

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

---

**State-Level Complaint 2019:520  
Mesa County School District 51**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on March 28, 2019, by the parents of a child not currently identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup>.

Based on the written Complaint, 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 Administration of the Protection of Persons from Restraint Act (PPRA), found at 1 C.C.R. 301-45<sup>2</sup>. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

On April 11, 2019, the Parties agreed to extend the 60-day investigation timeline to engage in mediation. Mediation resulted in impasse, and consequently, the State Complaints Officer (“SCO”) immediately resumed the investigation upon notification of impasse.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), CDE has the authority to investigate alleged violations of IDEA that occurred not more than one year from the date the original complaint was filed.

Pursuant to 1 C.C.R. 301-45, CDE has the authority to investigate alleged violations of the PPRA that occurred not more than one year from the date the original complaint was filed.

Accordingly, this investigation will be limited to the period of time from March 28, 2018, through March 28, 2019, for the purpose of determining if a violation of IDEA and/or PPRA

---

<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* and its corresponding regulations are found at 34 C.F.R. § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Exceptional Children’s Educational Act (“ECEA”), found at 1 CCR 301-8, 2220-R-1.00, *et seq.*

<sup>2</sup> Regulations for the Protection of Persons from Restraint Act are codified at 1 CCR 301-45, 2620-R-1.00, *et seq.*

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.

### **SUMMARY OF COMPLAINT ALLEGATIONS**

Whether the District violated the PPRA by improperly restraining Student on October 11, 2018 and November 8, 2018, specifically by:

1. Physically restraining Student in a non-emergency situation, consistent with 2620-R-2.01(1)(a);
2. Physically restraining Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective, consistent with 2620-R-2.01(1)(b);
3. Failing to comply with the documentation and notice requirements, consistent with 2620-R-2.04;
4. Failing to ensure staff were properly trained on appropriate use of restraints, consistent with 2620-R-2.03.

Whether the District violated the IDEA and denied Student a free appropriate public education (FAPE) by:

1. Failing to identify Student as IDEA eligible when it did not refer Student for a special education evaluation after Parents expressed concern about Student's behavior in September 2018 and Student's behavior continued to escalate at School, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

### **FINDINGS OF FACT**

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

1. Student, a seven-year-old who recently finished first grade at School 2 within the District, is not currently identified as eligible for special education and related services as a child with a disability under the IDEA. *Exhibit A*, pp. 9-12.
2. Student began the 2018-19 school year at School, located within the District. Student is described as an outgoing, friendly, bright, and creative child who maintains positive peer relationships, though she can also be incredibly strong-willed. *Complaint*, p. 3; *Interview with Classroom Teacher*; *Exhibit A*, p.7.

3. All school staff interviewed by the SCO described Student as a typical first grader. Classroom Teacher stated Student did not like being told no; however, this is not unusual behavior from a first grade student in her experience. *Interview with Classroom Teacher*. School Psychologist explained that, based on her observations, Student's behavior was not unusual, and that Student behaved much like other Students her age. As an example, School Psychologist stated that Student exhibited more behavioral issues in the morning, which is common for children just beginning primary school. *Interview with School Psychologist*. Similarly, Counselor 2 stated Student was a typical first grader, who had some friendship-related issues that are not abnormal for children this age. *Interview with Counselor 2*.

#### **Parents share concerns with School regarding Student's anxiety**

4. On September 10, 2018, Parents emailed Classroom Teacher requesting a meeting to discuss their concern that a classroom activity was causing Student to be anxious. The activity in question is called "secret student." Secret student involves a predetermined student being recognized at the end of the school day if that student had demonstrated positive behavior throughout the day. However, the student's identity was not announced until the end of the day. Parents stated that Student's uncertainty about whether she was secret student was causing her to present behavior challenges at home, and asked to discuss ways to lessen Student's anxiety around this activity. Parent also requested that Principal and Counselor 2 attend the meeting because they were familiar with Student from kindergarten. *Exhibit J*, p. 2.
5. On September 12, 2018, Parents, Principal, Counselor 2, and Classroom Teacher met to discuss Parent's concerns. *Exhibit J*, p. 8. During this meeting, Classroom Teacher explained that she was not seeing the anxious behavior Parents were describing. *Interview with Classroom Teacher and Parents*. Parents requested that Classroom Teacher tell them in advance when Student would be secret student so they could tell her, which they believed would help alleviate her anxiety. Parents stated at this meeting their understanding of the secret student activity "was that it was used to recognize a student for being a 'perfect student' and thought that [Student] was struggling with the public nature of not being picked." *Reply*, p. 2.
6. Following this meeting, Parents created a book for Student titled "We Choose [Student]" in an attempt to alleviate her anxiety surrounding secret student. However, in the days following the meeting, Parents stated that Student continued to display anxious behavior at home. On September 21, 2018, Parent emailed Classroom Teacher and Principal to request another meeting to discuss supports for Student, as well as to discuss the 504 Plan process. *Exhibit J*, p. 25.
7. On September 23, 2018, Principal responded, in part:

As far as behavior supports for [Student], we need to really see behavior in order to match the appropriate support for her at school. The first step for that is through the Response to Intervention process with our Multi-Tiered Systems of Support (MTSS) team. This team meets Fridays to discuss student concerns and I can certainly bring [Student] to the table to talk about strategies to assist when presented with a struggle. We have seen three incidents where [Student] has struggled to work through frustration . . . We will continue to take data for dates, times and the antecedent, to see if there are any trends. This data will allow us to respond in the most appropriate way.

*Exhibit J*, pp. 24-25. Principal also suggested that Parents meet with Counselor 2 to discuss the 504 plan process. *Id.*

8. On September 23, 2018, Classroom Teacher also emailed Parents in response to their meeting request. Pertinent to this decision, Classroom Teacher inquired: “since there has been a lot of talk about anxiety and [Student] experiencing anxious feelings, I was wondering...is there an official diagnosis of anxiety for [Student]? This information is going to be useful for us as we move towards a 504 plan.” *Exhibit J*, p. 21. Parent responded on September 25, and wrote in part: “[Student] doesn’t have a diagnosis and I’d be happy to share more about our thinking around not going that route if you are interested.” *Exhibit J*, p. 20.
9. The SCO finds that both Principal and Classroom teacher were responsive to Parents’ concerns, and that suggesting MTSS as a starting point and inquiring whether Student had an official diagnosis were appropriate steps given Student had not yet displayed behavioral or emotional issues at School.
10. On October 3, 2018, Parents and Counselor 2 met to discuss further supports and the 504 Plan process. Counselor 2 stated that during this meeting she explained the 504 Plan process, including that a formal diagnosis is not required. Counselor 2 also stated she thoroughly explained the MTSS process to Parents. *Interview with Counselor 2*. Parents later stated in an email on October 10: “Our meeting with [Counselor 2] was very helpful and we don’t feel like the next step for [Student] is a 504, however we do see need for intervention or really possibly just differentiation around her emotional needs with regard to classroom activities that may be triggering a fear response.” *Exhibit J*, p. 72.
11. On October 3 Student also received a disciplinary referral for refusing to come out of the bathroom after recess. Both Counselor 2 and Classroom Teacher met with Student to talk though the incident. Student was sent home with a “white slip” to notify Parents that Student had received a disciplinary referral. *Exhibit I*, p. 3.

12. On October 10, 2018, Parents requested a team meeting to discuss the October 3 behavior incident. Principal replied, stating: "Prior to meeting as a team, I would like to meet with you both. I think the next step is a conversation regarding the RtI (Response to Intervention) process and where [Student] falls in this." *Exhibit J*, p. 76. A meeting was scheduled for October 15 to discuss School's MTSS process.

### **October 11, 2018 Disciplinary Incident and First Alleged Restraint**

13. On October 11, 2018, Student became extremely dysregulated during class. According to Classroom Teacher, Student became upset when Classroom Teacher asked to check her math problems. Student refused and began breaking pencils and throwing them around the classroom. Student also began yelling and screaming. *Interviews with Classroom Teacher; Exhibit I*, p.1. Classroom Teacher attempted to calm Student using breathing exercises and requested Student go to the calm down corner. When Student continued to throw items, scream, and disrupt the class, Classroom Teacher paged Principal for assistance. *Interview with Classroom Teacher*.
14. Principal recalled arriving in the classroom around 9:30 a.m. Principal stated Student was extremely dysregulated, and Principal immediately attempted several de-escalation techniques to try and calm Student, including 4-7-8 breathing, using the glitter jar, and suggesting Student go to the calm down corner. Despite Principal's efforts, Student continued to cry, scream, and roam around the classroom. At a certain point, Student crawled under a table, and Principal continued to try to calm Student. At this point, Principal paged Counselor 1 for assistance. *Interview with Principal*.
15. Counselor 1 explained that when she arrived in the classroom, Student was extremely dysregulated, and was laughing and crying simultaneously. At 10 a.m. the class lined up to go to recess. At that time, Student ran out from under the table towards the classroom door. Principal explained that the classroom door is located directly next to an exterior door that leads to a busy thoroughfare. Based on Student's continued escalated behavior, Principal and Counselor 1 were concerned for her safety, and decided to escort Student to the counseling office. Principal explained that in the past, Student had been effectively calmed in that room. *Interviews with Principal and Counselor 1; Exhibit I*, p.1.
16. Due to their concern that Student may elope onto a busy street, Principal and Counselor 1 used a "2 person reverse transport" technique to take Student to the counseling office. According to Principal and Counselor 1, during a 2 person reverse transport, each person stands on either side of the person being transported. The two people utilizing the transport face the direction towards which they are heading, and the person being escorted faces the opposite direction. The people utilizing the transport each place one of their arms under the arm of the person being transported, and the person being transported then walks backwards. *Interviews with Principal and Counselor 1*. Both

Principal and Counselor 1 explained to the SCO that the counseling office is located cater-corner from Classroom Teacher's classroom. They each estimated that Student was placed in the 2 person reverse transport hold for less than 30 seconds. *Interviews with Principal and Counselor 1.*

17. Both Principal and Counselor 1 have been trained in behavior management techniques, and had up to date certifications in the fall of 2018. They explained that the first half of the training focuses on de-escalation and prevention techniques, while the second half focuses on restraints and holds. Both had attended an all-day training course on July 30, 2018, and had obtained passing certificates. Additionally, both Principal and Counselor 1 explained that the 2 person reverse transport is a technique they learned during this training. *Interviews with Principal and Counselor 1; Exhibit K.*
18. Once in the counseling office, Principal and Counselor 1 released Student, and she immediately ran under a table. Principal believed Student was beginning to calm down, and told Counselor 1 she could leave. Principal then again attempted to use various calming strategies with Student, including 4-8-7 breathing. When these attempts failed to calm Student, Principal called Counselor 1 back to the counseling office. Counselor 1 then returned, and after a short period of speaking with Student, Student deescalated. Student and Counselor 1 then had lunch together. *Interview with Counselor 1.*
19. According to Parent, Principal called her that day to tell her Student had begun yelling in class, breaking pencils and had thrown a snack. Parent stated that during that phone call, Principal did not say anything about physically removing Student from the classroom. *Interview with Parent.*

### **October 15<sup>th</sup> meeting and initiation of MTSS**

20. On October 15, a meeting was held to discuss School's MTSS process. Parents and Principal attended, as well as School Psychologist, who leads School 1's MTSS team. On October 11, School Psychologist emailed Parents several MTSS documents so they could review them prior to the meeting and become familiarized with the process. *Exhibit J*, p. 80. School Psychologist explained that Parents came to the meeting with a variety of questions. She also believed Parents were asking for extensive accommodations for Student. School Psychologist separately explained the processes for MTSS, 504 Plans, and IEPs. When Parents asked for her opinion, she stated that because Student had only recently started first grade, the team did not know a lot about her. She therefore recommended they begin with MTSS to track and document Student's behaviors in order to determine whether Student's behavior could be corrected with general education interventions, or whether a 504 plan or IDEA evaluation was warranted. *Interviews with School Psychologist and Parents.*

21. At this meeting, Principal also told Parents that Student had been carried during the October 11 disciplinary incident. Parent explained that Principal had stated Student had been carried, but did not explain the extent or details of how Student had been carried. *Interview with Parents*. This is consistent with Principal's recollection. Principal explained that when she told Parent that Student had been carried, Parent was extremely thankful and appreciative. *Interview with Principal*. Based on Principal's explanation, Parents believed that Student "had been carried like a small child would be carried: upright with freedom to move her arms and legs." *Reply*, p. 5.
22. Following this meeting, School Psychologist consulted with Classroom Teacher to develop a behavior chart. School Psychologist explained to the SCO that Student's behaviors did not follow a pattern, however the problematic behaviors tended to escalate the more contact Student had with Parent during the school day. School Psychologist did not see the problematic behaviors when Parent was not at School 1. *Interview with School Psychologist*. School Psychologist shared her opinion with Principal in an email on November 16, following a day when Parent had visited the classroom, stating: "I did notice a difference in behaviors with [Student] while her mother is present versus when she is not. Most times that I am in the classroom [Student] speaks clearly, is attentive and hard working. When [Parent] was present she used more baby talk, whining, and was not as engaged in the learning activity." *Exhibit J*, p. 206.
23. On October 17, School began implementing Tier-2 MTSS interventions. According to the MTSS documentation, the reason for the increased interventions was because: [Student] displays dis-regulation [*sic*] during her school day. These dis-regulated [*sic*] moments look like, selective speaking, screaming, laughing and crying at the same time, breaking objects. These moments will last on average 70 minutes and can disrupt her school day." *Exhibit A*, p. 13. The team used a sticker chart to monitor Student's progress, and after earning 3 stickers Student would be allowed to complete a preferred activity. *Exhibit A*, p. 1.

#### **November 8, 2018 Disciplinary Incident and Second Alleged Restraint**

24. On November 8, 2018, Student again became extremely dysregulated in class. According to Classroom Teacher, throughout that day, Student and two friends had been quarreling. After several failed attempts to end the disturbance, Classroom Teacher called Principal for assistance. Principal came to the classroom, spoke to the three students, and decided that they would be physically separated for the rest of the day. Principal then left the classroom. *Interviews with Principal and Classroom Teacher*. After Principal left the classroom, Student grabbed her notebook and ripped it into pieces. According to Classroom Teacher, Student then began barking, hissing, growling, and throwing various items around the classroom. Classroom Teacher moved the other

students in the class to one side of the room and called Principal for help. *Interview with Classroom Teacher.*

25. Principal came to the classroom and stated there was notebook paper scattered all over the floor, and that Student was hiding under a table. Principal sat at a table near Student and began trying to speak with her in an attempt to help her deescalate. However, Student began making loud animal noises, saying “mama”, crawling around the classroom, throwing pencils, and grabbing computers off other desks. *Interview with Principal.* At that point Principal believed the situation had become dangerous, and asked Classroom Teacher to remove the other students from the class. Principal also again called Counselor 1 for assistance. *Interview with Counselor 1.*
26. As Classroom Teacher lined up the other students to take them out of the classroom, Student ran towards the door. As Student approached the door, she slipped on some of the notebook paper she had previously thrown on the floor, and fell onto her back. As Principal and Counselor 1 went over to help Student get up, Student swung her fist toward Counselor 1. *Interview with Principal and Counselor 1.*
27. As with the October 10 incident, Principal and Counselor 1 were again concerned that Student would elope from the classroom. This time, they closed the classroom door and continued to attempt to help Student deescalate. Student initially ran and hid, then resumed throwing objects in the classroom. Principal tried to convince Student to walk to the counseling office, however Student began running around the classroom. *Exhibit I, p. 11.* Principal and Counselor 1 then decided to transport Student to the counseling office. Both Principal and Counselor 1 explained that they initially attempted the reverse 2 person transport, however Student began thrashing and kicking her legs. Due to their concern for both Student’s safety and their own, Counselor 1 held Student’s feet, and Principal held her under the arms, and they transported her to the counseling office. Again, they each estimated that the hold lasted for less than 30 seconds. *Interview with Principal and Counselor 1; Exhibit I, p.4.*
28. Once in the counseling office, Student was placed on the ground, and she immediately ran under a table. Student continued to scream and cry. While on her back under the table, Student pushed the table up with her feet. Principal became concerned for Student’s safety and placed the table on its side. Student then ran over to a bookshelf and began grabbing items and throwing them. Because the bookshelf was not anchored to the wall, Principal became extremely concerned for Student’s safety, fearing that Student could pull the bookshelf down on herself. Principal then approached Student, at which point Student hit Principal in the eye. Principal and Counselor 1 moved Student to a corner of the room, and Principal held Student and sat on the floor. Then, according to Principal, she placed her arms around Student to comfort her. After a short period, Principal let go of Student, and Student again hit Principal in the eye. Student began thrashing and Principal again held her, stating “I again laid my arms on



her and she was still. I believe she just needed some touch so I provided that.” *Exhibit I*, p. 11. Student was also kicking, so Counselor 1 briefly held her legs. Principal estimated Student was held for approximately three minutes. *Exhibit I*, p. 10. Counselor 1 then began calming Student by speaking with her, utilizing breathing strategies, and showing Student pictures of her dog. It was at this point Student deescalated. *Interviews with Principal and Counselor 1*.

29. Following this incident, Principal completed a document titled: “Restraint Incident Debriefing Notes.” There, Principal explained the rationale behind the modified technique used to transport Student: “carried-would have used reverse escort but potentially unsafe.” Principal also noted that Student “was awkward for transport with size/level of intensity.” *Exhibit I*, p. 7.
30. That afternoon, Principal met with Parent for 90 minutes when Parent arrived to pick up Student. During this meeting, Principal explained the incident to Parent, including a description of how Student was transported to the counseling office. Principal also explained that Student would be suspended for 1 school day. According to both Parent and Principal, Parent was extremely distraught during this discussion. *Interview with Principal and Parents*. A reentry meeting was scheduled for November 12, 2018. *Exhibit I*, p. 6.
31. On November 11, 2018, Principal completed the District’s “Physical Restraint Report.” This report was not provided to Parent, however it was provided to the District’s Behavior Specialist. Principal explained in the report: “Because this was less than 5 minutes and I met with [Parent] and [Student] no report was sent.” *Exhibit I*, pp. 7-12.
32. In reviewing the District’s “Physical Restraint Report” form, the SCO finds that it complies with the PPRA’s documentation and notification requirements. The District’s form contains sections to be completed regarding: antecedents to student’s behavior, description of the incident, efforts made to deescalate the situation, alternatives that were attempted, the type and duration of the restraint used, injuries that occurred, which staff were present, and staff involved in administering the restraint. *Exhibit I*, pp. 9-12, *District Physical Restraint Report*; see also *PPRA Rule 2.04(4)(a)-(g)*.
33. On November 12, 2018, the District conducted a reentry meeting. Parents, School Psychologist, and Principal attended the meeting. The parties discussed the November 8 behavioral incident, as well as the suitability of the interventions Student was receiving at that time. When discussing the behavior incidents, Parents became extremely upset, based on their belief that Student had been “carried in an inhumane method by two people by her upper body and legs like a prisoner rather than held like a small child.” *Reply*, p. 7.

34. Based on Parents' concerns, the school team believed that Parents were asking for special education resources. Parents then asked School Psychologist whether, in her professional opinion, she believed Student needed an IEP. School Psychologist told Parents that she did not believe Student needed special education and related services at that time, and encouraged them to continue to utilize MTSS and collect data. School Psychologist explained that many students this age have trouble settling in to grade school. *Interview with School Psychologist*. School Psychologist also recalls Principal asking Parents if they wanted an IDEA evaluation, and Parents refusing. Parents stated they recalled School Psychologist stating she did not believe Student needed special education. *Interview with Parents*.
35. Following the reentry meeting, School Psychologist emailed Counselor 2, Classroom Teacher, and Principal, stating in part:

[W]e met with [Student's] parents today to discuss the incident on Thursday, as well as, a second intervention for self-regulation. We have a break time process set-up and were thinking that two scheduled breaks a day would benefit [Student]. The goal behind these scheduled breaks is to teach her more self-awareness and learn to use calming strategies throughout her day. We proposed that he [sic] has two scheduled 5 minute breaks a day outside of the classroom . . . setting as she masters them.

*Exhibit J, p. 160.*

36. Student's MTSS plan was reviewed on November 14, 2018, and the alterations referenced above were documented. The MTSS document states that "detrimental behaviors have increased, [Student] is demonstrating more difficulty with self-regulation. Additional intervention being added." *Exhibit A, p. 14*. The team then added two scheduled breaks during the day with the goal of helping Student self-regulate. *Id.*
37. According to Parents, following the November 8 disciplinary incident, Student began displaying concerning behavior at home. Parents subsequently made an appointment for Student to see a therapist, who diagnosed Student with Post Traumatic Stress Disorder (PTSD), as a result of the two disciplinary incidents at issue in this case. *Therapist's letter dated 12/6/18, Reply, p. 32*. Parents subsequently removed Student from School based on therapist's advice. Student did not return to School after November 30, 2018. *Interview with Parents*.
38. On December 17, 2018, Parent emailed Behavior Analyst and asked: "we are wondering if the PTSD diagnosis would qualify [Student] for a 504 and specific accommodations through that to meet her current needs." *Exhibit J, p. 375*.

39. In January 2019, Student transferred to School 2 within the District. *Exhibit C*, p. 1. On January 30, 2019, Parents initiated a special education referral. *Exhibit A*, p. 7. In February and March 2019, the District conducted a special education evaluation in the areas of: general intelligence, communicative status, academic performance, social and emotional status, health, and motor abilities. *Exhibit C*. On April 2, 2019, the District convened an eligibility determination meeting, during which Student was determined not to be eligible for special education and related services. *Exhibit A*, pp. 9-12. However, Student was identified as a student with a disability pursuant to section 504, and a 504 plan to address Student's anxiety was developed on April 19, 2019. *Exhibit A*, p. 1.

### **CONCLUSIONS OF LAW**

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

#### **Conclusion to Alleged Violations of the Protection of Persons from Restraint Act (PPRA):**

The SCO concludes that the 2 person reverse transport used to escort Student on October 11, and the hold used by Principal in the counseling office on November 8, both fall within exceptions to the definition of physical restraint contained in the PPRA. However, by carrying Student on November 8, staff used more than minimal physical contact, thereby resulting in a restraint. The subsequent failure to provide Parents the written report of the incident on November 8 within 5 days resulted in a violation of the PPRA.

The PPRA defines restraint as "any method or device used to involuntarily limit freedom of movement, including but not limited to bodily physical force, mechanical devices, chemicals, and seclusion." PPRA Rule 2.00(8). Restraints are only to be used in emergency situations and with extreme caution, and after the failure of less restrictive alternatives or "a determination that less restrictive alternatives would be inappropriate or ineffective under the circumstances." PPRA Rule 2.01(1). Additionally, school staff may never use restraints as "a punitive form of discipline or as a threat to control or gain compliance of a student's behavior." PPRA Rule 2.01(2).

Relevant here, the PPRA specifies that physical restraint does not include "minimal physical contact for the purpose of safely escorting a student from one area to another." PPRA Rule 2.00(8)(c)(iii). Because the PPRA does not further define "minimal physical contact" in the context of an escort, the SCO looked to other sources for guidance. The U.S. Department of Education Office for Civil Rights (OCR) distinguishes between physical restraint and escorts, as follows:

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).

#### October 11 and November 8 Escort of Student to Safe Location

In evaluating whether the incidents of physical contact on October 11 and November 8 constituted a restraint, the SCO first considers the purpose for which staff made physical contact with Student. On both occasions, Principal and Counselor 1 made physical contact with Student to safely escort Student from the classroom to the counseling office when Student demonstrated behavior that threatened the safety of Student and others. On October 11, 2018, as more fully described in FF 13-18, Principal and Counselor 1 made physical contact with Student to move her to a safer location after Student's behavior continued to escalate, despite attempts to calm her, and both were concerned that Student would elope to an unsafe area. Similarly, on November 8, 2018, Principal and Counselor 1 made initial physical contact with Student to move her to a safer location when Student's behavior threatened the safety of others and staff became concerned with elopement. Because physical contact was made for the purpose of moving Student to a safer location, the SCO concludes that both instances constituted escorts. *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 69 IDELR 80 (OCR 2016).

Having determined both instances were escorts, the SCO next considers whether staff used minimal physical contact during the escort, based on the individual facts and circumstances for each incident. Because this term is not further defined by PPRA, the definition of a physical escort articulated by the U.S. Department of Education is persuasive. As stated above, a 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." *Id.*

Applying this definition to the first incident, the SCO concludes that by using the 2 person reverse transport on October 11, Principal and Counselor 1 used the minimum amount of physical contact necessary under the circumstances to safely escort Student from the classroom to the counseling office. The correct use of the reverse transport allowed Student to remain upright and walk, albeit backwards, to the counseling office under staff direction. This transport allowed staff to control Student's movements and safely direct her to the counseling office through a temporary touching of her arm, shoulder, and back. Given Student's size and age, this was minimum physical contact to safely escort her to a safer location.

In contrast, the SCO concludes that the escort on November 8, 2018, did not involve minimal physical contact when staff held Student by the torso and feet to carry her to a safer location. When Principal and Counselor 1 attempted to safely escort her to another location, Student

began “thrashing and kicking her legs,” demonstrating that she could not be safely escorted as she had been on October 11. Although staff believed they were taking the appropriate measures under the circumstances to safely move Student from the classroom to the counseling office, the method they employed prevented her from walking. Rather than touching her head, wrist, arm, shoulder or back, Counselor 1 held Student’s feet off the ground and walked to the counseling office. Holding Student in this manner not only created more risk of injury for Student, but for staff as well. By carrying Student in her escalated state, staff was at risk of dropping her on the floor. Additionally, the carry described would allow Student to potentially control Principal and Counselor 1’s movements, by kicking her legs and applying force to their bodies as they were walking.

The SCO concludes that carrying Student on November 8 was done with more than minimal physical contact, and thus did not fall within the exception to the definition of physical restraint as an escort. Because Student could not be escorted safely and with minimum physical contact, this incident constituted a restraint. Given that the purpose of the physical contact was to safely move Student from one area to another, the SCO concludes that the exception for holding a student for less than 5 minutes, pursuant to PPRA Rule 2.00(8)(c)(i), does not govern the analysis. Moreover, given the fact that Student could not be safely transported at this time, the use of an appropriate restraint by trained staff would have been a legitimate option until such time that Student could either move on her own or be safely escorted.

Having concluded the November 8 escort constituted a restraint, the SCO next addresses the specific allegations of noncompliance with the PPRA alleged by Parents. PPRA Rule 2.01(1)(a) requires that restraints be used only in emergency situations. The SCO concludes that Student’s erratic behavior created an emergency situation pursuant to the PPRA. The PPRA defines an 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.” PPRA Rule 2.00(4). On November 8, Student’s behavior constituted an emergency when throwing items around the classroom created a safety hazard for other students, and ultimately created a hazard for Student herself when she slipped on a piece of paper from a notebook she had destroyed and fell on her back. Additionally, Student attempted to run from the classroom, and staff were concerned about her eloping to a nearby busy street. Based on the above, the SCO concludes that staff restrained Student in response to an emergency situation, and accordingly finds no violation of PPRA Rule 2.01(1)(a).

PPRA Rule 2.01(1)(b) requires restraints only be used “after the failure of less restrictive alternatives (such as Positive Behavior Supports, constructive and non-physical de-escalation, and re-structuring the environment) or a determination that such alternatives would be inappropriate or ineffective under the circumstances.” On November 8, Principal believed Student’s behavior posed a level of danger sufficient to evacuate the class. Evacuating the class is an environmental management technique and a less restrictive alternative than physical

restraint. Principal also spoke to Student and tried to convince her to walk to the counseling office on her own. Only after Student slipped on the notebook paper and fell, then attempted to hit Counselor 1, was the decision made to initiate physical contact to transport Student to the counseling office. The SCO therefore concludes that less restrictive alternatives were attempted before using the restraint, and finds no violation of PPRA Rule 2.01(1)(b).

The PPRA requires that restraints can only be administered “by staff who have received training, in accordance with Section 2.03 of these Rules.” PPRA Rule 2.02(1)(a)(iii). In Finding of Fact #17, the SCO determined that Principal and Counselor 1 both received appropriate training in behavior management techniques, and at the time were both certified. Therefore, the SCO does not find a violation of PPRA Rule 2.02(1)(a)(iii).

The PPRA contains specific documentation and notification requirements when restraints are used. The SCO now considers the documentation and notification requirements at issue in this case.

PPRA Rule 2.04(2) requires that “if restraints are used by any school employee or volunteer, a written report must be submitted within one (1) school day to school administration.” As referenced in Finding of Fact #31-32, Principal completed the District’s “Restraint Incident Debriefing Notes” and sent a copy to District’s Behavior Specialist. The SCO concludes that Principal thereby fulfilled this requirement, and finds no violation.

Next, PPRA Rule 2.04(3) requires that “the school principal or designee shall verbally notify the parents as soon as possible but no later than the end of the school day that the restraint was used.” Here, as detailed in Finding of Fact #30, Principal met with Parent the afternoon of November 8 for ninety minutes to discuss the incident. The SCO therefore finds no violation of PPRA Rule 2.04(3).

Finally, PPRA Rule 2.04(4) requires that “a written report based on the findings of the staff review . . . must be emailed, faxed, or mailed to the parent within five (5) calendar days of the use of restraint.” The SCO previously found that Principal completed this form on November 11, and that it complied with the requirements of PPRA Rule 2.04(4). However, based on Principal’s belief that because the escort lasted under five minutes it was not a restraint, she did not provide Parents with a copy of the report. Therefore, the SCO finds a violation of PPRA Rule 2.04(4), and subsequently addresses the violation in the remedies section below.

#### November 8 hold in counseling office

The SCO concludes that Principal’s holding of Student in the counseling office on November 8 did not constitute physical restraint as defined in the PPRA, and therefore finds no violation. Physical restraint does not include “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.”

PPRA Rule 2.00(8)(c)(i). Once in the counseling office, Student's behavior continued to escalate. Principal became concerned for Student's safety when she began pulling items off an unsecured bookshelf. In response, Principal held Student and sank to the ground. After a brief period, Principal released her hold on Student, and Student hit her in the eye. Principal then again briefly held Student, at which time she quickly deescalated. At the time of the hold, Principal documented that she held Student for three minutes. Because Principal held Student for less than five minutes for both her and Student's protection, the hold did not constitute a restraint, and the SCO finds no violation.

**Conclusion to Alleged Violation of IDEA:** The District did not violate Child Find by failing to initiate a special education evaluation prior to Parent's request when it did not have reason to suspect that Student may have a disability and need special education and related services.

School Districts have an affirmative, ongoing obligation to identify, locate, and evaluate all children with disabilities residing within their jurisdiction that either have, or are suspected of having, disabilities and need special education and related services as a result. 34 C.F.R. § 300.111; ECEA Rule 4.02(1)(a). "The threshold for suspicion of a disability is relatively low, and is not whether the child actually qualifies for special education services, but rather whether the child should be referred for evaluation." *Boulder Valley School District*, 118 LRP 28098 (SEA CO 5/18/17) (citing *State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001)). Suspicion of a disability "may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." *Smith v. Cheyenne Mountain Sch. Dist.* 12, 2017 WL2791415 at \*18 (D. Colo. 2017) (citing *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)); *see also Weld Re-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 1/2/19).

Absent a test articulated by the Tenth Circuit defining what might be a relatively low threshold, the SCO concludes that the individual circumstances of this case did not raise a reasonable suspicion that Student should have been referred for an evaluation. *See Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14); *see also Weld RE-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 2019).

First, the SCO concludes that Parents' report of Student displaying anxiety at home surrounding a classroom activity, combined with the initial absence of any signs of anxiety at school, was not sufficient to trigger the District's child find obligation in September of 2018. Parents first told Classroom Teacher about their concerns regarding Student's anxiety on September 10, 2018. Classroom Teacher responded that she was not seeing the anxious behavior Parents were describing.

Following the October 3 behavioral incident when Student refused to leave the bathroom, Principal suggested starting the RtI process to see if Student would respond to general education interventions and to collect data in response to the interventions. The Office of

Special Education Programs (OSEP) has endorsed the approach used by the District here. In *Memorandum to: State Directors of Special Education*, OSEP stated:

A multi-tiered instructional framework, often referred to as RTI, is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. With a multi-tiered instructional framework, schools identify students at-risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature of those interventions depending on a student's responsiveness.

OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many [Districts] have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions.

56 IDELR 50 (OSEP 2011).

Here, School began the RtI process on October 17, 2018, and developed a behavior chart as both a reward system and a method to collect data on Student's behavior. The original date the MTSS team set to review this plan was November 27, 2018. However, after the November 8 disciplinary incident, the MTSS team quickly responded, and on November 14 added increased supports in the form of scheduled breaks to help Student self-regulate. Had Student's behavior problems continued despite increased general education interventions, the District's child find obligation likely would have been triggered. *See Special Sch. Dist. of St. Louis*, 73 IDELR 217 (SEA MO 1/22/19)(finding child find violation in part on district's continued use of unsuccessful general education interventions). In this case, however, Parents removed Student from School on November 30, 2018. Student therefore had 6 weeks of general education interventions. "Often, students will respond differently to interventions, making it difficult to determine in advance the appropriate duration of a specific intervention (Sprague, Cook, Wright & Saddler, 2008). Typically, 20 to 40 school days (four to eight weeks) is considered an adequate period for determining whether interventions are having an impact (Sprague et al., 2008)." *Guidelines for Determining Eligibility for Special Education for Students with Serious Emotional Disability*, p. 12 found at: [https://www.cde.state.co.us/cdesped/sed\\_guidelines\\_2017-12-13](https://www.cde.state.co.us/cdesped/sed_guidelines_2017-12-13). The SCO concludes that six weeks was an insufficient period of time to determine whether Student was responding to the MTSS interventions. Consequently, the District's child find obligation was not triggered.



Finally, given Student's age and recent entry into grade school, the SCO concludes that the District's desire to gather more information before referring Student for an IDEA evaluation was appropriate. In *Board of Education v. Fayette County*, the Sixth Circuit Court of Appeals did not find a child find violation when a district failed to evaluate a student during first and second grade, noting that it is "difficult to assess whether a very young child is disabled or merely developing at a rate different from his peers, and the educational experts involved all seem to indicate that a hasty referral for special education can be damaging to a child." 478 F.3d 307, 313 (6th Cir. 2007). The Third Circuit Court of Appeals made a similar ruling in *D.K. v. Abington School District*, declining to find a child find violation, stating: "the School District was not required to jump to the conclusion that [student's] misbehavior denoted a disability or disorder because hyperactivity, difficulty following directions, and tantrums are not atypical during early primary school years." 696 F.3d 233, 251 (3rd Cir. 2012). The court in *D.K. v. Abington* also stated "schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when children are developing at different speeds and acclimating to the school environment." *Id.* at 252.

School Psychologist explained to Parents on November 14 that school still did not have very much information on Student, and that many children have issues settling into grade school. The SCO acknowledges that Student's disciplinary incidents on October 10 and November 8 were severe. On both occasions, Student became dysregulated to the point where multiple adults were involved, and the decision to remove her from the classroom was made. However, despite the severity of these incidents, in the absence of a parental request for an evaluation, the SCO concludes that these two incidents did not trigger the District's child find duty to refer her for an IDEA evaluation. As noted in above in Finding of Fact #3, staff and teachers all perceived Student to be a typically developing first grader. Additionally, Student did not have a diagnosis of anxiety or PTSD at the time, and Parents communicated this to Classroom Teacher. The District's continued attempt to utilize its MTSS framework was therefore appropriate under the circumstances.

Finally, IDEA's "child-find obligation is in no way absolute." *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F.Supp.2d 1307, 1311 (D. Utah 2002). For example, if a student is determined not to be a "child with a disability," then he is not owed a "child-find duty." *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018) (reasoning that "[l]ike the FAPE obligation, the IDEA requires States accepting IDEA funds to identify, locate, and evaluate only 'children with disabilities'"). As described in FF #39, the District conducted an IDEA evaluation following Parent's January 2019 request. Student was determined not to be IDEA eligible as a result of the evaluation. For all the reasons explained above, the SCO finds no violation of child find.

## REMEDIES

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

1. Failing to provide Parents with a copy of the written report completed on November 11, pursuant to PPRA Rule 2.04(4).

Pursuant to the PPRA Rule 2.07(9), the SCO is limited to making recommendations to the public education agency of remedial actions to address findings of noncompliance. Consistent with this authority, the CDE makes the following recommendations that should be taken in order to come into compliance with applicable law and regulations.

1. The District should review and revise restraint and seclusion policies to ensure clear expectations for identifying and reporting of use of physical restraint, specifically with regard to providing parents with all required documentation.

Concluding that the District has not violated IDEA, no remedy is ordered.

## CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See* 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 25th day of June, 2019.

---

Thomas Treinen  
State Complaints Officer

## **Appendix**

### **Complaint, pages 1-7**

Ex. 1 Email correspondence

### **Response, pages 1-12**

- Ex. A 504 Plan; Special Education Referral; Determination of Eligibility; MTSS records
- Ex. B Prior Written Notices; 504 Plan Consent to Evaluate
- Ex. C Evaluation
- Ex. D Notice of Meeting
- Ex. E Progress Reports
- Ex. F 2017-18 District Review of Use of Restraint
- Ex. G Staff training certifications
- Ex. H District restraint and seclusion policies
- Ex. I Incident referral forms
- Ex. J Email correspondence
- Ex. K Training certificates

### **Reply, pages, pages 1-15**

- Ex. 2 Email correspondence; Child Study; transfer request; District guidelines
- Ex. 3 Notes; email correspondence; journal entries

### **Interviews with:**

Parents  
Principal  
Counselor 1  
Counselor 2  
School Psychologist  
Classroom Teacher