

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 2023:528
[School District]

DECISION

INTRODUCTION

On March 23, 2023, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against [School District] (“Facility School”). The State Complaints Officer (“SCO”) determined that the Complaint identified two 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 March 23, 2022 through 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

1. Whether Facility School denied Student a Free Appropriate Public Education (“FAPE”) because Facility School:
 - a. Failed to properly implement Student’s IEP, on or about December 6, 2022, February 7, 2023, and February 28, 2023, specifically by failing to follow Student’s behavior intervention plan, in violation of 34 C.F.R. § 300.323.

2. Whether Facility School improperly restrained Student on or about December 6, 2022, February 7, 2023, and February 28, 2023, specifically by:
 - a. Restraining Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a) and C.R.S. § 26-20-103(1)(a);
 - b. Restraining Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective under the circumstances, in violation of Rule 2620-R-2.01(1)(b) and C.R.S. § 26-20-103(b)(I)-(II);
 - c. Restraining Student as a punitive form of discipline or as a threat to control or gain compliance of Student’s behavior, in violation of Rule 2620-R-2.01(2) and C.R.S. § 26-20-103(1.5);
 - d. Failing to ensure restraint was administered by staff who have received required training, in violation of Rule 2620-R-2.03 and C.R.S. § 26-20-105(1);
 - e. Failing to end the restraint when it was no longer necessary to protect Student or others, in violation of Rule 2620-R-2.02(1)(a)(v)-(vi) and C.R.S. § 26-20-103(2)(a)-(b);
 - f. Secluding Student in a space without adequate lighting, ventilation and size, and in a space that was not, to the extent possible under the specific circumstances, free of injurious items, in violation of Rule 2620-R-2.02(2)(e)(ii) and C.R.S. § 26-20-111(5);
 - g. Secluding Student without continually monitoring Student, in violation of C.R.S. § 26-20-111(5); and
 - h. Failing to comply with the documentation and notification requirements for restraint, in violation of Rule 2620-R-2.04 and C.R.S. §§ 22-32-147(3)(b5)-(c), 26-20-106, and 26-20-111(7).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁴ the SCO makes the following FINDINGS:

A. Background

1. Student attended fourth grade at Facility School for part of the 2022-2023 school year. *Interview with Parent*. His school district approved Student's placement at Facility School in Fall 2022. *Id.* Facility School is a CDE-approved facility school serving students in first through eighth grade. *Interview with Facility School Unit Manager ("Unit Manager")*. In this case, as a CDE-approved facility school, Facility School remains responsible for providing a FAPE to Student and for complying with the PPRA. See ECEA Rule 8.02(1)(c) and Rule 2620-R-2.00(7).
2. Student is eligible for special education and related services under the disability category of Other Health Impairment. *Exhibit A*, pp. 1, 21.
3. Student is a curious, creative, and outgoing young man who likes socializing with peers. *Interviews with Parent and Unit Manager*. He enjoys skateboarding, [sports], playing [a music instrument], and building with Legos. *Interview with Parent*. Student has difficulty trusting adults and, when pushed, will "flee or fight back." *Id.*

B. Facility School's Behavior Management System and Staff Training

4. Facility School uses Therapeutic Crisis Intervention ("TCI") for preventative behavior strategies and reactive behavior strategies. *Interview with Facility School Program Manager ("Program Manager")*. TCI teaches a variety of behavior support techniques to help a student regulate. *Id.* If those strategies prove ineffective, TCI recommends physical restraints that can be used when an imminent danger exists. *Id.* A restraint should be released as soon as the student indicates he or she can be safe. *Id.*
5. Facility School requires staff to complete initial TCI training within six months of their hire date. *Interview with Program Manager*. Refresher courses are offered throughout the year to ensure staff maintain their TCI certification. *Id.*
6. Unit Manager, School Services Coordinator ("Coordinator"), and Mental Health Therapist #1 ("MHT #1") became TCI certified in 2015, 2017, and 2019, respectively. *Exhibit I*, pp. 2, 4, 33. During the 2022-2023 school year, Coordinator and Unit Manager completed nine hours of refresher training during sessions held in August 2022, November 2022, and April 2023. *Id.* at pp. 12-13, 27, 28, 57, 64. Similarly, MHT #1 received 10 hours of training at refresher courses held in August 2022, November 2022, and April 2023. *Id.* at pp. 14, 15, 58. All three staff members also took refresher courses during the 2021-2022 school year. *Id.* at pp. 1-66.

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

C. Facility School's Structure

7. Each classroom at Facility School is staffed by a special education teacher and a mental health therapist. *Interview with MHT #1*. Facility School's mental health therapists rotate weekly through each of three classrooms. *Id.* So, in any given week, there are three mental health therapists in the classrooms and an additional mental health therapist working as a "floater." *Id.* The floater responds to crisis situations and provides additional support as needed. *Id.*
8. Facility School has three spaces students can use to "take space" outside of their assigned classroom: the [Room 1], the [Room 2], and the [Room 3]. *Response*, p. 2; *Interview with Unit Manager*. Pictures of each of these spaces were provided during this investigation. *Exhibit P*, pp. 1-9. The [Room 1] occupies an entire classroom and provides students access to sensory tools, a hammock, art supplies, and weighted blankets. *Interview with Unit Manager*. In the [Room 1], students can rest, work, or take a break. *Id.* Most students prefer to take their breaks in the [Room 1]. *Id.*
9. The [Room 2] offers students a space to complete work outside of the classroom. *Response*, pp. 2-3. This smaller room provides less stimulation to allow students to focus on their work. *Interview with Unit Manager*. Desks, chairs, and tables are available in the [Room 2], as well as a few coping tools (such as sand trays). *Id.*; *Response*, p. 3. At times, students also receive occupational therapy and speech language therapy in the [Room 2]. *Interview with Unit Manager*.
10. Facility School has two [Room 3's]. *Id.* Each room measures approximately six feet wide by eight feet long and contains no furniture or other items. *Id.*; *Response*, p. 3. Although students can access a [Room 3] at any time, the space is primarily used when students become escalated and demonstrate unsafe behaviors. *Response*, p. 3. The [Room 3's] have swing doors that open inwards and are not capable of being locked or latched. *Id.*; *Interview with Program Manager*. The doors contain windows to allow staff to monitor students in the [Room 3's]. *Id.* The [Room 3's] have lights. *Id.*

D. Student's Behavior Intervention Plan

11. Student began attending Facility School on October 24, 2022. *Response*, p. 2. Facility School adopted Student's existing behavior intervention plan ("BIP"). *Exhibit A*, pp. 29-31. That BIP was in effect for the duration of the investigation period. *See id.* at pp. 1-57. When a student enrolls in Facility School, Program Manager shares the student's IEP and BIP with Facility School staff. *Interview with Unit Manager*. Additionally, staff routinely meet on Wednesday afternoon to discuss changes to students' IEPs and BIPs. *Id.* The staff involved in the incidents at issue here were familiar with Student's BIP. *Interviews with Coordinator, Unit Manager, and MHT #1*.

12. The BIP identified four target behaviors:

- Non-compliance to escape unwanted tasks and demands;
- Physical aggression to escape unwanted attention;
- Inappropriate verbal outbursts to gain attention from adults or peers; and
- Oppositional behavior to escape tasks and demands and/or gain attention from adults or peers.

Exhibit A, p. 29.

13. The BIP outlined setting event strategies, such as preferential seating, morning check-ins, access to sensory tools, and giving Student a “fast pass” to a break space without verbal engagement. *Id.* at pp. 29-30.

14. Listed antecedent strategies designed to reduce the target behaviors included:

- Reminding Student of his strategies/choices when he exhibited signs of dysregulation;
- Encouraging Student to take a break in another space when he eloped;
- Ignoring Student’s inappropriate verbal outbursts or using minimal redirects;
- Ignoring non-compliance as long as it is not unsafe or disruptive; and
- Using distraction to get Student away from a trigger, such as offering a job or talking about a preferred subject.

Id.

15. The BIP also included behavior teaching strategies, such as providing social-emotional and social skills instruction, teaching Student to use quiet spaces, and helping Student learn to check-in with trusted adults. *Id.*

16. As reinforcement strategies, the BIP listed respecting Student’s requests for breaks and providing positive praise when Student was on task. *Id.*

17. Additionally, the BIP detailed a Crisis Intervention Plan to be followed in the event Student displayed behavior with the potential to cause harm. *Id.* at p. 30. If Student’s behavior became unsafe, staff should call for backup support. *Id.* Staff should reduce verbal communication, give Student space, and direct Student to a safe place. *Id.* If Student became unsafe toward others or himself, staff should “use least restrictive TCI techniques and increase as necessary to keep [Student] and others safe.” *Id.*

E. December 6, 2022 Incident

18. The first alleged restraint occurred on December 6, 2022. *Complaint*, p. 5. Prior to the incident, Student was in the [Room 2]. *Exhibit G*, p. 11. Student tried to barricade himself in

the [Room 2] and tip over furniture. *Id.* Facility School staff members used planned ignoring and eventually Student started his reading. *Id.* Without being asked, Student cleaned up the [Room 2] and started on an assignment. *Id.* However, instead of writing with letters, Student used symbols on his assignment. *Id.* Staff reminded Student of the expectations regarding his assignment. *Id.* Student then became verbally aggressive, knocked over furniture, and kicked a staff member. *Id.*

19. Facility School staff verbally directed Student to the [Room 3], and Student complied. *Id.* A few seconds later, Student exited the [Room 3] and kicked a staff member monitoring him outside the [Room 3]. *Id.*
20. In response, Unit Manager and MHT #1 place Student in a two-person wall sit hold. *Id.* In this hold, Unit Manager and MHT #1 stood on either side of Student, holding Student's arms. *Interviews with Unit Manager and MHT #1.* The staff members walked Student backwards to a wall in the [Room 3], where they slid down the wall to bring Student into a seated position between Unit Manager and MHT #1. *Id.* During the hold, Student scratched the staff members' hands and headbutted them. *Id.*
21. Student remained in the hold for nine minutes. *Id.* MHT #1 and Unit Manager released the hold even though Student was still being verbally aggressive, and his body was not calm. *Id.* Staff then backed out of the [Room 3]. *Id.* Student remained in the [Room 3] with the door closed. *Id.* The incident report did not document how long Student stayed in the [Room 3], and staff could not recall this information. *Id.; Exhibit G, pp. 9-16.*
22. Special Education Teacher notified Parent of the incident by phone near the end of the school day. *Exhibit G, p. 16.* Facility School did not provide Parent a written report regarding the incident. *Interview with Parent.*

F. February 7, 2023 Incident

23. The second alleged restraint occurred on February 7, 2023. *Complaint, p. 6.* That day, Student remained in the classroom while his peers went to the gym for an activity. *Exhibit G, p. 17.* He had his head down on his desk and had refused to engage with staff. *Id.* Coordinator gave Student space. *Id.*
24. Mental Health Therapist #2 ("MHT #2") entered the classroom with an occupational therapist ("OT"), who was there to meet and assess Student. *Id.* MHT #2 and OT started to discuss Student. *Id.* This conversation made Student upset, and he told them to stop talking about him. *Id.* He then threw his headphones at MHT #2. *Id.* Coordinator directed MHT #2 and OT to leave the classroom. *Id.* Coordinator monitored Student and continued to give him space. *Id.* Student threw a water bottle at Coordinator and "began wandering the classroom and throwing objects." *Id.*

25. At that time, Unit Manager came into the classroom to get a computer. *Id.* When Student tried to push a desk at Coordinator, Coordinator asked Unit Manager to assist in blocking the area where Student was accessing items to throw. *Id.* Eventually, Coordinator and Unit Manager were able to block a larger portion of the classroom and cutoff Student’s access to injurious items. *Id.* Student then “elbowed [Unit Manager] and attempted to grab objects off the board.” *Id.*
26. At that point, Coordinator and Unit Manager placed Student in a standing TCI hold and walked him to the [Room 3]. *Id.*; *Interviews with Coordinator and Unit Manager.* In this hold, Coordinator and Unit Manager approached Student from either side. *Exhibit G*, p. 17. Standing hip-to-hip with Student, staff placed their arms under Student’s armpits and then walked him to the [Room 3]. *Id.* During the walk to the [Room 3], staff faced forwards, while Student faced backwards. *Id.*
27. Staff released the hold once they got to the [Room 3]. *Id.* The hold lasted approximately one minute. *Id.* Coordinator recalled telling Student he could leave the [Room 3] “if he was safe.” *Interview with Coordinator.* Staff let the door to the [Room 3] close. *Id.* In the [Room 3], Student laid down and fell asleep within five minutes. *Exhibit G*, p. 17. Student slept for approximately 45 minutes to an hour, before processing with staff and moving to the [Room 1]. *Id.* He used a sand tray in the [Room 1] before rejoining his classroom. *Id.*
28. That afternoon, Coordinator notified Parent of the incident, including the hold, via telephone. *Id.* at p. 18; *Interview with Coordinator.* Unit Manager completed Facility School’s internal documentation process through SafetyZone, Facility School’s incident reporting system, but did not provide any documentation to Parent. *Exhibit G*, pp. 17-18; *Response*, p. 14.

G. February 28, 2023 Incident

29. The third alleged restraint occurred on February 28, 2023. *Complaint*, p. 4. That morning, Student eloped from class and sat in the hallway, cursing at MHT #1 and calling her names. *Exhibit E*, p. 15. MHT #1 encouraged Student to move to the [Room 1] to take space; when Student refused, MHT #1 gave him space and monitored from a distance. *Id.* Within 10-15 minutes, Student calmed down and moved to the [Room 1]. *Id.*
30. Once in the [Room 1], Student chose to use the sand tray. *Id.* MHT #1 set a timer for 10 minutes. *Id.* Once the timer went off, it would be time for Student to read. *Id.* MHT #1 needed to return to class, so Unit Manager took her place. *Id.*
31. When the timer went off, Student put the sand tray away but refused to do his reading. *Id.* Student asked if he could lay down before reading, and Unit Manager agreed. *Id.* Unit Manager set a timer for 10 minutes. *Id.* After the time expired, Unit Manager prompted Student to prepare for his reading. *Id.* Student ignored her and played with a tunnel instead.

Id. Unit Manager waited 15 minutes before re-engaging Student; however, Student continued to refuse to do his work. *Id.* At that time, MHT #1 returned to swap with Unit Manager. *Id.*

32. Student started wandering the [Room 1] and rifling through the desks. *Id.* Student was “verbally hostile” and non-compliant. *Id.* Unit Manager returned and staff physically blocked Student from the desks. *Id.* Student hit MHT #1 on the head before turning to walk to the [Room 3] while cursing at staff. *Id.* Student laid down in the [Room 3] with the door closed. *Id.*
33. After an hour, Facility School staff tried to check-in with Student, though he refused. *Id.* Student remained in the [Room 3] for approximately three and one-half hours. *Id.* Staff made several more attempts to check-in with Student, but Student indicated that he did not want to go back to class or told staff to go away. *Id.* Student left the [Room 3] when Parent came to pick him up for the day. *Id.*
34. Unit Manager notified Parent of the incident during pick up, though no documentation was provided to Parent. *Id.* at p. 16; *Interview with Parent; Response*, p. 14.
35. As a result of the February 28 incident, Student has not attended Facility School since March 8. *Interview with Parent.*

H. Facility School’s Restraint Notification and Documentation Procedure

36. When a student has been restrained, the staff members involved document the incident in SafetyZone. *Interview with Program Manager.* The staff members’ supervisors and Program Manager review the submitted incident report. *Id.*
37. It is Facility School’s practice to inform the parent no later than the end of the school day of the restraint. *Interview with Program Manager.* Staff members involved in the restraint determine who will notify the parent and how the parent is notified (i.e., in person, by phone, or by email). *Id.*
38. However, Facility School has no policy or procedure which requires any further communication with the parent beyond that initial notification. *Id.* And, indeed, Facility School does not provide parents with any written documentation of incidents of restraint. *Id.*
39. Program Manager, Unit Manager, and Special Education Director meet quarterly to review incident reports from the preceding three months. *Id.* This review looks at the frequency of the use of restraints, the staff involved, and precipitating factors. *Id.* Nothing from this meeting is documented in writing. *Id.* Facility School does not prepare any sort of written annual restraint review, and no annual restraint review was completed during the 2021-2022 school year. *Id.*

CONCLUSIONS OF LAW

As a preliminary matter, the SCO needs to address the passage of House Bill 22-1376 (the “Bill”), which was signed into law on May 26, 2022. The Bill addressed several education-related topics, including restraint and seclusion. Notably, the definition of “physical restraint” was broadened to “the use of bodily, physical force to involuntarily limit an individual’s freedom of movement for *more than one minute*.” C.R.S. § 26-20-102(5) (emphasis added). Previously, only holds lasting more than five minutes constituted a physical restraint. Additionally, the Bill removed the exceptions to physical restraint for the use of minimal physical contact. *Id.* 26-20-102(6). Parents must be notified in writing of any physical restraint lasting one to five minutes in length on the day of the incident. *Id.* 26-20-111(7).

The Bill also imposed additional requirements for seclusion. Seclusion rooms must have at least one window for monitoring or a video monitoring system. *Id.* 26-20-111(5). Students in seclusion must be “continually monitored.” *Id.* Spaces used for seclusion cannot also be used for “storage, custodial, or office space.” *Id.*

As written, these changes apply to “a public school of a school district, a charter school, or an institute charter school.” *Id.* 26-20-102(1)(a)(VI). The PPRA extends to facility schools via the Rules, not by statute. The Rules have not yet been amended to incorporate the changes made by the Bill. Until the Rules are amended, the changes made by the Bill to the PPRA do not explicitly apply to CDE-approved facility schools.

This Decision analyzes the Complaint’s allegations under the existing Rules and, as a result, has limited value as guidance to the field. One of the identified allegations—Allegation 2(g)—references requirements created by the Bill that do not apply to Facility School and, therefore, has not been analyzed in this Decision.

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

Conclusion to Allegation No. 1: Facility School properly implemented Student’s IEP on December 6, 2022, February 7, 2023, and February 28, 2023, by adhering to Student’s BIP, consistent with 34 C.F.R. § 300.323. No violation of the IDEA occurred.

The first allegation in the Complaint concerns whether Facility School followed Student’s BIP on December 6, February 7, and February 28 with regard to the incidents at issue.

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).

Here, the SCO finds and concludes that Facility School adhered to Student's BIP on December 6, February 7, and February 28. Staff involved in the three incidents indicated they were familiar with Student's BIP (FF # 11), demonstrating Facility School's compliance with 34 C.F.R. § 300.323(d).

The BIP specifically directed school staff to remind Student of his strategies/available choices when he became dysregulated and encourage him to take a break in another space. (FF # 15.) Staff should ignore verbal outbursts and noncompliance as long as Student was safe and use distraction to get Student away from a trigger. *Id.* As detailed in Facility School's incident reports, staff used a variety of these strategies from Student's BIP prior to the incidents at issue. (FF #s 13-16, 18, 23-24, 29-31.) For example, on December 6, staff directed Student to a separate space (the [Room 2]) to take a break. (FF # 18.) Once in the [Room 2], staff gave Student space, reviewed expectations, and used planned ignoring, as necessary. (*Id.*)

Similarly, on February 7, Coordinator gave Student space in the classroom after he refused to engage with staff or the classroom routine. (FF # 23.) Instead of joining his classmates in the gym, Student remained in the classroom. (*Id.*) Even after Student threw headphones at MHT #2, Coordinator gave Student space and reminded him of his goals and things he could earn. (FF # 24.)

And, on February 28, MHT #1 encouraged Student to take space in the [Room 1] after he eloped from the classroom. (FF # 29.) She gave Student space and reduced verbal interaction until he moved on his own to the [Room 1]. (*Id.*) Once in the [Room 1], MHT #1 allowed Student to access sensory tools, set a timer, and reminded him of the expectations with the timer. (FF #s 30-31.) Even after the timer went off, Student refused to engage in work, but Unit Manager gave Student space and let him engage in another preferred activity. (FF # 31.) When Student's noncompliance continued, Unit Manager gave Student space. (*Id.*)

In hindsight, it is easy to see how Facility School could have handled some things differently. For example, perhaps MHT #2 and OT should not have talked about Student in front of him when he was already having a tough day. (See FF #s 23-24.) But such actions were not violative of Student's BIP. (See FF #s 13-16.) For these reasons, the SCO finds and concludes that Facility School properly

implemented Student's BIP on December 6, February 7, and February 28, consistent with 34 C.F.R. § 300.323. No violation of the IDEA occurred.

Conclusion to Allegation Nos. 2(a)-(c), (e): Facility School improperly restrained Student on December 6, February 7, and February 28, when it secluded Student in the [Room 3] for longer than necessary, in violation of Rules 2620-R-2.01(3) and 2620-R-2.02(1)(a)(v).

Four of the allegations address the propriety of Facility School's use of restraint during incidents in December 2022 and February 2023. Specifically, Parent has alleged that Facility School used restraint in non-emergency situations and for longer than necessary.

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).

As a preliminary matter, the SCO must determine whether a student was restrained before evaluating whether the use of restraint was proper.

A. Whether Student was Physically Restrained on December 6 and February 7

"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. 2620-R-2.00(8)(c)(i)-(iv).

1. December 6 Hold

During the incident on December 6, Facility School staff used a two-person wall sit hold after Student repeatedly kicked staff. (FF #s 19-20.) In this hold, MHT #1 and Unit Manager restricted the movement of Student's arms and legs to ensure their protection. (FF # 20.) The hold lasted for nine minutes. (FF # 21.) Because the hold limited Student's freedom of movement and

exceeded five minutes, the SCO finds and concludes that the December 6 hold constituted a physical restraint.

2. February 7 Hold

On February 7, Student became dysregulated in the classroom and threw objects at Facility School staff. (FF #s 23-25.) In response, Coordinator and Unit Manager used a standing hold to transport Student from the classroom to the [Room 3]. (FF # 25.) In this hold, Student stood between Coordinator and Unit Manager and their arms were looped around Student's arms. (*Id.*) Student walked backwards to the [Room 3], while Coordinator and Unit Manager walked forward. (*Id.*) Because Student walked to the [Room 3] while in the hold, the SCO finds and concludes that the hold constituted minimal physical contact during an escort and not a physical restraint. See *Boulder Valley RE-2 Sch. Dist.*, 120 LRP 14036 (SEA CO 3/16/20).

B. Whether Student was Secluded on December 6, February 7, and February 28

"Seclusion", within the scope of the PPRA, means "the placement of a student alone in a room from which egress is involuntarily prevented." Rule 2620-R-2.00(9). Seclusion explicitly excludes: (a) placement of a student in residential services in his room for the night; and (b) time-out, where a student is removed from "potentially rewarding people or situations." *Id.* Any space used for seclusion "must have adequate lighting, ventilation, and size." *Id.* 2620-R-2.02(2)(e)(ii). "To the extent possible under the specific circumstances, the space should be free of injurious items." *Id.*

1. December 6 Use of [Room 3]

On December 6, Facility School staff directed Student to the [Room 3] after he became escalated in the [Room 2]. (FF #s 18-19.) Staff were monitoring Student outside of the [Room 3] when he exited the [Room 3] and kicked them. (FF # 19.) At that time, Staff used a physical restraint to move Student back into the [Room 3]. (FF #s 20-21.) He was released from the hold after nine minutes and remained in the [Room 3] for an unspecified amount of time. (FF # 21.) When staff left Student alone in the [Room 3] with the door closed, the SCO finds he was secluded. The lack of a locking mechanism on the door is not outcome determinative. If it were, school districts and facility schools could skirt the PPRA's requirements by ensuring students were always secluded in spaces without locks. And, indeed, the definition of seclusion does not require that egress be prevented by a lock. The [Room 3] was Facility School's designated space for students who were escalated or unsafe. (FF # 10.)

The question is whether Student reasonably believed he could voluntarily leave. Certainly, Student felt he could not leave the [Room 3] on December 6. Indeed, when he left the [Room 3] to kick staff members, he was placed in a physical restraint for nine minutes and returned to the [Room 3]. (FF #s 20-21.) For these reasons, the SCO finds and concludes that Facility School secluded Student on December 6.

2. February 7 Use of [Room 3]

On February 7, Facility School staff placed Student in a hold to transport him to the [Room 3]. (FF # 26.) Once in the [Room 3], staff released the hold, closed the door, and monitored Student from outside the [Room 3]. (FF # 27.) Staff reported that Student quickly fell asleep in the [Room 3]. (*Id.*) However, Student's sleeping does not impact whether his placement in the room constituted seclusion. Again, when staff left Student in the [Room 3] with the door closed, he was effectively secluded, regardless of his affect. Staff did not explicitly tell Student that he could not leave the [Room 3] but, instead, told him that he could leave "if he was safe." (*Id.*) Statements like this by Facility School staff implied that an adult would determine when Student was calm and, thus, ready to leave the [Room 3]. Student did not enter the [Room 3] voluntarily, and nothing in the Record suggests that Student reasonably felt he could leave once he was ready. (FF #s 23-27.) For these reasons, the SCO finds and concludes that Facility School secluded Student in the [Room 3] on February 7.

3. February 28 Use of [Room 3]

On February 28, Student became escalated in the [Room 1] and hit Unit Manager before walking to the [Room 3]. (FF # 32.) Once he was in the [Room 3], Student laid down, and the door was closed. (*Id.*) After an hour in the [Room 3], staff tried to check-in on Student, but he refused to engage. (FF # 33.) Student rebuffed attempts by staff to get him to rejoin his classroom, so staff left Student in the [Room 3] until Parent arrived to pick him up. (*Id.*)

Though Student entered the [Room 3] on his own, the outcome is no different. Like February 7, Student was left in the [Room 3] with the door closed. Even though the door was not locked, Student did not feel free to leave. Indeed, on December 6, Student kicked staff members monitoring him outside the [Room 3]. (FF #s 19-21.) During that incident, Student left the [Room 3] on his own and was consequently placed in a physical restraint for his behavior. (*Id.*) Student's past experiences in the [Room 3], comments by staff, and the closed door signified to Student that he was not free to leave. For these reasons, the SCO finds and concludes that Student was secluded in the [Room 3] on February 28.

C. Whether Facility School Had a Basis for the Restraint

The PPRA requires 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);
- Never be used as a punitive form or discipline or as a threat to gain control of a student's behavior; and

- Be used only for the period of time necessary and with no more force than necessary, while prioritizing the prevention of harm to the student.

Rule 2620-R-2.01.

The SCO must now determine whether Facility School had a basis for the physical restraint used on December 6 and the seclusion used on December 6, February 7, and February 28.

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.” *Id.* 2620-R-2.00(4). “Emergency includes situations in which the student creates such a threat by abusing or destroying property.” *Id.*

In this case, before Student was restrained on December 6 and secluded on December 6, February 7, and February 28, he displayed verbal and physical aggression toward Facility School staff members. (FF #s 18, 24-25, 32.) Student either hit, kicked, or threw items at staff. (*Id.*) Additionally, on December 6 and February 7, Student knocked over furniture. (FF #s 18, 25.) As a result, the SCO finds and concludes that Student’s behavior constituted an emergency under the PPRA on all three occasions.

Even in an emergency, the PPRA permits the use of restraints 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 restructuring the environment.” *Id.*

In this case, during all three incidents, Facility School staff used a variety of de-escalation techniques, including giving space, planned ignoring, using proximity, and offering distractions. (FF #s 18, 23-25, 29-31.) These techniques were not successful and were often followed by physical aggression. (*Id.*) As a result, the SCO finds and concludes that Facility School complied with the PPRA by attempting less restrictive alternatives before restraining Student on December 6, February 7, and February 28.

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, nothing in the Record suggests that Facility School staff threatened restraint or used restraint to punish Student for his behavior on these dates. Therefore, the SCO finds and concludes that Facility School did not use restraint as a punitive form of discipline or as a threat to gain control of Student’s behavior on December 6, February 7, or February 28.

Finally, the PPRA requires that the restraint last no longer and use no more force than necessary. Rule 2620-R-2.01(3). When seclusion is no longer necessary to protect the student or others, “staff must reintegrate the student or clearly communicate to the student that (s)he is free to leave the area used to seclude the student.” *Id.* 2620-R-2.01(a)(v). In this case, the physical

restraint on December 6 lasted for nine minutes. (FF # 21.) Staff released Student even before his body was completely calm and left the [Room 3]. (*Id.*) The SCO finds no suggestion that this restraint lasted longer than necessary or used more force than necessary.

However, the same cannot be said when Student was secluded on December 6, February 7, and February 28. Facility School's documentation makes no mention of how long Student was left in the [Room 3] on December 6. (*Id.*) Without this information, the SCO cannot find that Facility School timely ended the seclusion.

Additionally, the incident report for February 7 indicated that Student immediately laid down and fell asleep within five minutes. (FF # 27.) Staff did not communicate to Student that he was free to leave until he awoke 45 minutes later. (*Id.*) At some point before Student fell asleep, the emergency no longer existed, and staff should have prompted Student to leave the [Room 3].

Similarly, Student immediately laid down in the [Room 3] on February 28. (FF # 32.) According to the incident report, Student rejected staff attempts to check-in with him after he had been in the [Room 3] for one hour. (*Id.*) It is unclear whether staff told Student he was free to leave at that point or whether he was required to stay because he refused to check-in. Regardless, the emergency had subsided and checking in with staff is not a requirement under the PPRA. Moreover, the incident report fails to indicate whether staff tried to talk to Student before an hour elapsed. For these reasons, the SCO finds and concludes that Facility School used restraint longer than necessary when Student was secluded on December 6, February 7, and February 28, in violation of Rules 2620-R-2.01(3) and 2620-R-2.02(1)(a)(v).

Pursuant to C.R.S. § 22-32-147(5), the CDE has the same enforcement authority for restraint investigations as state-level complaints under the IDEA. Here the Findings of Fact show that Student was improperly restrained on three occasions in a three-month period. Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an "hour-for-hour calculation." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). Like compensatory education, Student is entitled to compensatory services as an equitable remedy that is intended to place Student in the same position but for Facility School's PPRA violations. The SCO finds an award of three hours of private mental health services to be appropriate.

Conclusion to Allegation No. 2(d): The restraints were administered by staff with required training, consistent with Rule 2620-R-2.03. No violation of the PPRA occurred.

The next allegation in this investigation examines whether staff who administered restraints had completed the training required by the PPRA.

Under the PPRA, school districts and approved facility schools must “ensure that staff utilizing restraint in schools or facilities are trained.” Rule 2620-R-2.03. Staff utilizing restraint must complete “retraining at a frequency of at least every two years.” *Id.*

Here, as evidenced by the Findings of Fact, Coordinator, MHT #1, and Program Manager were TCI certified and completed refresher training during the 2021-2022 and 2022-2023 school years. (FF # 6.) Accordingly, the SCO finds and concludes that the Facility School staff involved in the restraints of Student had completed the training required by the PPRA. No violation of the PPRA occurred.

Conclusion to Allegation No. 2(f): Facility School secluded Student in a space consistent with the requirements of Rule 2620-R-2.02(2)(e)(ii). No violation of the PPRA occurred.

This allegation concerns the suitability of the [Room 3] as a space for seclusion.

Under the PPRA, “[a]ny space in which a student is secluded must have adequate lighting, ventilation, and size.” Rule 2620-R-2.02(2)(e)(ii). Additionally, “to the extent possible”, the space must be free of “injurious items.” *Id.*

Here, the [Room 3] is approximately six feet wide by eight feet long. (FF # 10.) It has a light and a swing door with a window. (*Id.*) Facility School provided pictures of the [Room 3] during this investigation. (FF # 8.) The space contains no furniture or other items and, thus, is completely free from injurious items. (FF # 10.) The SCO finds and concludes that the [Room 3] satisfies the requirements of the PPRA by having adequate lighting, ventilation, and size. No violation of the PPRA occurred.

Conclusion to Allegation No. 2(h): Facility School failed to comply with the PPRA’s documentation and notification requirements, in violation of Rule 2620-R-2.04.

The final allegation accepted for investigation concerns Facility School’s compliance with the PPRA’s documentation and notification requirements. Specifically, Parent contends Facility School did not provide her with a written report following incidents of restraint.

The PPRA imposes documentation and notification requirements on school districts and approved facility schools after a student is restrained. Rule 2620-R-2.04(2)-(4). These requirements specify, in part, that:

- The school principal or designee must verbally notify parents as soon as possible, but no later than the end of the school day, on the day that restraint was used.
- A written report must be submitted to school administration within one day of the use of restraint.
- A written report must be provided to parent within five calendar days of the use of restraint. This report must include: the antecedent to the student’s behavior, a

description of the incident, efforts made to de-escalate the student, alternatives attempted, the type and duration of the restraint, any injuries that occurred, and the staff involved in the restraint.

Id.

Here, Facility School failed to provide Parent with a written report of each incident of restraint within five calendar days (or even at all). (FF #s 22, 28, 34.) Though Facility School staff documented the incidents for internal use, Facility School did not have a system in place to provide those incident reports to Parent. (FF #s 36-38.) For this reason, the SCO finds and concludes that Facility School failed to comply with the PPRA documentation requirements, resulting in a violation of Rule 2620-R-2.04.

Conclusion regarding Annual Restraint Review: Facility School failed to conduct an annual review of the use of restraint, resulting in a violation of Rule 2620-R-2.05(2).

Under the PPRA, school districts and approved facility schools must conduct an annual review of the use of restraint within the district or school. Rule 2620-R-2.05(2). The purpose of the review is to determine whether the district or school is:

- Properly administering restraint;
- Identifying additional training needs;
- Minimizing and preventing use of restraint by increasing positive behavioral interventions; and
- Reducing incidents of injury to staff and students.

Id. Such review must include, in part, analysis of incident reports, training needs of staff, staff to student ratio, and environmental considerations. *Id.*

Here, though Facility School regularly reviews incidents of restraint, it has no system in place for conducting a written annual review of the school's use of restraint. (FF # 38.) The annual review required by the PPRA goes beyond Facility School's regularly scheduled meetings and requires Facility School to focus on the cumulative use of restraint at Facility School during a given school year. (*See id.*) Indeed, Facility School conducted no annual review during the 2021-2022 school year. (FF # 39.) Accordingly, the SCO finds and concludes that Facility School failed to comply with the PPRA's annual review requirements, in violation of Rule 2620-R-2.05(2).

REMEDIES

The SCO concludes that Facility School has violated the following PPRA requirements:

- a. Using restraints for more time than necessary, in violation of Rule 2620-R-2.01(3) and 2620-R-2.02(1)(a)(v);

- b. Failing to comply with documentation requirements, in violation of Rule 2620-R-2.04(4); and
- c. Failing to complete an annual review of the use of restraint, in violation of Rule 2620-R-2.05(2).

The CDE has the authority to order Facility School to take remedial actions to bring the District into compliance with the IDEA. *CDE State-Level Complaint Procedures*, ¶ 12. Under C.R.S. § 22-32-147(5), the CDE has the same enforcement authority for restraint investigations as state-level complaints under the IDEA. The remedies below address Facility School’s violations of the PPRA.

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

1. Corrective Action Plan

- a. By **June 26, 2023**, Facility School 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 Facility School 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 Facility School’s timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Program Manager, Unit Manager, Coordinator of Student Services, and all MHTs must review this Decision, as well as the requirements of Rules 2620-R-2.02 and 2620-R-2.04. This review must occur no later than **August 18, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **August 25, 2023**.

3. Training

- a. Program Manager, Unit Manager, Coordinator of Student Services, and all MHTs must attend and complete training provided by CDE on PPRA’s documentation and notification requirements. This training will address, at a minimum, the requirements of Rule 2620-R-2.04 and the related concerns addressed in this Decision.
- b. Program Manager and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training

may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.

- a. Such training shall be completed no later than **August 18, 2023**. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **August 25, 2023**.

4. Procedure Development

- a. Facility School must develop written procedures regarding notifying parents of the use of restraint, in accordance with Rule 2620-R-2.04(3)-(5). Such procedures must address both notifying parents the day the restraint occurs, as well as providing parents a written report within five calendar days. Facility School must develop these procedures and submit them to the CDE for approval by **July 24, 2023**.
- b. Facility School must develop written procedures regarding conducting an annual restraint review, in accordance with Rule 2620-R-2.05(2). Facility School must develop these procedures and submit them to the CDE for approval by **July 24, 2023**.

5. Compensatory Services

- a. Student shall receive **3 hours of mental health services** provided by Student's existing mental health provider, if any, or through a contract between Facility School and a suitable provider at Facility School's expense. All 3 hours must be completed by **November 3, 2023**, though Parent and the private provider are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.). If Parent and Facility School cannot agree to a provider by July 7, 2023, the CDE will select the Provider by July 21, 2023.
- b. To verify that Student has received the mental health services required by this Decision, Facility School must submit records of the services provided to the CDE by the **second Monday of each month** until all compensatory services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. Facility School must communicate with the selected provider to obtain this information.
- c. These mental health services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. These mental health services

must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction Student is entitled to (including time in general education). If for any reason, including illness, Student is not available for any scheduled compensatory services, Facility School will be excused from providing the service scheduled for that session. If for any reason Facility School fails to provide a scheduled session, Facility School will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent, as well as notify the CDE of the change in the monthly service log.

6. 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 Facility School to meet any of the timelines set forth above may subject Facility School 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; 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 22nd day of May, 2023.

Ashley Schubert

Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-8

Response, pages 1-17

- Exhibit A: IEPs, including BIPs
- Exhibit B: Blank
- Exhibit C: Evaluation reports
- Exhibit D: PWNs
- Exhibit E: Behavior logs
- Exhibit F: Report cards & progress monitoring
- Exhibit G: Restraint incident reports
- Exhibit H: Blank
- Exhibit I: Training documentation
- Exhibit J: Academic calendar
- Exhibit K: Policies and procedures
- Exhibit L: Correspondence
- Exhibit M: Blank
- Exhibit N: Blank
- Exhibit O: Verification of delivery to Parent
- Exhibit P: Pictures of rooms

Reply, pages 1-5

- Exhibit 1: Parent's notes
- Exhibit 2: Parent's notes
- Exhibit 3: Parent's notes
- Exhibit 4: Parent's notes
- Exhibit 5: Parent's notes
- Exhibit 6: Parent's notes
- Exhibit 7: Email correspondence
- Exhibit 8: Email correspondence
- Exhibit 9: Transcribed conversation

Telephone Interviews

- Coordinator of Student Services: May 3, 2023
- MHT #1: May 3, 2023
- Parent: May 4, 2023
- Program Manager: May 2, 2023
- Unit Manager: May 2, 2023