strategies designed to reduce the target behavior included "allow[ing] [Student] to look out the back of the bus window, prior to making her choice between two seats." *Id.* at p. 3.
9. The BIP also included behavior teaching strategies, such as use of social stories to help Student prepare for changes at School or on the bus. *Id.*
10. Additionally, the BIP detailed a Crisis Intervention Plan to be followed in the event Student became escalated. *Id.* The Crisis Intervention Plan directed staff to follow standard CPI protocol. *Id.* at p. 4. If Student became escalated, staff should "not

engage/talk to her until she has calmed down. Restraint should be used as an absolute LAST resort.” *Id.*

11. The Crisis Intervention Plan clearly stated that staff should “not block or touch [Student] on the bus.” *Id.* Instead, the plan reiterated that staff should “allow her to look out the back window before asking her to choose between her 2 seat options in the front.” *Id.*
12. The BIP noted that District staff contact Parents anytime Student became escalated, before taking any other action. *Id.* at p. 3. Additionally, the BIP indicated, in bold print, that “If Staff ever put’s [sic] hands on [Student] in a hold for safety purposes, parent’s [sic] request that they are notified immediately, no matter how long the hold is.” *Id.*
13. As Student’s case manager, Learning Specialist was responsible for informing District staff, including Transportation, of Student’s BIP. *Id.* at p. 5. District policy requires a student’s case manager to check a flag in the District’s data management system indicating that the student has an IEP. *Interview with Director of Special Education (“Director”).* The case manager would then communicate an IEP snapshot and details of the BIP to the teachers and staff that support the student. *Id.*
14. To inform the District’s Transportation staff, the case manager would submit a 1066 form to Transportation. *Id.; Exhibit N*, pp. 1-3. That form asks whether the student has a behavior intervention plan or a crisis plan. *Exhibit N*, p. 3. If a student has either of those plans, a copy of the plan should be attached to the form. *Id.* at pp. 1-3. Transportation supervisors share the information with the drivers and bus aides involved with that student. *Id.* The District’s policy makes clear that updated behavior intervention plans and crisis plans should be sent to Transportation. *Id.* at p. 1.
15. At the beginning of the 2019-2020 school year, Learning Specialist flagged Student in District’s data management system as a Student with an IEP. *Interview with Learning Specialist.* Learning Specialist delivered a hard copy of Student’s IEP snapshot and BIP to Student’s teachers, paraeducators, and service providers. *Id.*
16. Additionally, Learning Specialist completed the 1066 form, including checking the box indicating that Student had a behavior intervention plan. *Id.* However, Learning Specialist did not attach a copy of the BIP to the 1066 form and did not otherwise notify Transportation of the details of Student’s BIP. *Id.* Nothing in the record indicates that Transportation requested the BIP either.

### **C. The School’s Behavior Management System and Staff Training**

17. The District uses Crisis Prevention Institute’s Nonviolent Crisis Intervention Program (“CPI”) for crisis intervention and physical behavior management. *Interview with Director.* CPI teaches a variety of techniques to de-escalate students. *Id.* Under CPI, physical intervention is always a last resort. *Id.*

18. The District recommends that all special education teachers, paraeducators, bus drivers, bus aides, security staff, and mental health providers complete CPI training; however, such training is not required. *Id.*
19. Training is offered approximately twelve times per year and is open to all District staff members. *Id.* Based on the training materials provided, the SCO finds that the District's training includes all of the required components in Rule 2620-R-2.02. *See Exhibit J*, pp. 1-43.
20. Once certified, staff must complete a refresher course every two years to maintain certification. *Id.*
21. Bus Aide—who was involved in the incident underlying this investigation—completed CPI training on December 15, 2017. *Exhibit C*, p. 1. Under District policy, his CPI training was valid through December 31, 2019. *Id.*; *Interview with Director*.

**D. The School's Policies and Procedures regarding Use of Physical Intervention**

22. When a student experiences a behavioral crisis, School staff use different de-escalation strategies to help the student. *Interview with Director*. Physical intervention remains a last resort. *Id.*
23. Pursuant to District policy and procedure, any time a staff member restrains a student, the staff member must immediately notify the school principal or designated building administrator. *Id.*; *Exhibit D*, p. 6. The school principal or designated building administrator then verbally notifies the student's parents "as soon as possible, but no later than the end of the school day on which the restraint was used." *Interview with Director*; *Exhibit D*, p. 5.
24. Staff involved in the restraint must complete a Restraint Incident Report within one school day of the use of the restraint. *Exhibit D*, p. 5.
25. Within two school days of the incident, the principal or designated building administrator must convene a meeting to review the Restraint Incident Report with staff members. *Id.* at p. 6.
26. The principal or designated building administrator then provides a copy of the Restraint Incident Report to the student's parents within five calendar days of the use of restraint. *Id.*
27. The District conducts an annual review of incidents involving restraint, including seclusion, throughout the District. *Interview with Director*. A team of District staff, including Director, prepares a written report detailing the results of the annual review. *Id.* The report breaks down the incidents by school, disability category, location within

the school, and type of restraint/seclusion used. *Id.* The team uses this information to identify potential areas for improvement or training needs. *Id.*

28. The District has not yet completed the annual restraint review for the 2019-2020 school year and, therefore, did not provide a copy of the 2019-2020 annual restraint review during the course of this investigation. *Id.*; *Response*, p. 7.

#### **E. September 13, 2019 Incident**

29. On a typical day, Learning Specialist or Paraeducator walked Student to her bus shortly before the general education students were dismissed at 3:20 p.m. *Interviews with Learning Specialist and Paraeducator.* Learning Specialist or Paraeducator helped Student get settled into her assigned seat in the front row of the bus before exiting the bus and leaving Student in the supervision of the bus driver or the bus aide. *Id.* If neither the bus driver nor the bus aide was present, Learning Specialist or Paraeducator waited with Student on the sidewalk. *Id.*
30. On Friday, September 13, 2019—the day of the incident at issue—Student’s dismissal began in accordance with her ordinary routine. *Id.* That day, Learning Specialist was on vacation, so Paraeducator walked Student to her bus. *Id.* Paraeducator watched Student take her assigned seat in the front row of the bus. *Interview with Paraeducator.* Bus Aide—a substitute for Student’s regular bus aide—was on the bus, so Paraeducator exited the bus once Student was seated. *Id.* Only one other Student was on the bus at that time. *Id.* Paraeducator then waited on the sidewalk with some of Student’s classmates for another bus to arrive. *Id.*
31. Student waved to Paraeducator from the bus window. *Id.* Then, Student stood up from her seat and moved towards the aisle of the bus, where Bus Aide was standing. *Video of Incident.* Bus Aide grabbed both of Student’s arms and pinned them behind her back. *Id.* With Student’s arms pinned, Bus Aide used his body to shove Student back into her seat. *Id.* Once Student was in her seat, Bus Aide continued to push her towards the window. *Id.* Student was screaming and crying. *Id.*; *Exhibit E*, p. 1; *Exhibit H*, p. 1.
32. Student kicked her backpack or lunchbox to the floor. *Video of Incident.* Bus Aide picked the item up and slammed it onto the seat next to Student. *Id.* When Student tried to stand up from her seat a second time, Bus Aide placed Student in a headlock with his left forearm around Student’s neck. *Id.* Student and Bus Aide stumbled backwards towards the driver’s seat. *Id.* Student slid to the ground. *Id.* Bus Aide pulled Student back towards him before releasing her and yelling for help. *Id.*
33. It is unclear from the video whether Bus Aide’s physical contact with Student inhibited or impeded Student’s breathing or communicating. *Id.* However, the SCO finds that the physical contact used by Bus Aide—namely, the headlock position—certainly had the potential to inhibit or impede Student’s breathing or communicating.

34. Paraeducator heard the commotion—both Student’s cries and Bus Aide’s request for help—and rushed toward the bus. *Id.*; *Interview with Paraeducator*. At that point, Student was seated on the floor of the bus near the driver’s seat with her hands covering her ears. *Interview with Paraeducator*. Student was scared and shaking. *Id.* Paraeducator comforted Student and, ultimately, helped Student return to her seat. *Id.* Once the general education students began to board the bus, Paraeducator left the bus. *Id.*
35. The incident lasted approximately two minutes. *Video of Incident*.

#### **F. The District’s Response to the September 13 Incident**

36. After she exited the bus, Paraeducator informed Special Education Teacher of the incident. *Id.* Special Education Teacher told Paraeducator to look for Principal. *Id.* When Paraeducator was unable to locate Principal, she decided to wait until Monday to report the incident. *Id.* Paraeducator did not contact Student’s parents. *Id.*
37. Similarly, nothing in the record indicates that Bus Aide informed either his supervisor or Student’s parents of the incident.
38. After she arrived home on September 13, Student told Parents her throat or her neck hurt. *Interview with Parents*. Because Parents were not aware of the incident, they assumed Student had a sore throat or other minor medical issue. *Id.* Student was unusually restless that weekend and had difficulty calming down. *Id.*
39. On Monday, September 16, Paraeducator notified Assistant Principal of the incident. *Interview with Paraeducator*. Assistant Principal directed Paraeducator to complete a Restraint Incident Report, which Paraeducator did. *Id.*; *Exhibit E*, pp. 1-2.
40. Assistant Principal then called Parents to inform them of the incident. *Exhibit E*, p. 2; *Interview with Parents*. Based on her knowledge at the time, Assistant Principal told Parents that Bus Aide “put his hands on” Student and threw her backpack at her. *Interview with Parents*.
41. During the call, Parents inquired as to whether the bus had cameras. *Id.* Thereafter, Assistant Principal contacted Transportation to request that the video of the incident be pulled and retained. *Exhibit E*, p. 2. On September 25, one of Student’s Parents viewed the video at the Transportation Office. *Response*, p. 8; *Complaint*, p. 2.<sup>5</sup>
42. Between their initial notification on September 16 and the viewing of the video on September 25, Parents did not receive any further information from the District regarding the incident. *Interview with Parents*. Parents never received a copy of the

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<sup>5</sup> The format of the video requires it to be viewed in software licensed by the District (or by someone else with a license). As a result, the District did not provide a copy of the video during this investigation but, instead, allowed the SCO and Parents’ counsel to view the video.

Restraint Incident Report. *Id.* Indeed, Parents said they had not seen the Restraint Incident Report until this investigation. *Id.*

43. At some point between September 16 and September 27, Principal and Assistant Principal met with Learning Specialist and Paraeducator to review the incident. *Interview with Paraeducator; Exhibit H*, pp. 3-4. Principal sent individual emails to Learning Specialist and Paraeducator following the meeting. *Id.*
44. In his email to Learning Specialist, Principal noted that Transportation was not notified of Student's BIP prior to the incident. *Id.* at p. 4. Principal reminded Learning Specialist that she needed to provide a copy of IEPs, BIPs, and other relevant information to Transportation and "all stake holders" at the beginning of the school year. *Id.* Principal also told Learning Specialist to ensure that all SSN paraeducators—including Paraeducator—understood and followed all IEPs and BIPs, specifically the provision in Student's BIP requiring Parents to be notified the day of *any* physical contact with Student. *Id.*
45. In his email to Paraeducator, Principal directed Paraeducator to stay on the bus with Student until her bus departed. *Id.* at p. 3. Principal also reminded Paraeducator to report any incidents involving Student to Parents immediately. *Id.*
46. Learning Specialist and Paraeducator complied with Principal's directions by notifying Transportation of Student's BIP, ensuring Paraeducator understood her obligation under Student's BIP, and staying on the bus with Student until her bus departed. *Interviews with Learning Specialist and Paraeducator.* Additionally, the District now has a compliance technician review 1066 forms to ensure that they are properly documented and contain a student's BIP. *Interview with Director.*
47. Based on Parents' concerns, the District investigated the September 13 incident. *Exhibit 1*, p. 1; *Exhibit H*, p. 1-2. On October 2, 2019, the District notified Parents that it had completed its investigation, finding that "the greater weight of the evidence supports a conclusion that staff members violated one or more district policies. As such, we have taken appropriate disciplinary action." *Exhibit 1*, p. 1. The District's correspondence did not identify the staff members who violated the District policies or the specific policies violated. *Id.* However, Bus Aide was terminated as a result of the incident. *Response*, p. 4.

### **G. Student's Return to School**

48. Following the incident, Student returned to School on Monday, September 16 and remained in School through Friday, September 27. *Exhibit M*, pp. 2-3. After viewing the video on September 27, Parents elected to keep Student out of School "until this investigation is complete and a safe and acceptable plan is in place." *Exhibit G*, p. 2. Principal responded that the School would "support the family's choice to keep

[Student] home during this process” and said the School would excuse Student’s absences. *Id.* at p.1. As a result, Student had excused absences from Monday, September 30 through Wednesday, October 9. *Exhibit M*, pp. 2-3.

49. When Student returned on Thursday, October 10, Learning Specialist emailed Parents indicating that Student “had a great day today and was excited to be back.” *Exhibit G*, p. 10.
50. On or around Monday, October 14, Student resumed taking the bus to and from School (though she was on a new route after school). *Interview with Parents; Exhibit G*; p. 14-15. Student continued riding the bus without incident through December 20, 2019, when School recessed for winter break. *Response*, p. 5.
51. Between October 10 and December 20, 2019, Student was absent from School on 4 ½ days: two and one-half days for vacation, one day for weather; and one day for sleeping in class. *Exhibit M*, p. 2-3. Additionally, Student was tardy on two mornings, once due to a late bus and once due to Student refusing to get dressed. *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 implement Student’s BIP on September 13 and failed to ensure that Transportation was informed of its responsibilities under Student’s BIP. However, these failures did not result in a denial of FAPE.**

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.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). 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).

### **A. Implementation of Student’s BIP**

In its Response, the District concedes that Bus Aide failed to implement Student’s BIP during the incident on September 13. *Response*, p. 6. The SCO agrees. Amongst other failures, Bus Aide failed to implement Student’s BIP when he did not allow Student to look out the back of the bus before choosing between two seats, by blocking and touching Student on the bus, by utilizing physical restraint as an initial intervention, and by not notifying Parents of the use of restraint. (FF #s 8, 10-12.) As a result, the SCO finds and concludes that the District failed to implement Student’s BIP—and, thus, her IEP—during the September 13 incident.

Additionally, the SCO finds that the District did not properly ensure that Transportation was informed of its responsibilities for implementing Student’s BIP. Learning Specialist provided Student’s IEP snapshot and a copy of her BIP to Student’s teachers, paraeducators, and service providers. (FF # 15.) And Learning Specialist checked the box on the 1066 form to inform Transportation that Student had a behavior intervention plan. (FF # 16.) But Learning Specialist never provided the BIP to Transportation, and Transportation never requested the BIP. (*Id.*) As a result, the SCO finds and concludes that none of the Transportation staff—including Bus Aide—was informed of their responsibilities for implementing Student’s BIP.

### **B. Materiality of Failure to Implement**

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 ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail.” *Id.* But a child’s educational progress, or lack thereof, may indicate whether there has been more than a “minor shortfall in the services provided.” *Id.*

Here, the District failed to implement Student’s BIP during a two-minute period on September 13. This failure occurred, at least in part, because Learning Specialist never provided a copy of Student’s BIP to Transportation. (FF # 16.) However, Student’s BIP focused primarily on how District staff should support Student during transitions and how District staff should respond to Student during a crisis situation. (*See* FF #s 5-12.) The BIP did not require Transportation to

provide Student with any specific services or supports while on the bus. (*Id.*) Indeed, Learning Specialist and Paraeducator—who were informed of Student’s BIP—escorted Student to the bus each day to assist with her transition. (FF # 29.) Despite the incident on the bus, Student was able to return to School and even traveled to and from School by bus. (FF #s 48-51.) Student only missed a handful of days of School between September 13 and December 20, when School recessed for winter break. (FF # 51.) Those absences were due to weather, vacation, and a day Student was sleeping at School. (*Id.*)

For these reasons, the SCO finds that the District’s failure to implement Student’s BIP to be immaterial. This legal conclusion in no way diminishes the inexcusable manner in which Student was treated by Bus Aide or how scary that incident was for Student.

The District took remedial action to correct this violation immediately after the violation occurred. Specifically, the District directed Learning Specialist to notify Transportation of Student’s BIP and clarified Paraeducator’s obligations under the BIP. (FF #s 45-46.) Additionally, the District required Learning Specialist or Paraeducator to remain on the bus with Student until they departed. (*Id.*) Learning Specialist and Paraeducator complied with these directives. (FF # 46.) A District compliance technician also reviews 1066 forms to ensure District staff properly complete 1066 forms and attach BIPs where necessary. (*Id.*) For these reasons, the SCO concludes that the District has taken sufficient remedial action to address the failure to implement Student’s BIP on the bus and ensure future compliance for other similarly situated students. Consequently, the SCO has not ordered an additional remedy for the District’s IDEA violation.

**Conclusion to Allegation No. 2: School improperly restrained Student on September 13, 2019, in violation of the PPRA.**

As a preliminary matter, the SCO must determine whether the physical intervention Bus Aide used on September 13 constituted a restraint within the scope of the PPRA.

A. Whether the Physical Intervention Constituted a Restraint

As used in the PPRA, “restraint” refers to “any method or device used to involuntarily limit freedom of movement” and includes chemical restraint, mechanical restraint, physical restraint, and seclusion. Rule 2620-R-2.00(8).

“Physical restraint” means “the use of bodily, physical force to involuntarily limit an individual’s freedom of movement.” Rule 2620-R-2.00(8)(c). However, physical restraint specifically *excludes*:

- Holding of a student in a position other than a prone position for less than five minutes by a staff person for the protection of the student or others;

- Brief holding of a student by one adult for the purpose of calming or comforting the student, not to include holding a student in a prone position;
- Minimal physical contact for the purpose of safely escorting a student from one area to another; and
- Minimal physical contact for the purpose of assisting the student in completing a task or response.

*Id.* 200(8)(c)(i)-(iv).

The District concedes in its Response that Bus Aide restrained Student. *Response*, p. 7. And, as detailed below, the SCO finds and concludes that Student was physically restrained during the incident on September 13, as none of the above exceptions apply.

Regarding the first exception, Bus Aide held Student for less than five minutes (FF # 35); however, his physical contact with Student was neither for her protection or the protection of others. Though it is unclear why Student initially rose from her seat, nothing in the record indicates that Student posed a safety risk to herself or others. (FF #s 30-31.)

As for the second exception, Bus Aide did not hold Student to calm or comfort her. Indeed, as depicted in the video, Bus Aide’s physical contact with Student was rough and aggressive and, ultimately, left Student scared and shaking on the bus floor. (FF #s 31-34.) His contact was anything but calming or comforting.

With regard to the third exception, the PPRA does not explain what constitutes minimal physical contact in the context of an escort. In past decisions, CDE has relied on guidance from the U.S. Department of Education Office of Civil Rights (“OCR”) distinguishing between a physical restraint and an escort:

Physical restraint refers to a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.

*Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 69 IDELR 80 (OCR 2016); *see also Decision 2019:520; Decision 2019:528; Decision 2019:901*. Bus Aide forcibly held Student’s arms behind her back while physically pushing her into her seat. (FF # 31.) Moments later, Bus Aide placed Student in a headlock, with his forearm around her neck. (FF # 32.) This physical contact reduced Student’s ability to move her torso and arms freely and potentially endangered her breathing. (FF #s 31-34.) Bus Aide’s physical contact went well beyond the temporary touching or holding of a hand, wrist, arm, shoulder or back.

Finally, as for the fourth exception, it is clear that Bus Aide’s physical contact far exceeded the minimum physical contact necessary to assist Student in returning to her seat.

For these reasons, the SCO finds and concludes that the physical intervention used by Bus Aide failed to qualify for any of the exceptions and, as a result, constituted a physical restraint under Rule 2620-R-2.00(8)(c).

#### B. The District’s Basis for the Restraint

Having determined that Bus Aide physically restrained Student on September 13, the SCO must next evaluate whether the District had a basis to restrain Student.

Under the PPRA, a school district must have an appropriate basis for the use of restraint. Among other requirements, the PPRA mandates that restraints:

- Only be used in an emergency and with extreme caution after the failure of less restrictive alternatives (or a determination that such alternatives would be inappropriate or ineffective); and
- Never be used as a punitive form or discipline or as a threat to gain control of a student’s behavior.

Rule 2620-R-2.01. As explained below, the District failed to satisfy all of these requirements.

Restraints may only be used in an emergency. *Id.* 2620-R-2.01(1). The PPRA defines “emergency” as “serious, probable imminent threat of bodily injury to self or others with the present ability to effect such bodily injury. Emergency includes situations in which the student creates such a threat by abusing or destroying property.” *Id.* 2620-R-2.00(4). On September 13—immediately before she was placed in a hold—Student sat calmly in her seat on the bus. (FF #s 30-31.) The moment Student rose from her seat on the bus, Bus Aide restrained Student. (FF # 31.) Nothing in the record even remotely suggested that Student posed a threat to herself or others. As a result, Student’s behavior did not create an emergency under the PPRA. Because Bus Aide restrained Student in a non-emergency situation, the SCO finds and concludes that the District violated Rule 2620-R-2.01(1)(a).

Even if there had been 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, constructive and non-physical de-escalation, and re-structuring the environment.” *Id.* Here, Bus Aide never attempted any less restrictive alternatives. (FF # 31.) Bus Aide immediately restrained Student. (*Id.*) Therefore, the District violated Rule 2620-R-2.01(1) by using restraint before the failure of least restrictive alternatives.

Finally, 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, Bus Aide physically restrained Student to get Student to return to her seat and remain there. (FF #s 31-32.) His use of restraint was designed to gain control over Student's behavior. As a result, the SCO finds that the District also violated Rule 2620-R-2.01(2).

### C. The District's Duties Related to the Use of Restraint

The PPRA imposes duties on school districts related to the use of restraint. Two of those duties are at issue in this investigation. The first duty at issue requires the school district to ensure that "[n]o restraint is administered in such a way that the student is inhibited or impeded from breathing or communicating." Rule 2620-R-2.02(1)(a)(i). From the video, it was unclear whether the restraint actually inhibited or impeded Student's breathing or communicating. (FF # 33). However, Bus Aide's use of a headlock—with his forearm across Student's neck—undoubtedly had the potential to inhibit or impede Student's breathing or communicating. (FF #s 32, 33.) And, indeed, Student complained of pain in her neck or throat the night of the incident. (FF # 38.) As a result, the SCO finds that the District violated Rule 2620-R-2.02(1)(a)(i).

The second duty at issue requires restraints to be administered only by staff who have received training in accordance with the Rules. Rule 2620-R-2.02(1)(a)(iii). Bus Aide received appropriate training in behavior management techniques and, at the time of the incident, held a valid certification. (FF #s 19-21.) As a result, the SCO finds no violation of Rule 2620-R-2.02(1)(a)(iii).

### D. The District's Compliance with the Notification Requirements

Use of a restraint triggers the PPRA's documentation and notification requirements. Rule 2620-R-2.04. These requirements specify, in part:

- That the school district "verbally notify the parents as soon as possible but no later than the end of the school day that the restraint was used." *Id.*, 2620-R-2.04(3).
- That the school district provide parent a written report based on the findings of staff within five calendar days of the use of restraint. The report may be sent via email, fax or mail. *Id.*, 2620-R-2.04(4).

Though the PPRA imposes other requirements, these are the only requirements at issue in this Complaint.

The District's restraint of Student on September 13 triggered the PPRA's notification requirements. Under the first requirement, the District must verbally notify Parents of the use of restraint "as soon as possible but no later than the end of the school day that the restraint

was used.” Rule 2620-R-2.04(3). Bus Aide restrained Student at or around the end of the school day on Friday, September 13. (FF #s 30-32.) Therefore, the District was required to notify Parents of the restraint that day. It is undisputed that Parents were not notified of the restraint until Monday, September 16. (FF #s 36-40.) As a result, the SCO finds and concludes that the District violated Rule 2620-R-2.04(3).

Under the second requirement, the District must provide Parents a written report within five calendar days of the use of restraint. Rule 2620-R-2.04(4). Parents never received a written report from the District until this investigation. (FF # 42.) As a result, the SCO finds and concludes that the District also violated Rule 2620-R-2.04(4).

#### E. The District’s Annual Restraint Review

The PPRA requires the District to establish, conduct, and document in writing an annual review of the use of restraint within the District, to include an analysis of the incident reports prepared pursuant to Rule 2620-R-2.04(2) and Rule 2620-R-2.04(4). *Id.*

The SCO requested a copy of the District’s annual restraint review in correspondence dated September 8, 2020. In its Response—submitted on October 28, 2020—the District indicated the annual restraint review for 2019-2020 has not yet been completed. The District agreed to provide a copy of the annual restraint review upon completion, but the SCO has not yet received a copy. Without a document to review, the SCO cannot confirm that the District’s annual restraint review complies with the PPRA. As a result, the SCO finds and concludes that the District violated Rule 2620-R-2.05(2).

### **REMEDIES**

As outlined in this Decision, the District has violated the following PPRA requirements:

1. Using restraint in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a);
2. Using restraint before the failure of less restrictive alternatives, in violation of Rule 2620-R-2.01(1)(b);
3. Using restraint as a punitive form of discipline or as a threat to control of gain compliance of a student’s behavior, in violation of Rule 2620-R-2.01(2);
4. Failing to ensure that no restraint is administered in such a way that the Student is inhibited or impeded from breathing or communicating, in violation of Rule 2620-R-2.0(1)(a)(i);
5. Failing to comply with the documentation and notification requirements, in violation of Rule 2620-R-2.04(3) and Rule 2620-R-2.04(4).

Pursuant to Rule 2620-R-2.07(9), the SCO has authority to make recommendations to the District of remedial actions that should be taken to bring the District into compliance with the PPRA and the Rules. Consistent with this authority, CDE makes the following recommendations:

1. The District should provide School staff with additional training regarding identification of emergency situations in accordance with the PPRA;
2. The District should provide School staff with additional training regarding not using restraint before the failure of less restrictive alternative in accordance with the PPRA;
3. The District should provide School staff with additional training regarding not using restraint as a form of discipline or as a threat to gain control of a student's behavior in accordance with the PPRA;
4. The District should provide School staff with additional training regarding the requirement that restraints not be administered in such a way as to inhibit or impede the student's breathing or communicating in accordance with the PPRA;
5. The District should provide School staff training on the PPRA's notification requirements; and
6. The District should ensure that it establishes processes to timely complete its annual review of the use of restraint.

Using the information below, the District may contact Beth Nelson at CDE for support in implementing these recommendations or for guidance regarding the requirements of the PPRA and the Rules.

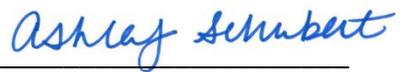
Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Beth Nelson  
1560 Broadway, Suite 1100  
Denver, CO 80202-5149

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13; Rule 2620-R-2.07(9)(c). If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level*

*Complaint Procedures*, ¶13; See also 34 C.F.R. § 300.507(a); 71 Fed. Reg. 156, 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 1<sup>st</sup> day of December, 2020.



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Ashley E. Schubert  
State Complaints Officer

## **Appendix**

### **Complaint, pages 1-3**

- Exhibit 1: Correspondence regarding the District's investigation
- Exhibit 2: Student's BIP dated February 12, 2019
- Exhibit 3: Student's IEP dated November 30, 2018
- Exhibit 4: Student's IEP dated November 13, 2019
- Exhibit 5: Student's 2019-2020 Progress Report

### **Response, pages 1-9**

- Exhibit A: Student's BIPs
- Exhibit B: Blank
- Exhibit C: Bus Aide's training certifications
- Exhibit D: District and School policies regarding restraint
- Exhibit E: Incident reports for Student for September 13, 2019
- Exhibit F: Blank
- Exhibit G: Correspondence between Parent and District
- Exhibit H: Correspondence within District
- Exhibit I: Blank
- Exhibit J: CPI training materials
- Exhibit K: Blank (contained within Response)
- Exhibit L: Student's grade and progress reports
- Exhibit M: Student's attendance records
- Exhibit N: Additional District and School policies

### **Reply, pages 1-4**

- Exhibit 6: Student's Year-Over-Year Performance

### **Viewing of Video of Incident**

- Via Zoom with District's counsel and Parents' counsel: November 5, 2020

### **Telephonic Interviews**

- Director of Special Education: November 10, 2020
- Learning Specialist: November 10, 2020
- Special Education Paraeducator: November 11, 2020
- Parents: November 16, 2020