

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 2020:536
Mountain BOCES**

DECISION

INTRODUCTION

The parent (“Parent”) of a child (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against [County School District] (“District”), a member district of the Mountain Board of Cooperative Educational Services (“BOCES”), on Thursday, September 24, 2020.

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

RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has authority to investigate alleged violations of the IDEA and the PPRA that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c); Rule 2620-R-2.07(2)(f). Accordingly, this investigation will consider only events that occurred not earlier than September 24, 2019 to determine whether a violation of the IDEA or the PPRA occurred. 34 C.F.R. § 300.153(c); Rule 2620-R-2.07(2)(f). Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

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 the BOCES denied Student a Free Appropriate Public Education (“FAPE”) by failing to develop an IEP during the 2019-2020 academic year that was tailored to meet Student’s individualized needs, specifically as follows:
 - a. Annual goals did not adequately address behavior that interfered with learning, in violation of 34 C.F.R. § 300.320(a)(2)(i); and
 - b. Behavioral strategies and supports, specifically Student’s Behavioral Intervention Plan (“BIP”), did not adequately address behavioral needs, in violation of 34 C.F.R. § 300.324(a)(2)(i).
2. Whether the BOCES denied Student a FAPE by failing to properly implement Student’s IEP, specifically by failing to follow Student’s BIP on February 12, 2020, in violation of 34 C.F.R. § 300.323.
3. Whether the BOCES improperly restrained (physical) Student on February 12, 2020, specifically by:
 - a. Physically restraining Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a); and
 - b. Physically restraining Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective, in violation of Rule 2620-R-2.01(1)(b).
4. Whether the BOCES improperly restrained (seclusion) Student on February 12, 2020, specifically by:
 - a. Secluding Student in a non-emergency situation, in violation of 2620-R-2.01(1)(a);
 - b. Secluding Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective, in violation of 2620-R-2.01(1)(b);
 - c. Secluding Student as a punitive form of discipline or as a threat to control or gain compliance of Student’s behavior, in violation of 2620-R-2.01(2);
 - d. Failing to provide Student with relief periods from seclusion, in violation of 2620-R-2.02(2)(e)(i); and

- e. Secluding Student in a space without adequate size, in violation of 2620-R-2.02(2)(e)(ii).
5. Whether the BOCES failed to comply with the documentation requirements for the alleged restraints (physical and seclusion) on February 12, 2020, in violation of Rule 2620-R-2.04.

FINDINGS OF FACT

After thorough and careful analysis of the entire record,⁴ the SCO makes the following FINDINGS OF FACT:

A. Background

1. Student attends a District elementary school (“School”). *Exhibit Q*, pp. 1, 19. The District is a member of the BOCES. *Id.* at p. 1. The BOCES is responsible for providing a FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.
2. Student is currently eligible for special education and related services under the Serious Emotional Disability (“SED”) category. *Exhibit Q*, p. 1.
3. Student is an active and kind-hearted child who enjoys problem solving and helping others. *Interviews with Parent, Special Education Case Manager (“Case Manager”)*⁵, and *Special Education Paraprofessional (“Paraprofessional”)*. Student loves Legos, basketball, and technology. *Interviews with Parent, Paraprofessional, and BOCES Special Education Consultant (“Special Education Consultant”)*.⁶ At School and at home, Student struggles to regulate his emotions. *Interviews with Parent, Case Manager, Paraprofessional, and BOCES Special Education Director (“Special Education Director”)*.
4. This investigation concerns the 2019-2020 academic year, when Student was enrolled in kindergarten at School as an IDEA-eligible child under the Developmental Delay disability category. *Exhibit A*, p. 1.

B. Student’s 2019-2020 IEP

5. During the 2019-2020 academic year, Student’s May 6, 2019 IEP (“2019 IEP”) was in effect. *Id.* at pp. 1-14. The annual review for Student’s September 19, 2018 IEP was moved up to May to prepare for his transition to kindergarten. *Id.* at p. 24. Student did not finish the

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

⁵ Case Manager was employed by the District through the end of 2019-2020 academic year.

⁶ Special Education Consultant was employed by the BOCES through mid-summer 2020.

2018-2019 preschool year due to increasingly unsafe behavior (e.g. aggression directed at peers and adults) requiring physical intervention (e.g. a “hold”) and daily classroom removals. *Exhibit P*, pp. 68, 71; *Interviews with Parent and Paraprofessional*.

6. The 2019 IEP reviewed Student’s present levels of performance in communication, social-emotional functioning, and occupational therapy. *Exhibit A*, p. 4. Student demonstrated basic motor and social-emotional skills significantly below his age level and he had difficulty with self-regulation. *Id.* For instance, if routine was disrupted Student reverted “back to very concerning acting out behaviors, not following directions, and throwing materials.” *Id.* A progress report indicated that Student made progress on annual goals for communication, physical motor skills, pre-academics, and self-determination in preschool. *Id.* at pp. 31-33.
7. The 2019 IEP described Student’s disability-related needs, and the impact of the disability, as requiring speech-language services for Student to “communicate his wants and needs both academically and socially.” *Id.* at p. 5. The 2019 IEP also indicated that Student demonstrated a need for “a highly predictable routine [and a] visual schedule in tandem with a token reinforcement system.” *Id.* Finally, this section of the 2019 IEP indicated that Student demonstrated a need for “special education support and social emotional support” as well as for occupational therapy to “be successful with basic hand skills and sensory modulation.” *Id.*
8. As described in the next section below, Student exhibited behavior that required a BIP. *Id.*
9. The 2019 IEP contained the following annual goals:
 - Goal #1 (Communication): “Currently, [Student] uses ‘he,’ and ‘she’ in structured activities with 70% accuracy. He continues to work on 2-step directions with concepts and is making steady gains [sic] he is now at 70% w/o cues. His use of I and Me is at 70% w/o cues and he/she is at 75% w/o cues. By next annual review, he will be at 80% accuracy for the aforementioned skills in order for him to be successful with making his needs known and understood both socially and academically.” *Id.* at p. 6.
 - Goal #2 (Pre-academics): “During small group time, [Student] will increase his basic academic knowledge needed in a typical kindergarten setting. We will know he can do this when he labels all upper case letters and numerals 1-20 two out of three times attempted.” *Id.*
 - Goal #3 (Social-Emotional Wellness): “During typical kindergarten transitions, [Student] will follow directions related to the daily routine. We will know he can do this when he accepts directions and completes a request 75% of the time.” *Id.* at p. 7.
 - Goal #4 (Physical Motor): “By his next IEP date, [Student] will be able to copy the upper case letters of the alphabet with 70% of the letters legible.” *Id.*

- Goal #5 (Other): “By his next IEP date, [Student] will be able to perform 5 sensory and self-regulation strategies, when given a verbal prompt, on 3 of 4 attempts.” *Id.*
 - Goal #6 (Self-Determination): “[Student] will persist and remain with a typical kindergarten task through completion. We will know he can do this when he resists distractions and manages frustration to begin and complete a task within the time parameters set by his teacher 50% of the time.” *Id.* at p. 8.
10. An amendment to Student’s preschool programming in January of 2019 included a goal for Student to accept a “prompt to get his pants changed,” but the 2019 IEP did not include a related or similar goal. *Id.* pp. 5-8, *Exhibit P*, pp. 71-72. Progress reports on 2019 IEP annual goals were to be provided to Parent with report cards. *Exhibit A*, p. 5.
 11. The service delivery statement indicated that mental health support would be provided to Student and Parent “as needed.” *Id.* at p. 11. It also indicated that Student would start kindergarten on a modified schedule. *Id.* Per an amendment to the 2019 IEP on August 5, time would be added to the modified schedule if (1) Student followed adult direction 50 percent of the time and (2) Student demonstrated self-regulation skills 75 percent of the time as determined by service providers and measured by a daily chart. *Id.*
 12. Under the 2019 IEP, Student had four hours per week of direct academic instruction, one hour per week of direct occupational therapy, two hours per week of direct academic support, and one hour per week of direct speech instruction. *Id.* at p. 12. Student and Parent received forty-five minutes of weekly counseling from a school-based health center therapist through November 2019, but these minutes are not detailed in the service delivery grid. *Id.* at p. 27; *Interviews with Parent, Case Manager, and Special Education Consultant.*
 13. The 2019 IEP included accommodations to target Student’s self-regulation, communication, and sensory needs, such as speaking to feelings, advance warning of schedule changes or fire drills, timers for transition, and firm pressure squeezing. *Exhibit A*, p. 8.
 14. Student spent 25 percent of his time in the general education environment. *Id.* at p. 13.

C. Student’s 2019-2020 BIP

Functional Behavior Assessment

15. Student’s May 6, 2019 BIP (“2019 BIP”) was in effect during the 2019-2020 academic year. *Id.* at pp. 27-30. A functional behavior assessment was completed on February 6, 2019 (“2019 FBA”) to identify positive behavior supports for the 2019 BIP. *Id.* at p. 5; *Exhibit P*, pp. 74-76.

16. The 2019 FBA identified Student's target behavior as oppositional defiance. *Exhibit P*, p. 74. It described the target behavior as Student repeatedly yelling "No!" and "I hate . . . to preferred choices" and "throw[ing] things in a frenzy." *Id.* The 2019 FBA indicated the function of the target behavior was to avoid transitions to a new setting and to obtain power. *Id.*
17. CDE Specialist 1, trained in developing comprehensive positive behavioral supports, noted that oppositional defiance disorder is a diagnosis. *Interview with CDE Specialist 1*. A diagnosis is a standard method to describe a set of symptoms, but a diagnosis itself is not a target behavior and thus should not be identified as one in an FBA. *Id.*
18. The 2019 FBA reported that Student's behavior could be "very intense" and that it occurred "hourly." *Exhibit P*, p. 74. The 2019 FBA included a pathways inventory list with five skill categories. *Id.* at pp. 75-76. An "X" mark noted whether he exhibited a specific deficit within the categories, but there is no rating scale in the pathways inventory list for an "X" mark. *Id.*
19. Student received three "X" marks across most executive skills deficits, to include difficulty with transitions and impulsiveness. *Id.* at p. 75. He received two "X" marks across emotion regulation deficits, to include difficulty staying calm enough to think rationally and exhibiting irritability outside the context of frustration. *Id.* He received one "X" mark across cognitive flexibility and social deficits, to include inappropriate attention seeking and lack of empathy. *Id.* at pp. 75-76. There are no marks for language processing deficits, which included difficulty expressing needs/feelings or understanding what has been said. *Id.* at p. 75. Still, the 2019 FBA noted that he exhibited "deficits in being able [to] verbalize appropriately." *Id.* at p. 74.

The 2019 BIP

20. The 2019 BIP listed "teacher" and an "observation during work sessions" as sources of information used in the 2019 FBA. *Exhibit A*, p. 27. The 2019 FBA did not detail antecedents, behaviors, and consequences observed during the work sessions. *Exhibit P*, pp. 74-76. Though not noted in the 2019 BIP, Parent and Student were interviewed for the 2019 FBA. *Exhibit A*, p. 27; *Interview with Parent*.
21. The 2019 BIP's strength-based profile section documented family and community supports but omitted Student's skills and interests. *Exhibit A*, p. 27.
22. The FBA summary statement did not identify specific target behaviors but instead indicated that Student "demonstrates difficulty with executive function skills, social skills, and [sic] emotional regulation, and cognitive flexibility." *Id.* It hypothesized that the function of these difficulties is Student "likely feels out of control" or "needs a feeling of control." *Id.*

23. The strategies/outcomes worksheet envisioned a structured setting with minimal transitions, and choices with clear parameters and frequent positive reinforcement, to prevent negative behavior. *Id.* at pp. 27-28. Antecedent strategies included a “consistent routine, calm environment, shorter periods of time . . . a visual schedule . . . [and making] choices within clear boundaries.” *Id.*
24. Behavior teaching strategies included a visual schedule for Student to select three to five tasks and a reinforcing activity to work toward. *Id.* The desired alternative behaviors included accepting direction and support from adults, maintaining focus on a task, keeping everyone safe, and transitioning between activities with minimal support. *Id.*
25. Reinforcement strategies included selecting activities from photo icons such as bubbles, silly putty, a mini trampoline, or a ball pit. *Id.* A reinforcement card would contain the activity Student selected, and once Student earned five [] stickers to place on the card, he would achieve his selected activity. *Id.* There are no strategies for redirecting Student if he engaged in negative or unsafe behavior. *Id.; Interview with CDE Specialist 1.*
26. The crisis intervention plan provided that a “team of caring staff members will be identified who can be contacted if and when [Student] needs de-escalating. We know that he is much more successful and less volatile in a smaller setting with clear visual supports and clear reinforcement schedule.” *Exhibit A*, p. 28. The plan did not specify staff names or roles, describe situations in which the staff may be contacted, or explain how the staff would address behavior that may harm Student or others. *Id.* The 2019 BIP did not identify any de-escalation strategies for Student. *Id.* at pp. 27-30; *Interview with CDE Specialist 1.*
27. Case Manager was responsible for ensuring teachers monitored progress, with a desired performance level of increasing the occurrence of the identified alternative behaviors and decreasing the occurrence of the “behavior of greatest concern.” *Exhibit A*, p. 28. This section did not specify what is being measured (e.g. verbal or physical compliance) or how (e.g. point card, office discipline referrals or teacher reports). *Id.; Interview with CDE Specialist 1.*
28. The criterion for success indicated Student would “transition to school smoothly upon arrival, and complete 5 distinct tasks using his visual schedule and token reinforcement system 3 out of 4 sessions.” *Exhibit A*, p. 28. Transition and task completion, though, are distinct skillsets and this criterion reinforced only task completion. *Id.; Interview with CDE Specialist 1.*
29. The 2019 BIP’s contextual fit section indicated that Student’s “team will be provided support from our mental health providers, school counselor, and special education staff to address his concerns and implement his highly structured plan.” *Exhibit A*, pp. 28-29.

30. Case Manager was responsible for communicating the 2019 BIP to kindergarten staff. *Id.* at p. 29. The SCO requested policies from the BOCES related to the IDEA allegations accepted for investigation, including implementation, but only received polices for the use of physical intervention. *Response*, p. 5; *Exhibit K*.
31. Staff responsible for implementing special education programming at School have electronic access to IEPs and BIPs through Frontline Education. *Interview with Special Education Director*. At the beginning of the 2019-2020 academic year, Case Manager informed Student's teachers and providers of the 2019 IEP and the 2019 BIP, met with Paraprofessional to discuss Student's specific needs, and reviewed responsibilities with Paraprofessional. *Interviews with Case Manager, Paraprofessional, and Special Education Director*.
32. Paraprofessional approached these documents "with a grain of salt" because he does not "fully trust those who write IEPs." *Interview with Paraprofessional*. Though he is aware of his responsibilities, until he becomes familiar with a student, Paraprofessional does not "pass judgment upon what is written in an IEP." *Id.*

D. 2019-2020 Academic Year and Progress on 2019 IEP Goals

33. Student began kindergarten on August 22, 2019 with a modified schedule, attending 7:45 a.m. – 10:45 a.m. four days per week. *Exhibit A*, pp. 11, 20. Per amendment to the 2019 IEP on September 5, Student's dismissal increased from 10:45 a.m. to 12:30 p.m. *Id.* at pp. 20-21. After "analyzing the data" the IEP Team determined he met the "criteria" created on August 5 for following adult direction and demonstrating self-regulation skills. *Id.*
34. A typical day started with a teacher meeting Student outside at the curb to accompany him to the classroom because beginning the day in the multipurpose room with others would "likely lead to over-stimulation." *Id.* at pp. 11, 14. Paraprofessional assisted Student with other daily transitions, such as from recess to the classroom. *Interview with Paraprofessional*.
35. Case Manager provided small group and one-on-one academic support for Student, such as pull-out services for language arts and math, as well as social-emotional lessons. *Interview with Case Manager*. Paraprofessional pushed into Case Manager's classroom to provide ongoing support for Student and peers. *Interviews with Case Manager and Paraprofessional*.
36. Case Manager was responsible for monitoring progress on annual goals under the 2019 IEP and behavior under the 2019 BIP. *Interviews with Case Manager and Special Education Consultant*. Case Manager described tracking progress on daily charts and stated that Student was making progress during the first half of the academic year. *Id.* She acknowledged that she should have, but did not, input data in Frontline Education. *Id.*

37. Special Education Director joined the BOCES in the summer of 2020 and observed a lack of “oversight” for progress monitoring. *Interview with Special Education Director*. Some staff input data in Frontline Education while other staff documented progress with alternative tools, such as Google Docs. *Id.* Special Education Director intends to revise policies to ensure staff monitor progress consistent with a goal’s unit of measurement, track tangible data (i.e. “not just ‘he’s making progress’”), and always input data electronically. *Id.*
38. All progress monitoring data for Student were “lost or misplaced.” *Response*, pp. 3-4; *Interviews with Case Manager and Special Education Director*. The Governor of the State of Colorado issued an executive order on March 18, 2020 requiring all public and private elementary and secondary schools in Colorado to suspend in-person instruction due to the COVID-19 pandemic.⁷ The BOCES then closed schools for the remainder of the academic year. *Response*, p. 4. Staff of a private company hired to disinfect School placed all loose papers and notebooks from Case Manager’s classroom into boxes that have not been located. *Id.*
39. Even without data, the SCO finds that the relevant annual goals (#3, #5, and #6) did not adequately address behavior that interfered with Student’s learning. *Exhibit A*, pp. 6-8.
40. Goal #3 required Student to “follow directions related to the daily routine” during “typical kindergarten transitions.” *Id.* at p. 7. Goal #3 continued “[w]e will know he can do this when he accepts directions and completes a request 75% of the time.” *Id.*
41. CDE Specialist 2, trained in developing measurable annual goals, stated that Goal #3 was not designed to allow Student to participate and make progress in general education. *Interview with CDE Specialist 2*. The goal was vague in defining “typical kindergarten transitions” (i.e. are they mental or physical) and in describing how Student would demonstrate compliance (e.g. by staying in line, raising his hand, or not speaking). *Id.*; *Interview with CDE Specialist 1*. Also, since Student struggled to follow adult direction, it was not realistic for him to be able to meet these undefined objectives 75 percent of the time. *Interview with CDE Specialist 2*.
42. Goal #5 required Student “to perform 5 sensory and self-regulation strategies, when given a verbal prompt, on 3 of 4 attempts.” *Exhibit A*, p. 7. A verbal prompt involved Case Manager asking Student to “talk about” how he was feeling and how to regulate his body. *Interview with Case Manager*. Case Manager would then present Student with a ring of photos if he felt escalated. *Id.* One side of the photo allowed him to identify his feeling while the other side of the photo offered a sensory activity to calm himself. *Id.*

⁷ See *Colo. Exec. Order No. D 2020 007* (Mar. 18, 2020), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20007%20Ordering%20Suspension%20of%20Normal%20In-Person%20Instruction_0.pdf.

43. The SCO finds that this goal did not consider Student’s then present levels of performance. *Interview with CDE Specialist 2*. Because Student did not respond well to adult direction, expecting him to perform a task based on a verbal prompt, without adult support to access a specific strategy, was not appropriate. *Id.* Also, as written, the goal indicates that five strategies must be performed per one verbal prompt. *Interview with CDE Specialist 1*. It would be realistic for a child who is emotionally dysregulated to be able to perform only one, not five, calming technique at a time. *Id.*
44. Goal #6 required that Student “persist and remain with a typical kindergarten task through completion.” *Exhibit A*, p. 8. It continued “[w]e will know he can do this when he resists distractions and manages frustration to begin and complete a task within the time parameters set by his teacher 50% of the time.” *Id.* Identified as targeting self-determination, this goal is written for task completion. *Interview with CDE Specialist 1*. The ability to complete a task does not necessarily equate to self-advocacy or self-awareness. *Id.*
45. Regardless, the SCO finds that Goal #6 is not responsive to Student’s behavioral needs. *Interviews with CDE Specialist 1 and CDE Specialist 2*. Remaining with a task through completion is a challenge for most, if not all, kindergarten-age children. *Interview with CDE Specialist 2*. Also, resisting distraction and managing frustration—both undescribed in this goal—are unattainable objectives given Student’s age and identified social-emotional needs. *Id.* Moreover, the method to measure progress on this goal is vague. *Id.*
46. Student’s unsafe behavior intensified during the first half of the academic year, further demonstrating that this behavior interfered with learning. *Exhibit G*. Parent picked Student up at 10:30 a.m. on December 5 because he was hitting peers. *Id.* at p. 3. Student spent time in a classroom space designated for de-escalation on multiple occasions, often “kicking/screaming” while in the space. *Id.* at pp. 1-3. He spent between fifteen minutes and one hour in this space each time. *Id.* On January 22, 2020, Student eloped from School and a physical intervention ensued. *Id.* at p. 2.
47. Parent withheld Student from School following allegations that Case Manager and Paraprofessional improperly restrained him on February 12, 2020. *Exhibit M*, p. 3; *Exhibit Q*, p. 41. School staff did not contact Parent about a continued offer of a FAPE until at least April 1, 2020. *Exhibit M*, p. 3. Student did not participate in remote instruction during School’s closure due to the COVID-19 pandemic. *Exhibit Q*, p. 41.

E. BOCES’ Behavior Management System and Staff Training

48. The BOCES uses Crisis Prevention Institute’s Nonviolent Crisis Intervention Program (“CPI”) for crisis intervention and physical behavior management. *Exhibit J; Interview with Special Education Director*. CPI teaches a variety of interventions to prevent escalation and, hopefully, avoid the need for physical intervention. *Exhibit J; Interview with Special Education*

Director. Physical intervention should be used as a last resort, after attempts of lesser restrictive intervention have failed, under CPI. *Interview with Special Education Director.*

49. The BOCES requires CPI certification for special education and related service providers at all District schools. *Id.* Prior to Special Education Director's arrival at the BOCES, "there was not a clear policy because schools were training everyone." *Id.* She is working on specifying the category of employees, apart from special education staff, who require CPI certification. *Id.*
50. The BOCES offers CPI training (half-day refresher and full-day courses) once a month during the academic year. *Id.* E-mail reminders are used to inform staff of upcoming trainings. *Id.* Special Education Director also sends out a quarterly e-newsletter to District schools on various topics. *Id.* The October 2020 issue highlighted CPI and physical intervention. *Id.*
51. Paraprofessional received CPI certification on August 23, 2019. *Exhibit I*, p. 1. Case Manager received CPI certification on October 18, 2019. *Id.* at p. 2. Both held active CPI certifications on February 12, 2020. *Id.* at pp. 1-2.

F. Policies and Procedures regarding Disciplinary Incidents

52. When a student experiences a behavioral crisis at School, staff are instructed to use a variety of de-escalation strategies to calm the student. *Interviews with Case Manager and Paraprofessional.* For example, School uses a program termed zones of regulation to help students identify their emotions by pairing a certain emotion with colors, such as green for "ready to learn" and red for a heightened state of emotion. *Id.*
53. When possible, the student's teacher resolves a crisis. *Id.* However, if the teacher needs support, School has a "caring crisis team" that may be contacted by public address system for assistance. *Id.* This team during the 2019-2020 academic year included Case Manager, Paraprofessional, Former School Counselor, School Nurse, and Former School Principal.⁸ *Id.*
54. An "all-call" to the "caring crisis team" would detail the location of the crisis but not a student name. *Id.* Case Manager and Paraprofessional indicated that this process was listed in the 2019 BIP's crisis intervention plan. *Id.* Physical intervention is to be used only as a last resort, such as when a student's behavior poses a significant safety risk to that student or others. *Interviews with Special Education Director, Case Manager, and Paraprofessional.*
55. Under School's standard procedure, the staff member who restrains a student completes a written report of the incident. *Id.; Exhibit M*, pp. 1-2. District policy requires that the building principal be notified as "soon after [the restraint] as is practicable" and that the restraint be noted in the student's record. *Exhibit K*, p. 13.

⁸ Former School Counselor is currently a counselor for a District high school and Former School Principal is currently interim Superintendent for the District.

56. BOCES policy requires that the written report be submitted to its administration within one school day. *Id.* at p. 6. A principal or designee must notify the student's parent as soon as possible, but no later than the end of the school day, that a restraint was used. *Id.* A separate written report based on the findings of a staff review of the restraint must be provided to the student's parent within five calendar days of the use of restraint. *Id.*

G. February 12, 2020 Incident

Case Manager's Classroom

57. The behavioral incidents at issue in this investigation occurred on February 12, 2020. *Exhibit F; Exhibit M*, pp. 1-2. Shortly after 1:30 p.m., Student returned to School from recess with Paraprofessional by his side. *Exhibit F*, p. 1. Case Manager learned in the hallway that Student had a "rough time at recess" so she verbally guided him to her classroom to fill out his smiley face chart and determine what activity he wanted to work for. *Id.* Student selected robot coloring pages. *Id.* Case Manager went over the afternoon schedule with Student as she always does. *Id.* He was "happy" and "very compliant" at that time. *Exhibit M*, p. 1.

58. After Case Manager left the room to print the coloring pages Paraprofessional observed that Student had wet his pants. *Id.* Paraprofessional asked Student if they could change his clothes at which time Student's "attitude drastically changed from Green zone to Red zone immediately." *Id.* Case Manager returned from printing the pages and told Student that she found his clean set of clothes to change into. *Exhibit F*, p. 1.

59. Student yelled that he did not want to change his clothes and ran out of the classroom. *Id.* Paraprofessional blocked Student from accessing nearby stairs. *Id.* Case Manager gave Student the choice of changing in School Nurse's office or in another teacher's bathroom. *Id.* She told Student they needed to return to her classroom to talk about the choices, but he refused and began to hit and kick Case Manager and Paraprofessional. *Id.; Exhibit M*, p. 1.

60. At 1:35 p.m., Case Manager and Paraprofessional "had to escort" Student to a de-escalation space created for Student referred to as the Calm Corner. *Exhibit F*, p. 1; *Interview with Case Manager*. Located in the corner of Case Manager's classroom, the space had a pop-up [] tent and a blanket for Student. *Interviews with Parent, Case Manager, and Paraprofessional*. Case Manager told Student he needed to go to the Calm Corner to "get into the Green Zone." *Interview with Case Manager*. Student was kicking and pushing both staff and knocking books off the shelves as they made their way to the Calm Corner. *Id.*

61. Case Manager and Paraprofessional held up a four-panel partition at the Calm Corner, creating a barrier between them and Student. *Exhibit F*, p. 2; *Interviews with Case Manager and Paraprofessional*. The partition was not attached to a wall, but it pinned Student in the

Calm Corner and prevented his ability to leave (“Incident A”). *Interviews with Case Manager and Paraprofessional*. Student “escalated more while in the Calm Corner”; he kicked the partition, threw shoes over the partition, and hit the staff. *Interview with Case Manager*. He grabbed Case Manager’s skirt through a “slight opening” in the partition. *Exhibit F*, p. 2.

62. Case Manager and Paraprofessional asked Student to think about “things we can do to help our bodies get into the Green Zone” or “how we can get smiley faces to be able to get those coloring pages.” *Id.* By 1:55 p.m., they determined the Calm Corner was not working for Student and Case Manager had difficulty maintaining the “stamina” to hold the partition. *Id.*; *Interviews with Case Manager and Paraprofessional*. They withdrew the partition and Student moved out of the Calm Corner to the main area of the classroom. *Exhibit F*, p. 2.
63. Though Case Manager provided Student a choice with clear parameters consistent with the 2019 BIP, neither the 2019 IEP nor the 2019 BIP identified the Calm Corner with a partition or the zones of regulation as emotional regulation strategies. *Exhibit A*, pp. 1-14, 27-30. For these reasons, the SCO finds that Case Manager and Paraprofessional failed to fully implement the 2019 BIP.
64. Case Manager offered Student the same choice for locations to change his clothes and he responded by “running around the classroom” shouting, “I’m not going to change, no, no, no.” It was close to 2:00 p.m. and Case Manager heard second-grade students heading to her classroom, so she used “C.P.I. skills to restrain [Student] while sitting on the ground.” *Exhibit F*, p. 2. She “did not want to have [Student] have to deal with other students in the room.” *Id.*
65. In the hold (“Incident B”), Student and Case Manager sat on the floor facing forward with Student positioned between Case Manager’s legs as she held his “arms crossed high above his chest.” *Id.*; *Interview with Case Manager*. Student kicked and bit Case Manager. *Exhibit F*, p. 2. Case Manager did not impede Student’s ability to breathe or wrap her legs around him. *Interview with Case Manager*. She could not remember whether Student was standing or seated when she initiated the hold. *Id.*
66. A paraprofessional walking with the second-grade students did not allow them to enter the classroom and took them to a different area of School. *Id.* Case Manager released Student from the hold shortly thereafter. *Interview with Case Manager*. The SCO finds that Incident B lasted up to two minutes at most. *Id.*
67. CDE Specialist 1, trained in physical intervention and personal safety techniques, including CPI, advised that CPI does not teach a hold where the staff member and the child are seated on the ground. *Interview with CDE Specialist 1*. In this position, a child can kick and, where the staff member’s arms are not underneath the child’s armpits, a child can bite the staff

member's hands. *Id.* When this happens, an instinct for the staff member may be to lean the child forward which can prevent the child from breathing. *Id.*

68. CPI instructs staff to use the Child Control Position to restrain students who are a danger to themselves or others. *Id.*; *Exhibit J*, p. 147. In this position, a staff member stands behind the student. *Interview with CDE Specialist 1, Exhibit J*, p. 147. The staff member crosses the student's arms across the student's waist and slides the student's crossed arms up around the student's collarbone. *Interview with CDE Specialist 1, Exhibit J*, p. 147. The staff member's hands hold each of student's wrists. *Interview with CDE Specialist 1, Exhibit J*, p. 147. The staff member then leans the student back on the staff member's thigh and knee. *Interview with CDE Specialist 1, Exhibit J*, p. 147.
69. A child in a properly performed Child Control Position cannot drop to the ground, kick, or bite because the posture of the hold deprives the child of leg strength and shifts the child's balance backwards. *Interview with CDE Specialist 1.*
70. CDE Specialist 1 identified blocking and moving as one of the CPI techniques that could have been used in this situation. *Id.* This involves a staff member using his or her body to physically block or prevent a student's unsafe behavior. *Id.* If implemented here, blocking would have involved Case Manager and/or Paraprofessional creating a physical barrier between Student and the students in the hallway, eliminating any ability to access those students. *Id.*
71. Following Incident B, Case Manager asked Student if he could walk to School Nurse's office. *Exhibit F*, p. 1. Student refused to change his clothes and continued to kick Case Manager and Paraprofessional, so they "carried" him to School Nurse's office. *Id.* Paraprofessional and Case Manager had determined "the sound box in the nurse's office was the overall safest place for the situation." *Exhibit M*, p. 1.

The Hallway

72. Case Manager and Paraprofessional carried Student from the classroom to School Nurse's office, about 200 feet down the hall ("Incident C"). *Interview with Paraprofessional.*
73. Case Manager said Student faced forward in a seated position, as if he was in a chair, with each adult placing one arm around Student's arms and the other arm underneath Student's buttocks. *Interview with Case Manager.* Paraprofessional said Student was positioned horizontally, with his face and torso facing up toward the ceiling, as one adult held Student's legs and one adult held beneath Student's arms while they walked sideways leg over leg. *Interview with Paraprofessional.* Paraprofessional said they used "CPI training to escort" Student from the classroom to School Nurse's office and estimated it took three minutes. *Id.*

74. The SCO finds Paraprofessional's description most reliable, but no CPI technique authorizes picking up a child or carrying a child while restrained. *Interview with CDE Specialist 1*. Carrying a student in an escalated state creates a risk of injury for the student and staff. *Id.* For example, if the student compressed his or her legs this could not only throw staff off balance but also prevent the student from breathing. *Id.*
75. CPI teaches a Two-Person Transport Position to safely transport students. *Id.* In this position, two staff members stand on either side of the student. *Id.* The student's arms are stretched outward across each staff member's torso. *Id.* Each staff member loops his or her internal arm over the student's forearm and uses his or her outer arm to hold down the student's wrists. *Id.* A child in a properly performed Two-Person Transport Position can walk. *Id.*
76. Case Manager and Paraprofessional released Student in the hall outside of School Nurse's office, and School Nurse unlocked the office door. *Interview with School Nurse*. They walked into the office just after 2:00 p.m. *Exhibit F; Exhibit M*, pp. 1-2; *Interview with School Nurse*.

School Nurse's Office

77. The office is fifteen feet wide by twenty feet long and contains one desk, three medical treatment tables, one small round table, and a bathroom. *Interview with School Nurse*. The office also contains an audiometric booth (the "Booth") used to administer three-minute hearing tests for students. *Id.* Case Manager told School Nurse that they came to her office that day to see if they could place him in the Booth to calm down. *Id.*
78. The Booth is "not very large"; at most measuring 4.5 feet long by 4.5 feet wide and eight feet tall. *Interviews with School Nurse and Paraprofessional; Exhibit S*. The Booth has one door that does not lock or have a window. *Exhibit S*, p. 1; *Interview with School Nurse*. There is one unobstructed window in the middle of one side of the Booth adjacent to the door. *Exhibit S*, p. 2. It would be difficult, if not impossible, to see the full interior of the Booth through the window while positioned outside the Booth's closed door. *Id.* at pp. 1-3. The Booth is lighted from the inside and has two vents on the interior ceiling. *Id.* at pp. 3-4. "Muffled" sound can be heard from inside and outside of the Booth with the door closed. *Interview with School Nurse*.
79. Once in the office, Student was "running around pushing chairs and refusing to change." *Exhibit F*, p. 2. He was also "pushing and kicking" Case Manager and Paraprofessional. *Id.* Case Manager told Student that he "would need to go in [the Booth] until [he] could calm down." *Id.*; *Exhibit M*, p. 2. Case Manager and Paraprofessional did not pick Student up but "herded" him into the Booth with their bodies. *Interview with School Nurse*. Though it is not precisely clear from the Record, the SCO finds that Student entered the Booth ("Incident D") at some point between 2:05 and 2:15 p.m. *Exhibit F; Interview with School Nurse*.

80. Paraprofessional closed the door and stood in front of it “preventing [Student] from just swinging the door open and running out . . .” *Exhibit M*, p. 2. He told Student “until you can show you are not a harm to self or others I cannot let you out.” *Interview with Paraprofessional*. Student was placed in the Booth with a plastic bag of clean clothes and “started to use the bag to harm himself” so Paraprofessional removed the bag and clothes but closed the door. *Id.*; *Exhibit F*, p. 3. Case Manager then left the office to speak with Former School Principal and Former School Counselor. *Exhibit F*, p. 3.
81. Student “kept yelling, hitting and kicking the walls saying that he wasn’t going to change.” *Id.* at p. 1. He fell asleep about ten to fifteen minutes after being placed in the Booth. *Interview with School Nurse*. During this time Paraprofessional and School Nurse were “sitting and talking, observing [Student] every 5 or so minutes to ensure his safety and state of consciousness.” *Exhibit M*, p. 2. Case Manager returned to the office and School Nurse called Parent to ask her to come to School because Student had wet his pants and refused to change. *Exhibit F*, p. 3; *Interview with School Nurse*.
82. Student “woke up looking angry.” *Exhibit F*, p. 3. Paraprofessional opened the Booth door at some point between 3:15 p.m. and 3:20 p.m. and Student “escalated quickly” as he ran toward a table to grab insulin and medical equipment. *Exhibit F*, p. 3; *Interview with School Nurse*. He was “pushing and kicking” Case Manager. *Exhibit F*, p. 3. A student “with severe medical needs” then entered the office for treatment. *Id.*; *Interview with School Nurse*.
83. Case Manager and Paraprofessional “herded” Student back into the Booth one minute after he had exited (“Incident E”). *Exhibit F*, p. 3; *Interview with School Nurse*. Paraprofessional closed the door and stood in front of it to prevent Student from leaving the Booth. *Exhibit M*, p. 2. Parent arrived at 3:30 p.m., not long after being called by School Nurse. *Exhibit R*, p. 1; *Interview with Parent*. Parent went into School Nurse’s office, but Case Manager escorted her to the hallway because the other student was still receiving medical treatment. *Exhibit F*, p. 3. Case Manager explained to Parent what had happened. *Id.*; *Interview with Case Manager Parent*.
84. Student remained in the Booth with Paraprofessional standing at the door. *Exhibit F*, p. 4; *Interviews with Case Manager and Parent*. Parent entered the office after the other student departed. *Interviews with Case Manager, Paraprofessional, and Parent*. Student was calm but started to kick and scream once he saw Parent look at him through the Booth window. *Interview with Parent*. Paraprofessional opened the Booth door at 3:50 p.m. *Interviews with School Nurse and Parent*. The School day ended at 4:05 p.m. *Interview with School Nurse*.

H. Specific Restraint Review and Annual Restraint Review

85. Case Manager typed an incident report on the morning of February 13 and provided it to BOCES and School administration that same day. *Interview with Case Manager; Exhibit F*.

Former School Principal provided the report to Parent on February 13. *Interviews with Case Manager and Parent*. Paraprofessional typed an incident report on February 13 and e-mailed it to Case Manager, Former School Principal, Former School Counselor, Former Kindergarten Teacher, and BOCES Special Education Coordinator at 2:03 p.m. *Exhibit M*, pp. 1-2.

86. Parent was aware of past physical interventions involving Student at School and she was verbally informed that certain staff were CPI-certified. *Interview with Parent*. However, the SCO finds no evidence that Parent was notified in writing of the type of restraints that might be used with Student or under what circumstances staff may physically engage with him. *Id.*
87. BOCES policy requires that a review for each incident of restraint be conducted and that a written report based on this review be provided to a parent. *Exhibit K*, pp. 6-7. Special Education Director stated that BOCES Special Education Coordinator reviewed the February 12, 2020 incident with School staff. *Interview with Special Education Director*. Special Education Director did not see “specifics” related to the review of this incident but stated she would like to create a “more clear process” for the staff review. *Id.* The SCO requested all written documentation regarding the February 12, 2020 incident and received only the typed incident reports from Case Manager and Paraprofessional. *Response*, p. 4.
88. BOCES policy requires that a general review process be performed at least annually to ensure the BOCES properly administers restraint and minimizes the use of restraint through positive behavior interventions. *Exhibit K*, p. 7. The SCO requested but did not receive a copy of the BOCES’ annual restraint review for the 2019-2020 academic year. *Response*, p. 4.

I. Programming and Services for the 2020-2021 Academic Year

89. In July 2020, Special Education Consultant coordinated a plan to review and revise the 2019 IEP and the 2019 BIP, enlisting psychologists and behavior specialists to reevaluate Student for communicative status, academic performance, social-emotional wellness, and motor abilities. *Exhibit L*, p. 56; *Exhibit Q*, pp. 44-54; *Interview with Special Education Consultant*.
90. On August 31, 2020, a properly constituted multidisciplinary team (“MDT”) discussed the evaluation data. *Exhibit Q*, pp. 35-40, 74-75. The MDT found that Student met the criteria for eligibility under the SED category. *Id.* at pp. 35-40, 76-77.
91. That same day, a properly constituted IEP Team, including Parent and a new Special Education Teacher, reviewed and revised Student’s special education programming. *Id.* at pp. 1-25, 74-75. The IEP Team finalized an amended IEP and BIP for Student at the meeting, but also decided to retain Student in kindergarten. *Id.* at pp. 19, 21-25.
92. Parent first received the revised documents on October 22, 2020 from the SCO as part of this investigation. *Interview with Parent*. Special Education Teacher sent the documents to

Parent on October 28, 2020. *Interview with Special Education Teacher*. Special Education Teacher said there was “miscommunication on who was sending out the documents and whose responsibility that was.” *Id.* The 2020-2021 academic year started on September 8, 2020, with the amended IEP and BIP in full effect for Student. *Id.*

93. The revised IEP, in part, contains annual goals for social-emotional wellness (“[b]y his next IEP date, when given a prompt, [Student] will choose and follow a calming or focusing strategy from a picture menu, on 3 of 4 attempts”) and self-determination (“[b]y his next IEP date, [Student] will be safe in class by asking for help appropriately seven out of ten times as measured through observation and tally chart”). *Exhibit Q*, pp. 11-13. The revised IEP also includes, in part, four hours per week of direct behavioral intervention and thirty minutes per week of direct mental health care services. *Id.* at p. 17.
94. The revised BIP identifies target behaviors as noncompliance, elopement, and aggression. *Id.* at p. 20. It details the function as avoidance and attention-seeking. *Id.* Setting event strategies include new instructions for communicating with Parent to ensure behavioral consistency and antecedent strategies include new instructions such as providing wait time before requiring responses and frequent check-ins to allow him to advocate for help. *Id.* at p. 21. Behavior teaching strategies include new directives to ensure Student is instructed and prompted to engage in self-regulation and communicate when a break is needed. *Id.* Finally, de-escalation strategies are set out in a revised crisis intervention plan, to include a bathroom plan and step-by-step instructions to address aggression and elopement. *Id.* at pp. 22-23.
95. CDE Specialist 1 and CDE Specialist 2 advised that the amended IEP and BIP are better aligned with respect to addressing behavior. *Interviews with CDE Specialist 1 and CDE Specialist 2*. Parent indicated that the amended IEP and BIP are better designed to meet Student’s needs. *Interview with Parent*. Student has had one accident at School this academic year, but he returned to class within minutes of being changed. *Id.* Though Student still has “up and down days” School staff have been able to quickly calm him if he becomes dysregulated. *Id.* His academic performance has also improved because he is in the classroom participating. *Id.*

CONCLUSIONS OF LAW

Based on the FINDINGS OF FACT above, the SCO enters the following CONCLUSIONS OF LAW:

Conclusion to Allegation No. 1: The BOCES denied Student a FAPE because the 2019 IEP was not tailored to meet Student’s individualized behavioral needs.

The first allegation accepted for investigation suggests that the 2019 IEP was not tailored to Student’s individualized needs for two reasons:

- 1) the annual goals did not adequately address behavior that interfered with learning, and
- 2) the strategies and supports in the 2019 BIP did not adequately address behavioral needs.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 206-207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* at 207.

The inadequacies alleged by Parent are now addressed below considering these legal standards.

A. Development of the 2019 IEP

An IEP must contain measurable goals designed to: 1) meet the needs that result from the student's disability to enable him or her to be involved in and make progress in the general education curriculum, and 2) meet each of the student's other educational needs that result from his or her disability. 34 C.F.R. § 300.320(a)(2). In developing an IEP, the IEP team must consider the use of positive behavioral interventions and supports to address behavior for a student whose behavior impedes his ability to learn. *Id.* § 300.324(a)(2)(i).

Here, the 2019 IEP contained annual goals for social-emotional functioning and positive behavioral interventions and supports provided through the 2019 BIP. (FF #s 9, 20-29.) Accordingly, the SCO finds and concludes that the 2019 IEP development process complied with IDEA's procedures. *Rowley*, 458 U.S. at 206. The second question is whether these annual goals and positive behavioral supports were substantively appropriate. *Id.* at 207.

B. Annual Goals and Positive Behavioral Supports

An IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. In essence, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 1001. IEP goals must be based on a student's unique needs. *Id.* at 999. Because the evaluation of progress is so closely tied to IEP goals, the IEP team must ensure that IEP goals are clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff'd*, 38 IDELR 63 (6th Cir. 2003, *unpublished*).

The IEP team must also consider the use of positive behavioral interventions and supports whenever a student's behavior interferes with the student's ability to benefit from his or her educational programming. 34 C.F.R. § 300.324(a)(2)(i). A BIP can document the "use of positive behavior interventions, supports and other strategies to address the behavior of a child whose behavior impedes the child's learning or that of others." *CDE IEP Procedural Guidance Manual*, p. 121. To be effective, a BIP should detail the target behaviors and the motivation behind these target behaviors. *Id.* If a student displays unsafe behaviors, a BIP should also include a crisis intervention plan to address positive intervention and de-escalation strategies. *Id.* IEP teams typically conduct an FBA prior to developing a BIP, but the IDEA does not require that positive behavioral supports be based on an FBA. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46683 (Aug. 14, 2006).

Here, the SCO finds and concludes that the 2019 IEP was not tailored to adequately meet Student's unique behavioral needs. First, the annual goals to address behavior were not clear or objectively measurable. (FF #s 39-45.) These goals were also not designed to meet Student's disability-related needs so that he could be involved in and make progress in the general education curriculum. (*Id.*) For instance, though Student had difficulty expressing his needs socially Goal #5 required him to "talk about" how he was feeling to access a sensory strategy. (FF # 42). Given the impact of Student's disability he required adult support to access an appropriate sensory strategy. (*Id.*)

Second, the 2019 IEP should have included additional goals to address identified social-emotional and sensory processing needs. (FF #s 8, 39-45.) Notably, the goal developed by amendment in January 2019 (for Student to accept a "prompt to get his pants changed") was not included in the 2019 IEP. (FF #s 7, 9.) Only four months elapsed between its creation and the development of the 2019 IEP. (*Id.*) The evidence in the Record—particularly the triggering event of February 12, 2020—shows that Student continued to struggle with toilet training. (FF #s 57-58.)

Third, there are no progress monitoring data or reports for the goals. (FF #s 36-38.) All hard copy data for Student were placed into boxes by the staff of a cleaning company hired to disinfect School during its closure due to the COVID-19 pandemic. (FF # 38.) The boxes have not been located. (*Id.*) Case Manager did not input data in Frontline Education. (FF # 36.) Nevertheless, the evidence in the Record shows that Student's unsafe behavior intensified during the first half of the academic year and interfered with his ability to make progress. (FF # 46.)

Fourth, the 2019 FBA did not comprehensively analyze Student's behavioral needs which compromised the IEP Team's ability to develop adequate goals and positive behavioral supports. (FF #s 15-19.) The IEP Team never identified a target behavior and its function; instead the 2019 FBA inappropriately identified the target behavior as oppositional defiance, a disorder. (FF #s 16-17.) This resulted in an FBA summary statement that did not clearly describe challenging behaviors, what happens right before these behaviors, and what happens right after the behaviors. (FF # 22.)

Fifth, the 2019 BIP failed to detail who would teach Student the identified alternative behaviors or in what manner they would teach them. (FF #s 24-25.) Also, the 2019 BIP did not identify how staff would redirect Student back to a desired behavior if he did not accept direction, focus on a task, keep himself and others safe, or transition with minimal support. (*Id.*)

Finally, despite the use of physical intervention since preschool and at least one documented “hold,” the 2019 BIP did not include any de-escalation strategies. (FF #s 5, 26.) Some 2019 IEP accommodations appropriately targeted self-regulation and sensory needs, but they were not included in the 2019 BIP. (FF #s 13.) The crisis intervention plan did not detail clear steps staff could take to support safety and de-escalation of Student’s behavior in emergency situations. (FF # 26.) It should have detailed the type of restraints that might need to be used (as a last resort after a continuum of interventions from verbal to nonverbal), the specific circumstances in which restraint might be used, and the trained staff to be involved. (*Id.*)

All combined, these factors lead the SCO to find and conclude that the BOCES violated IDEA procedural requirements related to the content and development of the 2019 IEP at 34 C.F.R. §§ 300.320(a)(2)(i) and 300.324(a)(2)(i).

A procedural violation results in denial of a FAPE for a child if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Here, the behavioral goals and supports described in the 2019 IEP and the 2019 BIP were not reasonably calculated to enable Student to make progress appropriate in light of his circumstances, resulting in denial of a FAPE. *Id.*; *Andrew F.*, 137 S. Ct. at 999. Even without progress monitoring data, the evidence in the Record shows that Student’s behavioral challenges resulted in a loss of instruction that has impeded his educational performance. (FF # 46.) This led to an improper use of restraint on February 12, 2020 (FF #s 57-84.) Ultimately, Student was retained in kindergarten for the 2020-2021 academic year. (FF # 91.)

In determining how to remedy the denial of a FAPE, the SCO considers the actions taken by the BOCES to address Student’s behavior for the 2020-2021 academic year. (FF #s 89-95.) The BOCES revised the 2019 IEP and the 2019 BIP, prior the Complaint being filed, through the IEP process based on the results of a reevaluation. (*Id.*) These revisions, most notably the significant revisions made to the 2019 BIP, address the concerns raised above. (*Id.*)

The revised BIP identifies specific target behaviors and their functions. (FF # 94.) This allowed for a match between Student’s specific disability-related need and instructional strategies and supports. (*Id.*) For instance, the revised BIP identifies one function of behavior as attention-seeking. (*Id.*) Responsive to the newly identified function, the revised BIP provides specific instructional supports and teaching strategies intended to increase positive recognition and opportunities for Student to respond while supporting Student with a critical need, emotional

regulation. (*Id.*) Also, the revised BIP includes a more comprehensive crisis intervention plan to target unsafe behavior and behavior challenges associated with toilet training. (*Id.*)

Thus, the SCO finds and concludes that the BOCES has partially remedied the denial of a FAPE. Acknowledging that the revised IEP details four hours of weekly direct behavioral intervention and 30 minutes of weekly direct mental health care services, the SCO will tailor the remedy in the next section below to the remaining need for compensatory services in the area of social-emotional functioning due to the failure to properly implement the 2019 IEP.

Finally, the SCO cautions the BOCES that its failure to provide Parent with finalized versions of the documents could have resulted in another denial of a FAPE. (FF # 92.); *See M.C. v. Antelope Valley Union High School District*, 858 F.3d 1189, 1198 (9th Cir. 2017) (finding if a “parent is unaware of the services offered to the student—and, therefore, can't monitor how these services are provided—a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP”). In this case, Parent meaningfully participated in the IEP process and was aware of the services and supports that are being provided. (FF #s 89-91.)

Conclusion to Allegation No. 2: The BOCES denied Student a FAPE because School staff failed to properly implement the 2019 IEP, failed to include a statement of all special education services in the 2019 IEP, and failed to properly safeguard Student’s education records.

The second allegation accepted for investigation suggests that the 2019 IEP—namely its positive behavioral interventions and supports—was not properly implemented on February 12, 2020.

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.*, 137 S. Ct. at 994 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Rowley*, 458 U.S. at 181 (1982)).

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

A. Implementation of the 2019 IEP

Here, Case Manager informed teachers and related services providers of their responsibilities under the 2019 IEP and the 2019 BIP. (FF # 31.) Case Manager also reviewed Student's behavioral needs with Paraprofessional. (*Id.*) The 2019 IEP and the 2019 BIP remained available to all teachers and related services providers in Frontline Education. (FF # 31.) Accordingly, the SCO finds and concludes that the BOCES complied with 34 C.F.R. § 300.323(d).

The 2019 BIP required that staff minimize transitions and give Student choices within clear parameters. (FF # 23.) The 2019 BIP included strategies to prevent challenging behavior, such as maintaining consistent routines and a calm environment. (*Id.*) The 2019 BIP included strategies to make the challenging behavior less reinforcing to Student, namely using a visual schedule to select three to five tasks and a reinforcing activity to work toward. (FF #s 23-24.)

For unsafe behaviors, the crisis intervention plan provided that a "team of caring staff members will be identified who can be contacted if and when [Student] needs de-escalating. We know that he is much more successful and less volatile in a smaller setting with clear visual supports and clear reinforcement schedule." (FF # 26.) Case Manager and Paraprofessional explained if additional supports were needed to resolve unsafe behavior, an "all-call" could be made over School's public address system to the "caring crisis team." (FF #s 53-54.) This team included Former School Principal, Former School Counselor, and School Nurse. (FF # 53.)

On February 12, 2020, Student filled out his smiley face chart and selected an activity to work toward after recess. (FF # 57.) Case Manager went over the afternoon schedule with Student. (*Id.*) Student was "happy" and "very compliant" at that time. (*Id.*) However, Student escalated after Paraprofessional asked Student if they could change his clothes due to a bathroom accident. (FF # 58.) Student ran out of the classroom, and though he was offered a choice of locations to change his clothes, Student started to kick and hit Case Manager and Paraprofessional. (FF # 59.) This led to a series of improper restraints. (FF #s 57-84.)

Case Manager and Paraprofessional implemented strategies to maintain a consistent routine and provide a desired activity for Student to work toward. (FF # 57.) Student was also given a clear choice of locations to change his clothes, both prior to and after escalating. (FF #s 59, 63-64.) However, these strategies are not designed for calming or de-escalation. (FF # 26.) Case Manager and Paraprofessional attempted strategies to calm Student (e.g. the Calm Corner and the zones of regulation), but these strategies are not included the 2019 BIP. (FF #s 57-64.) Indeed, Paraprofessional stated that he approached IEPs and BIPs "with a grain of salt." (FF # 32.)

The 2019 BIP does not identify de-escalation strategies. (FF # 26.) Still, Case Manager and Paraprofessional understood the crisis intervention plan to mean that an "all-call" could be made to a "caring crisis team" over the public address system if additional support was needed to resolve a behavioral crisis. (FF #s 53-54.) Neither Case Manager nor Paraprofessional contacted the "caring crisis team" on February 12, 2020, but instead resorted to physical intervention (a strategy not included in the 2019 BIP). (FF #s 57-84.) Because Case Manager and

Paraprofessional failed to implement the 2019 BIP, the SCO finds and concludes that the BOCES violated 34 C.F.R. § 300.323(c)(2).

Because it is within the scope of this investigation, the SCO turns to implementation of the 2019 IEP's service minutes and progress monitoring on the 2019 IEP's annual goals.

The 2019 IEP provided that mental health support would be provided to Student and Parent "as needed." (FF # 11.) Student and Parent received 45 weekly minutes of counseling from a School-based health center therapist through November 2019. (FF # 12.) These minutes were not included in the 2019 IEP's service delivery grid. (*Id.*) Because School staff failed to implement this aspect of the 2019 IEP after November 2019, the SCO finds and concludes that the BOCES violated 34 C.F.R. § 300.323(c)(2). The SCO also finds and concludes that the BOCES violated the IDEA by failing to include the mental health service minutes in the 2019 IEP's service delivery grid. 34 C.F.R. § 300.320(a)(4) (requiring an IEP to include a statement of the special education services to be provided to the child).

Under the 2019 IEP, progress reports were to be provided to Parent at the same time as report cards. (FF # 10.) Parent did not receive progress reports for the 2019 IEP because all data were lost when a private cleaning company hired to disinfect School during the COVID-19 pandemic placed all loose papers and notebooks from Case Manager's classroom into boxes that have not been located. (FF # 38.) Thus, the BOCES violated BOCES violated 34 C.F.R. §§ 300.320(a)(3) and 300.323(c)(2).

Finally, the circumstances here raise concerns with the safeguarding of education records and other personally identifiable information. (FF # 38.) The IDEA requires school districts to protect the confidentiality of personally identifiable information contained in education records. 34 C.F.R. § 300.623. In this case, Student's progress monitoring data were lost in part due to the actions of a third party during a global pandemic and they have not been located. (FF # 38.) Because progress monitoring data necessarily contain personally identifiable information, the SCO also finds and concludes that the BOCES violated 34 C.F.R. § 300.623.

B. Materiality of Failure to Implement

Not every deviation from an IEP's requirements results in a denial of a FAPE. *L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. Appx. 252, 260 (10th Cir. 2005) (holding that minor deviations which did not impact a student's ability to benefit from special education program did not amount to a "clear failure" of the IEP). Thus, a "finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry." *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). The "SCO must also determine whether the failure was material." *Id.*

The failure to implement a "material", "essential", or "significant" provision of an IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822

(9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE).

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

Here, the SCO finds and concludes that the BOCES’ failure was material, resulting in denial of a FAPE. *Van Duyn*, 502 F.3d at 822. Student suffered “demonstrable educational harm” leading up to February 12, 2020. *Id.*; (FF # 46.) There are no progress reports for the 2019 IEP’s annual goals up to that day and the evidence in the Record shows that Student’s behavior interfered with his ability to be present in the classroom. (FF #s 38, 46.) These challenges intensified in December 2019, shortly after Student stopped receiving weekly mental health services. (FF #s 12, 46.) Student was improperly restrained on February 12, 2020 and ultimately retained in kindergarten for the 2020-2021 academic year. (FF #s 57-84, 91.)

C. Compensatory Services

Compensatory services are 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 services need not be an “hour-for-hour calculation.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Here, the BOCES failed to provide Student with mental health services after November 2019 despite considerable emotional and behavioral regulation needs. (FF #s 8, 12.) Indeed, he displayed significant behavioral difficulties by December 2019 and leading up to the incident of February 12, 2020. (FF # 46.) Parent then withheld Student from School, but School staff did not reach out to Parent about a continued offer of a FAPE until April 1, 2020. (FF # 47). This means that Student missed mental health service minutes in December, January, February, and March. (FF #s 12, 47.) Student’s revised IEP requires four hours per week of direct behavioral intervention and thirty minutes per week of direct mental health care services. (FF # 93.) The SCO, in consultation with CDE Consultant 2, has devised a compensatory education award that seeks to benefit Student without overburdening Student.

Given the significance of the behavioral and mental health services Student already receives at School, an increase in those services seems imprudent. (*Id.*) During the 2019-2020 academic year, Parent and Student were receiving forty-five minutes of weekly counseling from a school-based health center therapist with success until November 2019. (FF # 12.) The SCO, therefore, awards Student nine hours of parent-child mental health services to be provided through a contract between the BOCES and a suitable, licensed provider.

D. Systemic IDEA Violations

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

Here, the SCO finds and concludes that the IDEA violations are systemic in nature. The SCO did not receive any BOCES or District policies related to the IDEA allegations as requested for this investigation. (FF # 30.) Written policies are essential to ensuring staff understand their responsibilities and provide special education services consistent with ECEA Rules and the IDEA. The lack of written policies on its face shows that the violations here were not unique to Student.

Additionally, Paraprofessional stated he approaches IEPs with a “with a grain of salt” because he does not “fully trust those who write IEPs.” (FF # 32). The failure to implement the 2019 IEP here resulted in multiple improper restraints of Student. (FF #s 57-84). Moreover, Special Education Director joined the BOCES in the summer of 2020 and observed a lack of “oversight” for progress monitoring. (FF # 37). The inconsistencies in monitoring progress contributed to the loss of Student’s data because Case Manager did not input data in Frontline Education. (FF # 36). Accordingly, to ensure relevant policies are in place and designed for the appropriate provision of services for all IDEA-eligible students in the BOCES, the SCO will set forth specific remedies consistent with the IDEA to address this concern.

Conclusion to Allegation No. 3: The BOCES violated the PPRA on February 12, 2020. Incidents B and C qualified as physical restraints. School lacked an appropriate basis to use the restraints.

In the Complaint, Parent alleges School staff lacked a proper basis for restraining Student on February 12, 2020. As a preliminary matter, the SCO must determine whether Incident B and Incident C constituted physical restraints within the scope of the PPRA.

A. Whether Incidents B and C are Physical Restraints

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

“Physical restraint” means “the use of bodily, physical force to involuntarily limit an individual’s freedom of movement.” *Id.* 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).

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

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

Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, 69 IDELR 80 (OCR 2016) (“*Dear Colleague Letter*”); *see also Boulder Valley RE-2 Sch. Dist.*, 120 LRP 14036 (SEA CO 3/16/20).

1. Incident B

Incident B, the hold on the classroom floor, does not fall within an exception and, thus, qualifies as a physical restraint. After Incident A, Student left the Calm Corner and was offered a choice of locations to change clothes. (FF #s 62-64.) Student started “running around” the classroom yelling “I’m not going to change, no, no, no.” (FF # 64.) Case Manager initiated a hold—unauthorized by CPI—where she and Student were seated on the floor facing forward. (FF #s 64-

65.) Student sat between Case Manager's legs as she held Student's "arms crossed high above his chest." (FF # 65.) Student kicked and bit Case Manager during Incident B. (*Id.*)

The physical contact limited Student's freedom of movement and was not made for the protection of Student or others or to calm or comfort Student. (FF # 64-66). Case Manager made physical contact with Student because she heard second-grade students heading to her classroom. (FF # 64.) These other students were with a paraprofessional and never entered the classroom. (FF # 66.) Paraprofessional was present in the classroom and could have blocked the door. (FF #s 64-66). Though the Record suggests Student escalated upon leaving the Calm Corner, it does not detail the nature of this escalation apart from "running around." (FF # 64.)

For these reasons, the SCO cannot find that Case Manager made contact for the "protection of the student or others" or for the "purpose of calming or comforting the student." Rule 2620-R-2.00(8)(c)(i)-(ii). Thus, the SCO finds and concludes that Incident B constituted a physical restraint.

2. Incident C

Incident C, which occurred in the hallway, does not fall within an exception and, thus, qualifies as a physical restraint. Case Manager and Paraprofessional made physical contact with Student to transport Student from the classroom to School Nurse's office. (FF #s 72-76.) They carried Student 200 feet down the hallway but described different methods for how they held Student. (FF #s 72-73.) Incident C lasted three minutes. (FF # 73.)

Because Case Manager and Paraprofessional carried Student, Incident C plainly limited Student's freedom of movement and went beyond "a temporary touching or holding of the hand, wrist, arm, shoulder, or back." *Dear Colleague Letter*, 69 IDELR 80 (OCR 2016). For this reason alone, the SCO finds and concludes that Incident C fell outside the scope of minimal physical contact during an escort and, instead, constituted a physical restraint.

Moreover, the exception in Rule 2620-R-2.00(8)(c)(iii) applies to "minimal physical contact for the purpose of *safely* escorting a student from one area to another." (emphasis added). The escort must be safe. *Id.* Where staff members deviate from the adopted physical behavior management program, it cannot be said that the staff members *safely* escorted a student from one area to another. *Boulder Valley RE-2 Sch. Dist.*, 120 LRP 14036 (SEA CO 3/16/20) (emphasis added). "The absence of an injury does not prove that the physical contact was safe." *Id.*

No CPI technique authorizes carrying a child while restrained, whether as described by Case Manager or Paraprofessional. (FF # 74.) Under CPI, the Two-Person Transport Position should be used to move a student from one area to another. (FF # 75.)

Here, Case Manager and Paraprofessional plainly deviated from CPI, endangering Student's safety. (FF # 73.) They risked dropping Student on the floor given his escalated state. (*Id.*) Also,

the carries they described to the SCO would allow for Student to potentially control their movement by kicking his legs and applying force to their bodies as they walked. (*Id.*); See *Mesa County Sch. Dist. 51*, 119 LRP 37621 (SEA CO 6/25/19). For these reasons, the SCO cannot find that Case Manager and Paraprofessional used the “minimal physical contact for the purpose of safely escorting” Student. Rule 2620-R-2.00(8)(c)(iii). Thus, the SCO finds and concludes that Incident C constituted a physical restraint and not an escort.

B. Whether School Had a Basis for the Restraints

Having determined that Incidents B and C constituted physical restraints, the SCO must next evaluate whether School had a basis for using the restraints.

Under the PPRA, a school must have an appropriate basis for the use of restraint. Rule 2620-R-2.01. 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 of discipline or as a threat to gain control of a student’s behavior; and
- Be used only for the period of time necessary and using no more force than necessary, while prioritizing the prevention of harm to the student.

Id. School must satisfy each of these requirements to show it had an appropriate basis to restrain Student. *Id.*

1. Incident B

Restraints may only be used in an emergency. *Id.* 2620-R-2.01(1)(a). The PPRA defines “emergency” as “serious, probable, imminent threat of bodily injury to self or others with the present ability to effect such bodily injury. Emergency includes situations in which the student creates such a threat by abusing or destroying property.” *Id.* 2620-R-2.00(4).

Here, Student was “running around” the classroom with only Case Manager and Paraprofessional present. (FF # 64.) He was not participating in any unsafe behavior at the time Case Manager initiated the restraint. (*Id.*) In fact, given the position of the restraint, Student may have been on the floor. (FF # 65.) Case Manager feared that Student might encounter the second-grade students as they were approaching the classroom, but that does not rise to the level of an emergency under the PPRA. (FF # 64.) The second-grade students never entered the classroom. (FF # 66.) Because Student was the only child in the classroom, either Case Manager or Paraprofessional could have used CPI’s blocking technique to position themselves between

Student and the door. (FF # 70.) Thus, the SCO finds and concludes that Case Manager restrained Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a).

Even if there had been an emergency, the PPRA would permit the use of restraints only after the failure of less restrictive alternatives (or a determination that those alternatives would be inappropriate or ineffective). *Id.* 2620-R-2.01(1)(b). Less restrictive alternatives include “Positive Behavior Supports, constructive and non-physical de-escalation, and restructuring the environment.” *Id.*

Here, Case Manager did not attempt to verbally de-escalate Student. (FF # 64.) She offered two locations for Student to change clothes, but this was not a de-escalation technique. (*Id.*) Notably, it was this choice that triggered the behavioral crisis. (FF #s 58-59.) Case Manager could have increased wait time before resorting to restraint, or if Student had attempted to run out of the classroom, Case Manager and/or Paraprofessional could have blocked Student. (FF # 70.) As a result, the SCO finds and concludes that School violated Rule 2620-R-2.01(1)(b).

The PPRA prohibits the use of restraint as a punitive form of discipline or as a threat to gain control over a student’s behavior. *Id.* 2620-R-2.01(2). No evidence in the Record suggests that Case Manager used the restraint as a punitive form of discipline or as a threat to gain control over Student’s behavior. (FF # 64.) Case Manager thought a group of second-grade students was about to enter the classroom. (*Id.*) Therefore, the SCO finds and concludes School did not violate Rule 2620-R-2.01(2).

Finally, the PPRA requires that a school prioritize the prevention of harm to a student, while using a restraint for no longer and with no more force than necessary. *Id.* 2620-R-2.01(3). Case Manager did not use a CPI technique during Incident B but, instead, held Student while they were both in a seated position on the floor. (FF # 65.) This created a safety risk for both Student and Case Manager. (FF #s 65, 67.) Because Case Manager used a technique that was not authorized by CPI—one that could have impeded Student’s ability to breathe if she had leaned him forward in the seated position—the SCO finds and concludes that Case Manager did not prioritize the prevention of harm to Student, in violation of Rule 2620-R-2.01(3)(b).

Because School did not satisfy any of the requirements of Rule 2620-R-2.01, School did not have a basis to restrain Student on February 12, 2020.

2. Incident C

Restraints may only be used in an emergency. *Id.* 2620-R-2.01(1)(a). The PPRA defines “emergency” as “serious, probable, imminent threat of bodily injury to self or others with the present ability to effect such bodily injury. Emergency includes situations in which the student creates such a threat by abusing or destroying property.” *Id.* 2620-R-2.00(4).

Here, Case Manager had just released Student from an improper restraint on the classroom floor. (FF # 66.) Case Manager asked Student if he could walk to School Nurse's office and Student kicked her. (FF # 71.) Only Case Manager and Paraprofessional were present in the classroom with Student, and no evidence in the Record suggests that Student was destroying property or attempting to leave the classroom at the time. (*Id.*) These circumstances do not evidence a "serious, probable imminent threat of bodily injury to self or others." *Id.* 2620-R-2.00(4). Thus, the SCO finds and concludes that Case Manager and Paraprofessional restrained Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a).

Even if there had been an emergency, the PPRA would permit the use of restraints only after the failure of less restrictive alternatives (or a determination that those alternatives would be inappropriate or ineffective). *Id.* 2620-R-2.01(1)(b). Less restrictive alternatives include "Positive Behavior Supports, constructive and non-physical de-escalation, and restructuring the environment." *Id.* The Record does not indicate that Case Manager or Paraprofessional attempted any less restrictive alternatives before restraining Student. (FF # 71.) Case Manager and Paraprofessional had made up their minds to take Student to School Nurse's office. (*Id.*) As a result, the SCO finds and concludes that School violated Rule 2620-R-2.01(1)(b).

The PPRA prohibits the use of restraint as a punitive form of discipline or as a threat to gain control over a student's behavior. *Id.* 2620-R-2.01(2). Here, because Student would not go willingly, Case Manager and Paraprofessional carried Student to School Nurse's office so they could place him in the Booth. (FF # 71.) For these reasons, the SCO finds and concludes that the restraint was used as a threat to gain control over Student's behavior, in violation of Rule 2620-R-2.01(2).

Finally, the PPRA requires that a school prioritize the prevention of harm to a student, while using a restraint for no longer and with no more force than necessary. *Id.* 2620-R-2.01(3). Case Manager and Paraprofessional picked Student up, during a non-emergency situation in the classroom, and carried him 200 feet to School Nurse's office to put him in the Booth. (FF # 72.) As a result, this restraint lasted longer and used more force than necessary, in violation of Rule 2620-R-2.01(3)(a). Also, because Case Manager and Paraprofessional deviated from CPI and improperly transported Student by carrying him in an escalated state, the SCO finds and concludes that they did not prioritize the prevention of harm to Student, in violation of Rule 2620-R-2.01(3)(b).

Because School did not satisfy any of the requirements of Rule 2620-R-2.01, School did not have a basis to restrain Student on February 12, 2020.

Conclusion to Allegation No. 4: The BOCES violated the PPRA on February 12, 2020. Incidents A, D, and E constituted seclusion. School lacked an appropriate basis to use these restraints.

In the Complaint, Parent alleges School staff lacked a proper basis for secluding Student on February 12, 2020. As a preliminary matter, the SCO must determine whether Incidents A, D, and E constituted seclusion within the scope of the PPRA.

A. Whether Incidents A, D, and E are Seclusion

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).

“Seclusion” means “the placement of a student alone in a room from which egress is involuntarily prevented.” *Id.* 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.*

Relief periods for “reasonable access to toilet facilities” must be provided to a student during seclusion. *Id.* 2620-R-2.02(2)(e)(i). Any space used for seclusion “must have adequate lighting, ventilation, and size. To the extent possible under the specific circumstances, the space should be free of injurious items.” *Id.* 2620-R-2.02(2)(e)(ii).

1. Incident A

Incident A, involving the Calm Corner, does not fall within an exception and, thus, qualifies as seclusion. Student escalated when Paraprofessional asked if they could change Student’s wet clothes after he had an accident. (FF # 58.) Student refused to change and ran out of the classroom into the hallway, but Paraprofessional was able to block access to nearby stairs. (FF # 59.) Case Manager offered Student a choice of locations to change clothes and asked Student to return to the classroom, but he started to hit and kick Case Manager and Paraprofessional. (*Id.*)

Student was then placed in the Calm Corner at 1:35 p.m. (FF # 60.) Intended to be a comfort space for Student, Case Manager and Paraprofessional converted it into a makeshift seclusion room by holding up a four-panel partition to create a barrier between them and Student. (FF # 61.) The partition pinned Student in the Calm Corner and physically prevented Student from being able to leave. (*Id.*) At 1:55 p.m., the partition was withdrawn because Case Manager had fatigued, and both staff realized the Calm Corner had not been effective in calming Student. (FF # 62.) The partition indicated to Student that he was not free to leave the Calm Corner. (FF # 61.) As a result, the SCO finds and concludes that Student’s placement in the Calm Corner from 1:35 p.m. to 1:55 p.m. constituted seclusion under the PPRA.

While in the Calm Corner for twenty minutes, Student was not provided with an opportunity to use the restroom. (FF # 60-62.) Given the length of the seclusion, and considering Student’s challenges with toileting, the SCO find and concludes that School violated Rule 2620-R-

2.02(2)(e)(i). Though the Calm Corner was free of injurious items and Student could sit or stand, the use of the partition here naturally limited the size of the space. (FF # 61.) Thus, the SCO finds and concludes that School violated Rule 2620-R-2.02(2)(e)(ii).

2. Incident D

Incident D, the first placement of Student in the Booth, does not fall within an exception and, thus, qualifies as seclusion. Case Manager and Paraprofessional carried Student from the classroom to School Nurse's office to place him in the Booth—an enclosed space designed solely for administering three-minute hearing tests—to calm down. (FF #s 77-78.) The Booth is 4.5 feet long by 4.5 feet wide and eight feet tall. (FF # 78.) The Booth has one door that does not lock or have a window. (*Id.*) There is one unobstructed window in the middle of one side of the Booth adjacent to the door. (*Id.*) The Booth is lit from the inside and has two vents on its interior ceiling. (*Id.*)

Student started to run around, push chairs, and kick and hit Case Manager and Paraprofessional after entering School Nurse's office shortly after 2:00 p.m. (FF #s 79.) Case Manager and Paraprofessional put Student in the Booth at some point between 2:05 p.m. and 2:15 p.m. (*Id.*) Paraprofessional stood in front of the Booth door, preventing Student from leaving. (FF # 80.) He told Student "until you can show you are not a harm to self or others I cannot let you out." (*Id.*) Paraprofessional opened the Booth door briefly to remove a plastic bag and clothes Student had with him because Student "started to use the bag to harm himself." (*Id.*) Student fell asleep ten to fifteen minutes after being placed in the Booth. (FF # 81.)

Paraprofessional opened the Booth door to let Student out shortly after School Nurse called Parent, but before Parent arrived at 3:30 p.m. (FF #s 81-82.) Because Parent arrived at School shortly after receiving the call, the SCO finds that the Booth door opened at some point between 3:15 p.m. and 3:20 p.m. (*Id.*) Student ran out of the Booth once the door opened. (FF # 83.) For these reasons, the SCO finds and concludes that Student's placement in the Booth, for at least one hour if not up to one hour and fifteen minutes, constituted seclusion under the PPRA.

While in the Booth, Student was not provided with an opportunity to use the restroom. (FF #s 79-81.) The Booth is a small educational space designed to isolate sound for administering three-minute hearing screenings, not a multi-sensory de-escalation room. (FF #s 77-78.) For these reasons, the SCO finds and concludes that School violated Rule 2620-R-2.02(2)(e)(i)-(ii).

3. Incident E

Incident E, the second placement of Student in the Booth, does not fall within an exception and, thus, qualifies as seclusion. When Paraprofessional opened the Booth door at some point between 3:15 p.m. and 3:20 p.m., Student ran toward a table to grab insulin and medical equipment. (FF # 82.) Student pushed and kicked Case Manager. (*Id.*) Within one minute of

Student leaving the Booth, a student with “severe medical needs” entered School Nurse’s office for treatment. (*Id.*)

Case Manager and Paraprofessional then placed Student back into the Booth. (FF # 83.) Paraprofessional stood in front of the Booth door, preventing Student from leaving. (*Id.*) Parent arrived at School at 3:30 p.m. but did not enter School Nurse’s office until after the student receiving medical treatment departed. (FF #s 83-84.) When Parent finally entered School Nurse’s office, Student was still in the Booth. (FF # 84.) Paraprofessional opened the Booth door at 3:50 p.m. (*Id.*) Thus, the SCO finds and concludes that Student’s placement in the Booth, for at least thirty minutes if not longer, constituted seclusion under the PPRA.

For the reasons detailed in paragraph 2 of this section, the SCO also finds and concludes School violated Rule 2620-R-2.02(2)(e)(i)-(ii) by not providing “reasonable access to toilet facilities” and by failing to ensure the space used for seclusion was of adequate size.

B. Whether School Had a Basis for the Restraints

Having determined that Incidents A, D, and E constituted seclusion, the SCO must next evaluate whether School had a basis for using restraint.

Under the PPRA, a school must have an appropriate basis for the use of restraint. Rule 2620-R-2.01. 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 of discipline or as a threat to gain control of a student’s behavior; and
- Be used only for the period of time necessary and using no more force than necessary, while prioritizing the prevention of harm to the student.

Id. School must satisfy each of these requirements to show it had an appropriate basis to restrain Student. *Id.*

1. Incident A

Restraints may only be used in an emergency. *Id.* 2620-R-2.01(1)(a). The PPRA defines “emergency” as “serious, probable, imminent threat of bodily injury to self or others with the present ability to effect such bodily injury. Emergency includes situations in which the student creates such a threat by abusing or destroying property.” *Id.* 2620-R-2.00(4).

Here, just before being secluded, Student ran out of the classroom. (FF # 59.) Paraprofessional used his body to block Student from accessing nearby stairs. (*Id.*) Student hit and kick Case Manager and Paraprofessional in the hallway and once they returned to the classroom. (FF #s 59-60.) In the hallway, it was probable that other students or staff might encounter Student in an escalated state. (FF # 59.) For these reasons, the SCO finds and concludes that Student's behavior rose to the level of an emergency under the PPRA. Thus, School did not violate Rule 2620-R-2.01(1)(a).

Even in an emergency, restraints may only be used after the failure of less restrictive alternatives (or a determination that those alternatives would be inappropriate or ineffective). *Id.* 2620-R-2.01(1)(b). Here, Case Manager offered Student two locations to change clothes and told Student they needed to return to the classroom to talk about it. (FF # 59.) Student refused and Case Manager then told him he needed to go the Calm Corner so he could "get into the Green Zone." (FF #s 60.) No other students or staff were present in the classroom when they returned, so Case Manager and Paraprofessional could have increased wait time before resorting to the Calm Corner (or at least not used the partition at the Calm Corner). (*Id.*) Or, if they needed additional assistance, they could have made an "all-call" to the "caring crisis team." (FF #s 53-54.) As a result, the SCO finds and concludes that School violated Rule 2620-R-2.01(1)(b).

The PPRA prohibits the use of restraint as a punitive form of discipline or as a threat to gain control over a student's behavior. *Id.* 2620-R-2.01(2). Here, Student did not go to the Calm Corner voluntarily. (FF # 60.) Also, the conversion of the Calm Corner to a makeshift seclusion room with the panel indicates that seclusion was used as a threat to gain control over Student's behavior. (FF # 61.) Even without the partition, the Record suggests that the Calm Corner had been improperly used by School staff with Student on past occasions. (FF # 46.) A sensory space should be voluntary and goal oriented. It should be used to prepare a student for learning—by practicing and developing self-regulation skills—not for punishment. A student forced to a calming space will only associate it with punishment. Thus, the SCO finds and concludes that School violated Rule 2620-R-2.01(2).

Finally, the PPRA requires that a school prioritize the prevention of harm to a student, while using a restraint for no longer and with no more force than necessary. *Id.* 2620-R-2.01(3). Case Manager and Paraprofessional constructively secluded Student in the Calm Corner by pinning Student in the space with a partition for twenty minutes. (FF #s 60-62.) Had Case Manager not fatigued, and because Student sometimes spent up to one hour in the Calm Corner on past occasions, it is likely this improper seclusion would have continued. (FF #s 46, 62.) As a result, the seclusion inevitably lasted longer and used more force than necessary, in violation of Rule 2620-R-2.01(3)(a).

Because School did not satisfy all requirements of Rule 2620-R-2.01, School did not have a basis to seclude Student.

2. Incidents D and E

Restraints may only be used in an emergency. *Id.* 2620-R-2.01(1)(a). The PPRA defines “emergency” as “serious, probable, imminent threat of bodily injury to self or others with the present ability to effect such bodily injury. Emergency includes situations in which the student creates such a threat by abusing or destroying property.” *Id.* 2620-R-2.00(4).

For Incidents D and E, there was an emergency given Student’s escalated behavior in School Nurse’s office. (FF #s 79, 82.) An insulin treatment was in plain view on a table which Student attempted to grab. (FF # 82.) A student “with severe medical needs” also walked into the office for treatment. (*Id.*) Though School did not violate Rule 2620-R-2.01(1)(a), Case Manager and Paraprofessional inconceivably created this emergency by carrying Student from an empty classroom to a location with high foot traffic and medical equipment. (FF #s 71-72.)

Even in an emergency, restraints may only be used after the failure of less restrictive alternatives (or a determination that those alternatives would be inappropriate or ineffective). Rule 2620-R-2.01(1)(b). For Incidents D and E, no less restrictive alternatives were attempted. (FF #s 77-84.) Indeed, Case Manager and Paraprofessional carried Student to School Nurse’s office intent on placing him in the Booth. (FF #s 71, 77.) Student was let out of the Booth—after at least one hour if not longer—but Case Manager and Paraprofessional immediately placed him back in the Booth when another student entered the office for medical treatment. (FF # 82.) As a result, the SCO finds and concludes that School violated Rule 2620-R-2.01(1)(b) for Incidents D and E.

The PPRA prohibits the use of restraint as a punitive form of discipline or as a threat to gain control over a student’s behavior. *Id.* 2620-R-2.01(2). Here, it is most disturbing that School staff carried Student from an empty classroom to School Nurse’s office because they thought the Booth “was the overall safest place for the situation.” (FF # 71.) They again secluded Student in a space and environment—the Booth in School Nurse’s office—intended to be welcoming, safe, and therapeutic. (FF #s 77-84). For this reason alone, the SCO finds and concludes that they secluded Student to gain control over his behavior. (*Id.*) Paraprofessional stood in front of the Booth door for Incidents D and E, verbally indicating to Student that he would not be let out until he could demonstrate he was not a harm to himself or others. (FF #s 80, 83.) Thus, the SCO finds and concludes that School violated Rule 2620-R-2.01(2) for Incidents D and E.

Finally, the PPRA requires that a school prioritize the prevention of harm to a student, while using a restraint for no longer and with no more force than necessary. *Id.* 2620-R-2.01(3). At minimum, Student was in the Booth for one hour during Incident D and for thirty minutes during Incident E. (FF #s 79-84.) Student was in the Booth for at least one and a half hours total between Incidents D and E. (*Id.*) The Booth is a small space used by a health professional to complete quick (up to three minute) hearing tests. (FF #s 77-78.) Though there were no objects in the Booth, Student had a plastic bag of clothes with him during Incident D. (FF # 80.) Paraprofessional was able to remove the bag after Student started to harm himself with it. (*Id.*) Nevertheless, it would be difficult for Paraprofessional to have a line of sight with Student with the door closed. (FF # 78.)

For these reasons, the SCO finds and concludes that School violated Rule 2620-R-2.01(3) for Incidents D and E.

Conclusion to Allegation No. 5: The BOCES violated the PPRA’s notification and restraint review requirements.

A. Notification

Use of a restraint triggers the PPRA’s documentation and notification requirements. Rule 2620-R-2.04. Here, the School’s restraints of Student on February 12, 2020 triggered the PPRA’s five notification requirements. (FF #s 57-84.)

Under the first requirement, a parent, and if appropriate, the student, must be notified in writing if there “is a reasonable probability that restraint might be used with a particular student . . .” *Id.* 2620-R-2.04(1). Here, Parent was aware of past physical intervention involving Student at School but neither she nor Student were notified in writing of the restraints that might be used, the specific situations in which restraint might be used, and the staff who would be involved. (FF # 86.) Thus, the SCO finds and concludes that School violated Rule 2620-R-2.04(1).

Under the second requirement, “a written report must be submitted within one (1) school day to school administration.” *Id.* 2620-R-2.04(2). The Rules do not define “within one (1) school day.” *Id.* However, the SCO finds that “within one (1) school day” requires that the report be submitted by the end of the next school day. “[W]ithin one (1) school day” is comparable to the phrase “within one business day.” That phrase commonly means by the close of the next business day, typically 5:00 p.m., excluding weekends and official holidays. CDE has found that a “school day” ends once classes are dismissed for that day. *CDE Decision 2019:901*. Like a business day, a “school day” does not include weekends or official holidays. Here, the School day ended at 4:05 p.m. (FF # 84.) Case Manager and Paraprofessional submitted written reports to BOCES/School administration before 4:05 p.m. on February 13, 2020. (FF # 85.) Thus, the SCO finds and concludes that School did not violate Rule 2620-R-2.04(2).

Under the third requirement, a school must “verbally notify the parents as soon as possible but no later than the end of the school day that the restraint was used.” *Id.* 2620-R-2.04(3). Here, School Nurse called Parent during Incident D. (FF # 81.) Parent arrived at School at 3:30 p.m. and shortly thereafter found Student still secluded in the Booth. (FF #s 83-84.) Case Manager explained what had happened. (FF # 83.) The School day ends at 4:05 p.m. (FF # 84.) Thus, the SCO finds and concludes that School did not violate Rule 2620-R-2.04(3).

Under the fourth requirement, a school must provide a parent a written report based on the findings of a staff review within five calendar days of the use of restraint. *Id.* 2620-R-2.04(4). The PPRA does not require that a specific form be used, but it does require that the written report detail the antecedent to the student’s behaviors, a description of the event, efforts made at de-

escalation, alternatives used, the type and duration of the restraint used, injuries that occurred, and the staff present and staff involved in administering the restraint. *Id.* Under the fifth requirement this report must be placed in the student’s confidential file. *Id.* 2620-R-2.04(5).

Here, Parent was provided with Case Manager’s typed incident report on February 13, 2020. (FF # 85.) Paraprofessional also typed an incident report, but neither Parent nor the SCO received a written report based on a School staff review of the February 12, 2020 incident. (FF #s 85, 87.) The absence of a written report based on a School staff review shows that one was also not placed in Student’s confidential file. (FF # 87.) For these reasons, the SCO finds and concludes that School violated Rule 2620-R-2.04(4)-(5).

B. Specific Restraint Review and Annual Restraint Review

Parent did not challenge the BOCES’ specific restraint review and annual restraint review processes, but the evidence missing from the Record—such as a written report based on a School staff review of the incident or the annual restraint review for the 2019-2020 academic year—supports expanding the scope of the investigation.

Under the PPRA, the BOCES must “ensure that a review process is established and conducted for each incident of restraint used.” Rule 2620-R-2.05(1). The BOCES must also establish, conduct, and document in writing an annual review of the use of restraint within the BOCES, to include an analysis of the incident reports prepared pursuant to Rule 2620-R-2.04(2) and Rule 2620-R-2.04(4). *Id.*

Here, because the SCO did not receive a copy of a written report to support that School staff completed a review of the February 12, 2020 incident, the SCO finds and concludes that the BOCES violated Rule 2620-R-2.05(1). Because the SCO did not receive a copy of the annual restraint review process for the 2019-2020 academic year, the SCO finds and concludes that the BOCES violated Rule 2620-R-2.05(2).

REMEDIES

A. IDEA Violations

The SCO finds and concludes that the BOCES has violated the following IDEA requirements:

- a. Failing to develop an IEP that was tailored to meet Student’s individualized behavioral needs, in violation of 34 C.F.R. §§ 300.320(a)(2)(i) and 300.324(a)(2)(i);
- b. Failing to include a statement of all special education services in an IEP, in violation of 34 C.F.R. § 300.320(a)(4);

- c. Failing to properly implement an IEP, to include providing progress monitoring reports, in violation of 34 C.F.R. §§ 300.320(a)(3) and 300.323; and
- d. Failing to properly safeguard education records, in violation of 34 C.F.R. § 300.623.

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

1. By **Friday, December 18, 2020**, the BOCES shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the BOCES is responsible. The CAP must, at a minimum, provide for the following:
 - a. Special Education Director, Former School Principal, Former School Counselor, School Nurse, Paraprofessional, all BOCES special education staff, and all BOCES early childhood education staff must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.320(a)(2)(i), 300.320(a)(3), 300.320(a)(4), 300.323(c)(2), 300.324(a)(2)(i) and 300.623. This review must occur no later than **Monday, January 4, 2021**. A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than **Monday, January 11, 2021**.
 - b. Attendance and completion of a training provided by CDE on the following: (a) writing appropriate, measurable annual IEP goals to address behavior and (b) developing and implementing comprehensive positive behavioral supports (e.g. FBAs, BIPs, crisis intervention plans, etc.). This training will address, at a minimum, the concerns noted in this Decision and the requirements of 34 C.F.R. §§ 300.320(a)(2), 300.323(c), and 300.324(a)(2)(i). Special Education Director and CDE Senior Consultant Beth Nelson will determine the date, time, and format for this training (i.e. video conference, web conference, webinar, or webcast). The training must be completed by **Friday, February 19, 2021**.
 - i. This training is mandatory for all BOCES early childhood education and elementary school special education staff (i.e. case managers/coordinators, special education teachers and related services providers), including Special Education Director, BOCES Special Education Coordinator, School Nurse, Paraprofessional, and any other BOCES staff who participate or are likely to participate in developing and implementing IEPs which require positive behavioral supports for a child to receive a FAPE.

- c. CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm the BOCES' timely correction of the areas of noncompliance.

2. BOCES Policies and Procedures

- a. **Within 60 days of completing the training detailed above**, the BOCES must submit written procedures to address all areas of noncompliance identified in this Decision, to include: (a) ensuring IEPs are tailored to meet individualized behavioral needs, in compliance with 34 C.F.R. §§ 300.320(a)(2)(i) and 300.324(a)(2)(i); (b) ensuring an IEP includes a statement of all special education services, in compliance with 34 C.F.R. § 300.320(a)(4); (c) ensuring IEPs are properly implemented, in compliance with 34 C.F.R. § 300.323; and (d) ensuring education records are properly safeguarded, in compliance with 34 C.F.R. § 300.623.

3. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive **nine (9) hours of parent-child psychological services** through a contract between the BOCES and a suitable, licensed provider at the BOCES' expense. If Parent and the BOCES do not agree to a licensed provider, CDE will select the licensed provider. All nine hours must be completed by **Thursday, June 10, 2021**, though Parent and the licensed provider are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.). Given the COVID-19 pandemic, these services may be provided remotely where necessary.
- b. To verify that Student has received the services required by this Decision, the BOCES must submit records of service logs to CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. The BOCES shall communicate with the licensed provider to obtain this information.
- c. By **Friday, December 18, 2020**, the BOCES shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with the BOCES within this time, the BOCES

will be excused from delivering compensatory services, provided that the BOCES diligently attempts to meet with Parent and documents efforts. A determination that the BOCES diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with CDE.

- d. The BOCES shall submit the schedule of compensatory services to CDE no later than **Monday, January 4, 2021**. If for any reason, including illness, Student is not available for any scheduled compensatory services, the BOCES will be excused from providing the service scheduled for that session. If for any reason the BOCES fails to provide a scheduled compensatory session, the BOCES will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify CDE of the change in the appropriate service log.

Please submit the documentation detailed above to CDE as follows:

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

NOTE: Failure by the BOCES to meet any of the timelines set forth above may adversely affect the BOCES' annual determination under the IDEA and subject the BOCES to enforcement action by the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with the BOCES to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

B. PPRA Violations

The SCO finds and concludes that the BOCES has violated the following PPRA requirements:

- a. Using restraints in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a);
- b. Using restraints without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective, in violation of Rule 2620-R-2.01(1)(b);
- c. Using restraints as a punitive form of discipline or as a threat to control or gain compliance of a student's behavior, in violation of Rule 2620-R-2.01(2);

- d. Using restraints for more time than necessary or using more force than necessary, in violation of Rule 2620-R-2.01(3)(a);
- e. Using restraints without prioritizing the prevention of harm to the student, in violation of Rule 2620-R-2.01(3)(b);
- f. Using seclusion without providing a relief period for reasonable access to toilet facilities, in violation of Rule 2620-R-2.02(2)(e)(i);
- g. Using a space for seclusion that did not have adequate ventilation or size, and that was not free of injurious items, in violation of Rule 2620-R-2.02(2)(e)(ii);
- h. Failing to comply with the documentation and notification requirements, in violation of Rule 2620-R-2.04(1), (4) and (5); and
- i. Failing to establish and complete specific restraint review and annual restraint review processes, in violation of Rule 2620-R-2.05.

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

1. The BOCES should provide School staff, including Paraprofessional, with additional training regarding identification of emergency situations under the PPRA;
2. The BOCES should provide School staff, including Paraprofessional, with additional training regarding not using restraint as a form of discipline or as a threat to gain control of a student's behavior;
3. The BOCES should provide School staff, including Paraprofessional, with additional training regarding the requirement that restraints be used only for the period of time necessary and use no more force than is necessary while prioritizing the prevention of harm to the student;
4. The BOCES should provide School staff, including Paraprofessional, with additional training regarding the requirement that relief periods from seclusion shall be provided for reasonable access to toilet facilities and that any space in which a student is secluded must have adequate lighting, ventilation, and size (and to the extent possible under the specific circumstances, the space should be free of injurious items);

5. The BOCES should provide School staff, including Former School Principal, with training on the PPRA's documentation and notification requirements; and
6. The BOCES should ensure that it establishes processes to conduct a review of individual restraints and an annual review of the use of restraint.

The BOCES may contact Beth Nelson at CDE for support in implementing these recommendations or for guidance regarding the requirements of the PPRA and the Rules:

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

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13; Rule 2620-R-2.07(9)(c). If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 23rd day of November, 2020.



Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-3

- No Exhibits

Response, pages 1-6

- Exhibit A: 2019 IEP and 2019 BIP
- Exhibit B: None
- Exhibit C: None
- Exhibit D: DIBELS Next Scores and Report Card
- Exhibit E: None
- Exhibit F: February 12, 2020 Incident Report
- Exhibit G: Behavior Records for 2019-2020 Academic Year
- Exhibit H: None
- Exhibit I: CPI Certifications
- Exhibit J: CPI Nonviolent Crisis Intervention Training
- Exhibit K: Physical Intervention and Restraint Policies
- Exhibit L: E-mail Correspondence
- Exhibit M: E-mail Correspondence
- Exhibit N: BOCES and District Staff List
- Exhibit O: Response Delivery Verification
- Exhibit P: IEP and Evaluations for 2018-2019 Academic Year
- Exhibit Q: IEP and BIP for 2020-2021 Academic Year
- Exhibit R: February 2020 Office Sign-In Sheet and Frontline Education Report
- Exhibit S: Photos of the Booth

Reply: None

Telephonic Interviews

- BOCES Special Education Consultant: October 21, 2020
- BOCES Special Education Director: October 21, 2020
- Special Education Paraprofessional: October 21, 2020
- Special Education Case Manager: October 22, 2020
- Parent: October 23, 2020
- School Nurse: November 5, 2020
- Special Education Teacher: November 5, 2020