



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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CALIFORNIA

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**VIA ELECTRONIC MAIL**

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(In reply, please refer to compliance review no. 09-19-5002)

Dear Superintendent Koligian:

This letter is to notify you of the resolution of the above-referenced compliance review of the Folsom Cordova Unified School District (District) initiated in January 2019 by the U. S. Department of Education (Department), Office for Civil Rights (OCR). This compliance review examined whether the District's use of restraint and seclusion during the 2017-2018 and 2018-2019 school years (review period) denied students with disabilities who participated in the District's programs a free, appropriate public education (FAPE), in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities.

**I. Summary of OCR's Compliance Review and Concerns**

OCR reviewed documents provided by the District in response to initial and supplemental data requests covering the review period. Specifically, OCR's review included files of District students with disabilities placed in District schools and non-public schools (NPSs) who experienced restraint and/or seclusion, behavior emergency reports, time away logs, District policies, training materials related to behavior management protocols, and the District's contracts with NPSs. OCR also reviewed student files at the District office. In addition, OCR conducted site visits and interviews at three District schools and at two NPSs (NPS 2 and NPS 3). Because NPS 1 closed prior to OCR commencing this compliance review, OCR was unable to visit NPS 1 or interview NPS 1 staff. OCR interviewed nine NPS employees at NPS 2 and NPS 3, including teachers, teacher aides, and administrators. OCR also interviewed nine District employees, including special education teachers, an instructional aide, behavior specialists, and District-level special education staff and administrators. OCR found that 54 students were restrained at 14 District schools and 11 NPSs a total of 254 times during the two-year review period and focused

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on District schools and NPSs with the highest overall number of restraints and where individual students experienced numerous restraints or use of a cool down/de-escalation room (time away).

Based on OCR's investigation to date, OCR found that the District violated Section 504 and Title II because the District did not convene a group of knowledgeable persons to evaluate whether students with identified disabilities needed a change in placement when the District had reason to suspect that the students needed an evaluation or reevaluation due to the repeated use of restraints and time away from the classroom. OCR also found that the District violated Section 504 and Title II because in some instances the District staff who were making placement decisions for students with disabilities at NPSs were not knowledgeable about the emergency procedures being used at the NPS. OCR also found that in some instances, placement decisions were made entirely outside of the process required under Section 504 that provides that placement decisions must be made by a group of persons knowledgeable about the child, knowledgeable about the meaning of the evaluation data, and knowledgeable about the placement options. OCR also identified a compliance concern that District placement decisions for some other students may have been made by individuals without complete and accurate records for the students. Finally, OCR identified compliance concerns regarding the District's implementation of Individualized Education Programs (IEPs) and Behavior Intervention Plans (BIPs) and whether the District may have denied students a FAPE based on these implementation failures. OCR found that the IEPs and BIPs of students who experienced time away did not consistently include whether time away should be used and, if so, how.

The legal standards and the facts gathered to date supporting these concerns and violations are summarized below. The District agreed to resolve these concerns and violations through the attached Resolution Agreement (the Agreement).

## **II. Legal Standards**

OCR applied the following legal standards to the facts to determine if the District complied with its obligations under Section 504 and Title II with respect to its use of restraints and seclusion.

### **A. Definitions**

For the purposes of this compliance review, OCR defines "mechanical restraint" as the use of any device or equipment to restrict a student's freedom of movement. The term does not include devices implemented by trained school personnel or used by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.<sup>1</sup>

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<sup>1</sup> Examples of specific and approved purposes include: adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports; vehicle safety restraints when used as intended during the transport of a student in a moving vehicle; restraints for medical immobilization; or orthopedically prescribed devices that permit a student to participate in activities without risk of harm.

For the purposes of this compliance review, OCR defines “physical restraint” as 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.

For the purposes of this compliance review, OCR defines “seclusion” as the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. The term does not include a timeout, which is a behavior management technique that is part of an approved program involving monitored separation of the student in a non-locked setting and is implemented for the purpose of de-escalation.

## **B. Section 504 and Title II**

The Section 504 regulation at 34 C.F.R. § 104.33 requires school districts to provide a FAPE to all students with disabilities in their jurisdictions, regardless of the nature or severity of the disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met and are based on adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34-36. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements.

The Section 504 regulation at 34 C.F.R. § 104.35(a) provides that a district shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. The regulation at 34 C.F.R. § 104.35(b) provides that a district shall establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services.<sup>2</sup>

Moreover, the Section 504 regulation at 34 C.F.R. § 104.35(c) provides that in interpreting evaluation data and in making placement decisions, a district shall (1) draw upon information from a variety of sources, including physical condition and adaptive behavior;<sup>3</sup> (2) establish procedures to ensure that information obtained from all such sources is documented and

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<sup>2</sup> The procedures must ensure that: (1) tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; (2) tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and (3) tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure). 34 C.F.R. § 104.35(b)(1)-(3).

<sup>3</sup> The regulation at 34 C.F.R. § 104.35(c)(1) also lists the following possible sources: aptitude and achievement tests, teacher recommendations, and social or cultural background.

carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with § 104.34, which requires placement in the regular educational environment to the maximum extent appropriate.

When a student exhibits behavior that interferes with the student's education or the education of other students in a manner that would reasonably cause a teacher or other school personnel to suspect that the student has a disability, as defined under Section 504, the school district must evaluate the student to determine if the student has a disability and needs special education or related services because of that disability. For a student who has already been identified as a student with a disability, a school's repeated use of restraint or seclusion may suggest that the student's current array of regular or special education and related aids and services is not sufficient to provide FAPE.

As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. 28 C.F.R. §35.103.

### **III. Facts**

OCR found the following facts in its compliance review of the District's restraint and seclusion practices. This section provides background about the District and summarizes its policies and procedures for restraint and seclusion, its use of restraint with students in District schools, and the use of restraint and seclusion with District students in three NPSs where the District placed them.

#### **A. District Overview**

The District serves the cities of Folsom and Rancho Cordova, both suburbs of Sacramento, California. The District includes twenty elementary schools, four middle schools, and five high schools, and runs five alternative education programs, including an alternative high school, a preschool, and a charter school. During the 2018-2019 school year, the District served 20,605 students; 2,479 of those were students who received services under the Individuals with Disabilities Education Act (IDEA), 61 of whom were placed at an NPS. During the 2017-2018 school year, the District served 20,353 students; 2,688 of those were students who received services under the IDEA, 62 of whom were placed at an NPS.

#### **B. The District's Policies and Procedures for Restraint, Seclusion, and Evaluating and Reevaluating Students for a Disability**

As part of this compliance review, OCR reviewed all of the District's policies and procedures related to restraint and seclusion that were in effect during the 2017-18 and 2018-19 school years. Because the use of restraint or seclusion may indicate to a school district that a student has a potential disability that requires evaluation, OCR also reviewed the District's policies and procedures for identifying, evaluating, and reevaluating students for a disability, behavior

interventions, and emergency interventions. OCR's review included those policies that applied to NPSs.

### **1. Policies and Procedures for Identifying, Evaluating, and Reevaluating Students for a Disability, Behavior Interventions, and Emergency Interventions**

The District's Board Policy 6164.4 (Identification and Evaluation of Individuals for Special Education) (Policy 6164.4) requires the District to establish procedures for the identification, screening, referral, and regular and triennial assessment of students eligible for special education services. The District's accompanying regulation, Administrative Regulation 6164.4 (Identification and Evaluation of Individuals for Special Education) (Regulation 6164.4) describes the procedures the District must follow when identifying, evaluating, and reevaluating students for special education services. Regulation 6164.4 states that after receiving a referral for special education services for a student, the District must develop a proposed evaluation plan within 15 days, unless the parent<sup>4</sup> agrees in writing to an extension. Upon receipt of a proposed evaluation plan, the parent has at least 15 days to decide whether to consent to the evaluation.

Regulation 6164.4 further states that the District must conduct a full and individual initial evaluation of the student and provide the student's parent with prior written notice of their procedural rights before the initial provision of special education services to the student. According to Regulation 6164.4, the District must determine whether the student has a disability, conduct the initial evaluation to determine their educational needs, and develop an IEP within 60 days of receiving the parent's informed consent for the evaluation. Regulation 6164.4 requires that qualified personnel conduct the evaluation in all areas related to the student's suspected disability, using a variety of assessment tools and strategies to gather relevant information about the student during the evaluation, including information provided by the parent.

Regarding the reevaluation of students, Regulation 6164.4 states that the District must conduct a reevaluation when it determines that the educational or related service needs of the student warrant a reevaluation or if the student's parent or teacher requests reevaluation. Regulation 6164.4 requires the District to reevaluate students every three years, unless the parent and District agree in writing that a reevaluation is unnecessary. Per the regulation, a reevaluation may not occur more than once a year unless the parent and the District agree otherwise.

The District has an administrative regulation (6159.4) addressing behavioral and emergency interventions but does not have a board policy regarding behavioral interventions for special education students or regarding the use of restraint or seclusion (i.e., emergency interventions). The District's Special Education Procedure Manual (Manual) addresses behavioral interventions, supports, and the use of emergency interventions, like restraints, in more detail. The Manual states that an IEP team must consider the use of positive behavioral interventions and supports (PBIS) if a student with an IEP is exhibiting a behavior that is impeding their own learning or the learning of others. The Manual also states that staff can use a variety of tools to address student behavior, as long as these tools are developed through the IEP process and documented in the IEP: (a) behavior goals with associated PBIS strategies and supports; (b) a PBIS plan should be

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<sup>4</sup> For ease of reference, the term "parent" in this document refers generally to parents, guardians, custodians, Education Rights Holders, or others with legal custody and/or educational decision-making authority.

developed if the student's "inappropriate behavior is repetitive, anticipated to re-occur and demonstrates a pattern, or may lead to disciplinary action"; and (c) Functional Behavior Assessments (FBAs) followed by the development of a BIP when the IEP team concludes that other behavioral support strategies included in the IEP are ineffective. The Manual states that IEP teams should be involved in the FBA assessment process and in the development of the BIP.

The Manual clarifies that emergency interventions should not be used as a substitute for a BIP, while recognizing that some BIPs specify emergency interventions to be used during severe incidents to ensure safety. The Manual limits the use of emergency interventions as follows:

Emergency interventions not specified in a student's [BIP] shall be used only when necessary to control unpredictable, spontaneous behavior which poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain behavior.

The Manual also states that emergency interventions are to be used only long enough to contain the behavior and that staff should seek assistance from the administrator or law enforcement if prolonged use of an emergency intervention is required.

The Manual requires completion of a Behavioral Emergency Report (BER) (discussed below) immediately following an emergency intervention. The Manual and the BER form state that within two days of an emergency intervention for a student without a BIP, the administrator must schedule an IEP meeting to review the BER and determine whether an FBA and/or interim plan is necessary. If the IEP team chooses not to conduct an FBA or develop an interim plan, the team must document its reasoning. If a student with a BIP experiences an emergency intervention after a designed intervention was not effective, or if the emergency intervention was related to a behavior problem not previously exhibited, the District must convene an IEP team meeting to review the incident and determine whether to modify the student's BIP.

The District uses a third-party protocol that focuses on de-escalation techniques as its behavior management protocol in its schools. Around 300 District staff were trained in the protocol during the review period, including teachers, instructional aides, behavior specialists, other behavior staff, and school administrators. Staff are retrained every two years. The protocol allows for the use of the following physical restraints to ensure safety: seated; small child against a wall; small child not against a wall; standing; and supine. The Manual states that staff may use emergency interventions only in accordance with the protocol's approach and that locked seclusion is prohibited. The protocol includes the use of Individual Crisis Management Plans, which are distinct from BIPs, that include a functional analysis of "high-risk behavior," individually tailored intervention strategies, and periodic review and revision. District staff explained to OCR that after a restraint, a "Classroom Team," including the teacher, instructional aides, and sometimes a behavior specialist, would often meet to discuss what occurred, how to prevent a crisis resulting in a restraint in the future, and to develop a Crisis Management Plan.

On December 19, 2018, the District's Assistant Superintendent circulated a memorandum to special education staff, cabinet members, and school administrators reminding them of the

Manual. She wrote that restraint could not be used after “the immediate threat to safety is alleviated”; the District did not authorize the use of prone restraint; children under 5 years old were not to be restrained; and that District staff could use only the following types of restraint: supine for students 12 years old and older; small child for students below chest height; and seated to only be used in some cases. Attached to the memo was a policy guide on the use of behavior supports and interventions, including a detailed guide on creating and implementing BIPs. After issuing the memo, the District took more steps to augment its procedures for responding to the use of restraint and seclusion. For example, the District added steps in its process for when a BER is completed. Now for each completed BER, a behavior specialist meets with the team about the BER to determine if additional training or updating of the BIP is necessary, and to determine if it would be appropriate to hold an IEP meeting. In addition, the District modified its Master Contract with all NPS schools to conform to the memo issued on December 19, 2018. Further, the District took steps to train or retrain staff who may be required to utilize its behavior management protocols to ensure that all staff were up to date on certifications.

## **2. Policies Relating to the Placement of District Students in Nonpublic Schools**

As noted above, the District placed approximately 60 students in NPSs in the 2017-18 and 2018-19 school years and maintained Master Contracts with each NPS. The 2018-2019 contract included that the NPS was responsible for providing all services in a student’s IEP; complying with the District’s policies and procedures unless agreed to otherwise; keeping a written policy regarding emergency interventions and BERs and providing staff with a copy of the policy; and ensuring all staff were trained annually in “crisis intervention and emergency procedures as related to appropriate behavior management strategies” including a behavior management protocol. The NPSs also used behavior management protocols other than the District’s behavior management protocol. These behavior management protocols used different approaches to behavior modification including different calming techniques and different types of restraints. The Master Contracts further included provisions similar to what is contained in the Manual about positive interventions and supports, emergency interventions, and the completion of BERs, and included that “[a]ll restraint practices [were to] be reviewed and revised when they [had] an adverse effect on a student and [were] used repeatedly for an individual child, either on multiple occasions within the same classroom or multiple uses by the same individual.”

## **3. Use of Behavior Emergency Report (BER) Forms**

As discussed above, District and NPS staff were required to fill out a BER for each restraint. BERs in use during the review period included space for information about the student and staff involved; the date, time, and location of the incident; a description of the incident; the start and end time of the emergency intervention; and the purpose of the emergency intervention. However, the blank BER and the completed BERs that OCR reviewed did not consistently include the amount of time a student spent away from class or the amount of recovery time a student needed. The BERs primarily used by District schools included questions about the reason for the restraint; what behavior management intervention was used; what other strategies were used; the type of restraint; and post-incident recovery actions. The BERs also listed follow-up tasks for staff to check off, including notifying the parent; providing a copy of the BER to the

site administrator and behavior analyst/mental health coordinator; placing a copy of the BER in the student's file; and scheduling an IEP meeting when the student did not have a BIP, or if the student had one, to determine if it was still appropriate. Most NPSs used slightly different BERs tailored to the particular behavior management protocol used and they ask if the BIP addressed the exhibited behavior. Some NPS BERs included a question about whether seclusion was used.

Schools generally sent copies of BERs to the District to notify it when restraints had occurred, except as described in more detail below for one NPS. According to District staff, after an NPS or District school submitted a BER to the District, one District staff member reviewed, logged, and filed the BER and sent it to the staff assigned to the school. At the start of this compliance review, the District reported to OCR that District staff reviewed a spreadsheet of BERs and sometimes the corresponding BERs on a monthly basis at the District's special education leadership meeting. During this review, the District changed its practice to review the spreadsheet of BERs and each BER during these meetings on a weekly basis to monitor the use of restraint and seclusion with District students more often and more closely.

District staff told OCR that if they found certain information was lacking on the BER (e.g., the BER omitted details or what de-escalation techniques were attempted) or otherwise had concerns (e.g., the restraint lasted longer than fifteen minutes) during the review period, they may have gathered more information from the school. District staff reported that they may have also consulted with a behavior specialist or brainstormed with the District's NPS team, NPS or District staff, and/or held an IEP meeting to discuss further.

However, based on OCR's review of NPS student files as well as interviews with District staff described below, the District rarely convened IEP meetings following restraints other than IDEA-required annual and triennial meetings. BERs for students at District schools were often silent as to whether an IEP meeting was scheduled. Some teachers at District schools told OCR that they did not regularly convene IEP meetings (e.g., if it was apparent that lack of staff or training resulted in a restraint), while others described circumstances when they would (e.g., if it was apparent that a student's BIP was not working). Some teachers at District schools explained that instead of scheduling IEP meetings, the Classroom Team would meet to discuss the incident.

### **C. Data Regarding the Use of Restraint and Seclusion**

During the review period, there were incidents of restraint and/or seclusion reported at 14 District schools and 11 NPSs. The data reflected that 54 students in total were restrained during the review period (some during both school years). All but one had IEPs; the other had a Section 504 Plan at the time. During the 2017-2018 school year, 28 students were restrained 97 times at District schools, collectively, primarily at three schools. That same school year at NPSs, 18 students were restrained 67 times, collectively, the majority of which occurred at NPS 1. During the 2018-2019 school year at District schools, 20 students were restrained 40 times, collectively, the majority of which occurred at District School 1. That same year at NPSs, 17 students were restrained 50 times, collectively, primarily at three NPSs.

Restraint data also reflected that during the 2017-2018 school year one student was restrained 25 times; one student was restrained 22 times; one student was restrained 15 times; and one student



was restrained 10 times. The remaining students were restrained between 1 and 7 times, and the majority were restrained once or twice. During the 2018-2019 school year, the most restraints a single student experienced was 11; the remaining students were restrained 7 times or fewer, and the majority were restrained between one and three times.

OCR notes that for the 2017-18 school year, the District reported only two instances of restraint to OCR as part of the Civil Rights Data Collection (CRDC). This number is far below the number of restraints that were reported to OCR as part of this compliance review.

NPS BERs indicated that seclusion was also used with District students with disabilities. At least 22 BERs from NPS 2 listed the use of seclusion in a safety room (Safety Room). NPS 2 staff explained that the door to the Safety Room was removed after California law prohibited the use of locked seclusion in certain settings.<sup>5</sup> Despite the existence of BERs from NPS 2 reporting the use of seclusion, District staff reported to OCR that they did not know that NPSs used seclusion. In addition, both District schools and NPSs frequently used time away rooms, but generally only locked the rooms when staff were also present inside. Other than the Safety Room at NPS 2, OCR did not find evidence of any concerns regarding the use of seclusion for District students.

#### **D. The Use of Restraint and Seclusion with District Students**

OCR reviewed 31 student files as part of this compliance review. Those files were selected by focusing on students and schools with the highest number of restraints. Below we highlight seven of those students and the four schools they attended because the evidence regarding them illustrates the types of violations and compliance concerns that OCR identified in this review.

##### **1. District School 1**

District School 1 is [redacted content] school that housed [redacted content] Counseling Enhanced Program (CEP) classrooms. The CEP program consisted of small classes of 6 to 12 students with social and emotional disabilities, most of whom had BIPs. Classes were typically staffed with one teacher and two instructional aides trained in the District's behavior management protocol. The program is designed to provide social and emotional language, academics, and vocational and adaptive living support.

The CEP program utilized a small time-away room, called the Regroup and Return (R&R) room, as a de-escalation space, which was approximately 9 feet by 9 feet, had plain walls, a window, and a chair. According to District School 1 staff, the use of the R&R room is discussed during each IEP meeting. Staff stated that the purpose of the R&R room is to preserve the student's dignity when having a behavior issue, and it provides students a much less stimulating environment to use their coping and calming skills that they had been practicing in the

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<sup>5</sup> California Assembly Bill 2657, which went into effect on January 1, 2019, provided that seclusion or a behavioral restraint may be used "only to control behavior that poses a clear and present danger of serious physical harm to the pupil or others that cannot be immediately prevented by a response that is less restrictive." The law also prohibits, among other things, many forms of prone restraint in addition to locked seclusion, unless state law otherwise permits the facility to use a locked room.

classroom. Staff further explained that the R&R room allows students to have a break area so that they are away from other students for both their own safety and that of the other students.

Staff explained that students were not left alone in the R&R room and that staff determined when a student was ready to leave. Staff explained that if a student's behavior escalated while in the R&R room and additional crisis management techniques were necessary, a second staff member would hold the door closed from the outside. Staff further explained that the CEP program had a general protocol that if a student ended their day in the R&R room, they would start the following day there for an approximate 10-minute check-in to have a counseling discussion about the previous day's incident. Staff at District School 1 explained that while the R&R room was not used as punishment, students who required time away were downgraded a level on their behavior charts upon their return to the classroom and were required to make up work they missed while in the R&R room. However, OCR did not find any documentation to verify whether and how often work was being made up for time missed in the R&R room. Staff kept time away logs that included columns to record the name of the student and staff, the time the student entered and exited the R&R room, and a brief description of what occurred in the R&R room, including if the student was restrained. OCR's review revealed that these logs were inconsistently filled out, including that the description and time columns were frequently left blank. OCR also found that the staff was not always consistent in requiring students to return to the R&R room the following morning if they had ended the previous day in the R&R room.

The District's 2017-18 data indicate that 11 students were restrained a total of 73 times at District School 1. Five students were restrained once each, two were restrained five times, three were restrained between nine and fifteen times, and one was restrained 22 times. The 2018-2019 data includes ten students who were restrained a total of 26 times. Four students were each restrained once, two students were each restrained twice, one student was restrained three times, one was restrained four times, one was restrained five times, and one was restrained six times. OCR analyzed the files for the students who were restrained and discusses two examples below.

**a. Student A**

Student A was [redacted content] years old during the 2017-2018 school year and was placed in the [redacted content] CEP classroom at District School 1. He was eligible for special education services for [redacted content]. As described below, he spent over 48 hours in the R&R room and experienced at least 13 restraints across the 2017-2018 and 2018-2019 school years. Staff explained that if Student A was having a behavioral incident, his BIP outlined the steps used to assist Student A through the incident. According to staff, after 20 minutes of attempting to utilize the calming skills developed in his BIP, Student A would be removed to the R&R room to provide a calmer environment. Most of the restraints took place in the R&R room. According to Student A's teacher, Student A was always accompanied by a staff member in R&R and would be blocked from leaving by a second staff member if he became dangerous.

A Triennial IEP meeting had been scheduled for Student A for [redacted content] 2017, but due to a behavioral incident that resulted in a restraint on [redacted content], 2017, the District sent an assessment plan for an FBA to be conducted prior to the triennial meeting. While being evaluated for a BIP, Student A had three more incidents, each resulting in three-to-five-minute

restraints. Student A's IEP team then met in [redacted content] 2017 and developed a BIP based on the FBA, which addressed behaviors such as [redacted content]. Notes from their IEP describe Student A as anxious and struggling with focus. Student A would [redacted content].

Records indicate that between [redacted content] 2017 and [redacted content] 2018, Student A was removed to the R&R room for a total of over 12 hours and restrained on two occasions, once in [redacted content] 2017 for 2 minutes and in [redacted content] 2018 for 25 minutes where Student A exhibited behaviors that the BIP addressed, including [redacted content]. In [redacted content] 2018, the District conducted an Educationally Related Mental Health Services (ERMHS) assessment to determine if Student A needed additional supports.

At an IEP meeting on [redacted content], 2018, the IEP team discussed the results of the ERMHS report and added two goals and additional counseling for the student. After this meeting, Student A spent over 30 hours in the R&R room during the remainder of the 2017-18 school year. On several occasions when Student A ended the day in the R&R room, Student A would start the following day there for counseling per the CEP's general protocols, despite neither the IEP nor the BIP including this requirement. Although removals to the R&R room continued, restraints of Student A lessened; District staff restrained Student A once for three minutes in [redacted content] 2018.

Subsequently, records reflect that Student A began engaging in behaviors addressed in their BIP again, at which time the IEP team met on [redacted content], 2019, and assigned an instructional aide. On [redacted content], 2019, Student A had a [redacted content] behavioral incident during which he was restrained three times, the first for 6 minutes and the two others for 3 minutes each. In an interview with OCR, Student A's teacher explained that each time Student A was removed from class or restrained, Student A's behaviors were consistent with the behaviors that were outlined in their BIP and, therefore, it was not necessary to hold an IEP meeting. She further explained that it was [redacted content], but that District staff did meet with behaviorists, mental health providers, and coordinators to discuss Student A's behaviors.

According to the R&R log and the CEP class log, Student A spent over 48 hours in the R&R room: over 12 hours during the 2017-2018 school year and over 36 hours during the 2018-19 school year. The logs documented over 75 incidents with an average of 29 minutes spent in the R&R room. OCR questioned the teacher to understand how Student A received a FAPE while they were in the R&R room, and she explained that when Student A was in crisis, Student A could not access any part of their FAPE. She explained that removing Student A from the classroom allowed them to return to class without disrupting peer relationships. Although Student A spent over 48 hours in the R&R room, the District did not produce any information describing how instruction was made up or if compensatory services were offered or provided.

With respect to recordkeeping, OCR noted inconsistencies between the time away log and the BERs. For example, the time away log would indicate that Student A was in the R&R room much longer than what the BERs reflected, and there were times that the log indicated that Student A had been restrained but no BER was provided regarding the restraint.

**b. Student B**

Student B was [redacted content] years old in the 2017-2018 school year and attended District School 1 in the CEP classroom. Student B was eligible for special education services under the IDEA categories of [redacted content]. According to the District, Student B struggled with their assigned teacher in the 2017-2018 school year with continual behavioral outbursts and removals from the classroom. The team of teachers worked with a behavior specialist and a school psychologist to try to address Student B's behavioral issues. As explained below, the District restrained Student B at least 22 times and Student B spent at least 36 hours in the R&R room across the 2017-2018 and 2018-2019 school years.

In [redacted content] 2017, the District conducted an FBA and developed a BIP at Student B's annual IEP meeting on [redacted content], 2017, because Student B's behaviors were escalating. However, Student B was restrained one time in [redacted content] 2017 and 14 other times over a course of nine incidents from [redacted content] 2017 through [redacted content] 2018, during which time he also spent more than 13 hours in the R&R room. This was a significant increase from the prior time Student B had spent there, which was in total a little over an hour between [redacted content] 2017 and [redacted content], 2017. Staff explained that in the R&R room, Student B sometimes [redacted content]. Staff explained that between [redacted content] 2017 and [redacted content] 2018, staff met with the behavior specialist and school psychologist, other teachers observed Student B, and staff kept the guardians informed of each incident. Despite the significant increase in the amount of time Student B spent in the R&R room and the frequent contact with IEP team members throughout this period, the District did not hold an IEP meeting. In [redacted content] 2018, the CEP teachers determined that Student B needed a different teacher. After being placed in the other CEP classroom, staff did not restrain Student B and Student B spent significantly less time in the R&R room for the remainder of that school year.

The following school year, the District conducted a multi-disciplinary assessment of Student B in [redacted content] 2018. A new BIP was presented at the triennial IEP meeting on [redacted content], 2018. At this meeting, Student B's guardians raised concerns about the amount of time Student B spent in the R&R room and noted that they felt "that he overuses going to the room to take a break...and uses it to get out of academic tasks." Student B's [redacted content] 2018 BIP stated "the team believes non-compliance and outbursts serves the function of escape from academic demands." It went on to explain that non-compliance was a combination of [redacted content]. According to the District, the IEP team addressed this concern about using the R&R room by requiring that Student B make up any work missed while in the R&R room, but OCR did not receive written documentation confirming that Student B made up his work.

Following the implementation of the IEP and new BIP, there was an initial increase in visits to the R&R room, with Student B using the R&R room on 14 separate days, sometimes multiple times a day, for over 500 minutes between [redacted content], 2018 and [redacted content] 2018. Student B was removed to the R&R room for [redacted content] behaviors or went there to sleep. Starting in [redacted content] 2019, after realizing that he still needed to complete his work, the number of visits to the R&R room decreased significantly, averaging one time per month. The number of restraints also decreased with only two restraints between [redacted content] 2019 and the end of the school year.

Based on the District's records, the District restrained Student B 14 times between [redacted content] 2017 and [redacted content] 2018, and another 8 times before the 2018-19 school year end, for a total of 22 times in the review period. According to the logs, Student B also spent 36 hours in the R&R room: 19 hours in the 2017-18 school year and 17 hours in the 2018-19 school year. The number of hours spent in the R & R room fell after a new BIP was implemented for several months, with Student B going to the R & R room five times over a five-month period at the end of the year. However, there were inconsistencies among the R&R room logs, the classroom logs, and the BERs, suggesting that the total number of hours may have been higher than the 36 reflected in the logs and the number of restraints may have exceeded 22. For example, on [redacted content], 2017, the BER stated that Student B was in the R&R room, but the R&R log does not reflect the same information; and, on [redacted content], 2018, the BER stated that Student B was in and out of the R&R room, but there is no description on the R&R room log as to what occurred there, nor does it list the final visit. There were also several entries on the R&R log with no end time. Finally, one log indicates a restraint on [redacted content], 2019, but there is no corresponding BER.

## 2. NPS 1

NPS 1 served students in grades K through 12 and used a different third-party methodology of behavior management and crisis intervention. NPS 1's BER form listed four restraint types: small child, seated, settled, and neutral. Based on OCR's research and statements from District staff, OCR understands a settled restraint as a supine restraint where the student is face up, and a neutral restraint as a prone restraint where the student is face down. NPS 1 required parents to sign a consent form for the use of emergency restraints, but the consent form did not describe the third-party behavior management methodology mentioned above, and was separate from a BIP. The District staff OCR interviewed were not familiar with the methodology, had not toured NPS 1's entire facility while District students were placed there, and told OCR that the procedures used pursuant to that methodology were not discussed during IEP meetings.

According to District records, NPS 1 restrained four District students a total of 37 times during the 2017-2018 school year. One student was restrained twice, one was restrained five times, one was restrained seven times, and the other was restrained 23 times. During the 2018-2019 school year, NPS 1 restrained five District students 12 times. One student was restrained once, two students were restrained twice, another student was restrained three times, and the fifth student was restrained four times. On [redacted content] 2018, a non-District student placed at NPS 1 died following a prone restraint. At the time of the incident, six District students were placed at NPS 1, and after the death of the non-District student, the District placed the six District students at other NPSs. In [redacted content] 2019, the State of California revoked NPS 1's certification.

OCR reviewed the records for the District students who were restrained while attending NPS 1 and discusses three of them below to illustrate the types of violations and concerns OCR found.

**a. Student F**

Student F was in [redacted content] grade at NPS 1 in the 2018-2019 school year and was eligible for special education and related services under the IDEA categories of [redacted content]. While at NPS 1, a BIP was developed in [redacted content] 2017 without a preceding FBA; there was no FBA in Student F's file. The BIP appears to have been implemented prior to its presentation at an IEP meeting and presented to the team to inform the team but not to seek input from the team. The BIP allowed for the use of the third-party behavior management methodology adopted by NPS 1, if necessary.

District records reflect that on [redacted content], 2017, Student F [redacted content], which, according to the BER, was possibly due to [redacted content]. Student F was placed in a neutral (prone) restraint for 90 minutes. On [redacted content], 2017, during a [redacted content], staff asked Student F to leave the area because he was [redacted content], at which point he became agitated and was prompted to take a break. Initially he calmed down and staff attempted to direct him back to the classroom, but Student F then became re-agitated and was escorted using NPS 1's behavior management methodology to the counseling room where he began [redacted content] and was placed in a settled (supine) restraint for 45 minutes. On [redacted content], 2017, Student F was placed in neutral (prone) restraints for approximately 5 minutes.

Student F had five subsequent neutral (prone) restraints: on [redacted content], 2018, for an hour each; on [redacted content], 2018, for over two and half hours; and [redacted content], 2018, and [redacted content], 2018, for at least 30 minutes each. District staff stated that following these restraints, there was no FBA conducted nor an IEP team meeting convened until Student F's mother called for an IEP meeting in [redacted content] 2018 to discuss the frequency and length of the restraints. An IEP meeting was held on [redacted content], 2018, and the behavior report stated that no hands-on interventions were to be used on Student F. Despite this direction, Student F was subject to a neutral (prone) restraint on [redacted content], 2018. The District then placed Student F at a different NPS. District staff told OCR that Student F had been restrained at least once in the new NPS, but there are no reports of those restraints in the data OCR reviewed. Student F was then moved to a [redacted content].

In total, NPS 1 staff placed Student F in prone restraints for at least 460 minutes (almost 8 hours) between [redacted content], 2017, and [redacted content], 2018, for periods ranging from 5 minutes to two and a half hours. There is no information in the IEP documents to indicate that the team discussed any additional factors that may have led to the restraints, beyond medication changes.

**b. Student H**

In [redacted content] 2017, Student H was in [redacted content] grade and received services under the IDEA category of [redacted content]. The District had placed Student H at NPS 1 in [redacted content] grade due to [redacted content]. The District did not conduct an FBA prior to changing Student H's placement to NPS 1, and the BIP that was part of Student H's IEP was developed by NPS 1 rather than through an FBA. The BIP did not contain any information about the use of the third-party behavior management methodology adopted by NPS 1. A District

school psychologist conducted a triennial evaluation in [redacted content] 2018, and the IEP meeting was held in [redacted content] 2018. There was no record of any discussion about NPS 1's use of the behavior management methodology.

Student H was restrained five times in the 2017-2018 and 2018-2019 school years. District records reflect that each restraint occurred when Student H became [redacted content]. Student H was restrained in either a standing hold or a neutral (prone) restraint ranging from three to twenty minutes. In one instance on [redacted content], 2017, Student H was placed in a neutral (prone) restraint while [redacted content]. No information was included in the BERs to enable OCR to determine whether the strategies in Student H's BIP were implemented, and there was no indication that meetings were scheduled after the restraints to discuss whether the BIP continued to be appropriate. Student H remained at NPS 1 until placement at a different NPS following the [redacted content] 2018 incident referenced above. The District held an annual IEP meeting on [redacted content], 2019, and developed a new BIP.

### **c. Student I**

At the start of the 2017-2018 school year, Student I attended [redacted content] grade at a District [redacted content] school. Student I had an IEP and was eligible for special education services under the IDEA categories of [redacted content]. An FBA from [redacted content] 2016 recommended developing a BIP for target behaviors like [redacted content]. In [redacted content] 2017, the District restrained Student I for an unspecified period of time to stop him from "[redacted content]." The District restrained him again in [redacted content] 2017, after he tried to [redacted content]. At an IEP meeting held on [redacted content], 2017, the District changed Student I's placement to NPS 1. IEP documentation reflected that Student I engaged in [redacted content] and had a related goal, that an FBA would be updated, and included a Positive Behavior Support Intervention plan.

In the 2017-2018 school year, NPS 1 staff restrained Student I 22 times for 540 minutes (including standing, small child, (settled) supine, and neutral (prone) restraints), generally when engaging in [redacted content]. Each BER noted that Student I did not have a BIP that addressed the behaviors resulting in restraint. The IEP records from that school year referenced the behaviors but not the restraints nor NPS 1's use of the behavior management methodology. The IEP records noted that Student I was making progress on the [redacted content] behavior goal as the attempts to [redacted content] (and the restraints) were decreasing.

In the 2018-19 school year, NPS 1 staff restrained Student I three times in [redacted content] 2018. OCR reviewed BERs for only two of these restraints, and according to the behavior logs, Student I had engaged in [redacted content] behavior on numerous other occasions. Of the 25 documented restraints at NPS 1, Student I spent a total of 9 hours and 27 minutes in restraints, each restraint lasting between 5 and 75 minutes (most between 10 and 35 minutes). The IEP team met on [redacted content], 2018, but the District did not produce any information indicating that it evaluated if these restraints resulted in a denial of FAPE and required compensatory services. At the IEP meeting on [redacted content], 2018, the IEP team added a new behavior goal related to [redacted content] as the prior goals had not been met. Student I's IEP also included a BIP that was developed by NPS 1 rather than being based on an FBA. The BIP stated

that if Student I became a danger to self or others, including for increased [redacted content], a “procedure may occur” under the behavior management methodology adopted by NPS 1. In [redacted content] 2019, the District placed Student I at another NPS. A behavior report for Student I at the new NPS noted that Student I continued to engage in similar [redacted content] behaviors with “moderate intensity,” averaging 10 incidents per day, and an associated BIP described that when the behaviors were serious, staff should evade or block when necessary. Student I experienced zero documented restraints during the review period after being placed at the new NPS.

#### 4. NPS 2

The District placed five students in 2017-18 and five students in 2018-19 at two school sites at NPS 2 serving students in grades [redacted content], as well as older students. NPS 2 reported that all NPS 2 teachers and aides were trained in a third-party method of behavior modification, de-escalation, and emergency intervention that NPS 2 had adopted. This method differed from the methodology used by the District and NPS 1. According to one of NPS 2’s associate directors, the third-party method permitted the use of restraint only when serious bodily injury to staff or student was imminent. NPS 2 used four restraint types: seated (2-person), wall, standing (2-person), and prone. As noted above, California law prohibited the use of prone restraint in January 2019.

According to an associate director interviewed by OCR, if a student entered NPS 2 with a BIP, staff reviewed it and made adjustments based on the behaviors they observed. If staff used an emergency intervention for a student who did not have a BIP related to the particular behavior, NPS 2 staff explained that they would schedule an IEP meeting to develop a BIP. According to the NPS 2 director, sometimes BIPs were created without a preceding FBA.

Staff at one of the two sites also used a “Safety Room” as an emergency intervention. The Safety Room was a small room furnished with a single chair and a single light bulb hanging overhead. At times prior to [redacted content] 2019, students were placed in the Safety Room alone while a staff member held the door shut; at other times, staff allowed the door to remain open but placed a thick folding mat across the doorway to block the student’s exit. NPS 2 staff reportedly completed BERs when the door was held shut as they considered it to be seclusion; however, NPS 2 staff did not complete BERs when the doorway was blocked with a mat. While NPS 2 generally marked the use of seclusion on the BERs when a student was placed in the Safety Room, some BERs OCR reviewed did not. BERs for District students placed at NPS 2 during the review period contained incomplete and inconsistent information regarding whether the students were placed in the Safety Room, and if so, the amount of time they spent there and whether the door was blocked.<sup>6</sup> Once a student calmed down, staff set a timer for between 5 and 20 minutes for the student to remain calm. If the student acted out, the timer was reset until the student remained calm. According to NPS 2 staff, as of OCR’s site visit in September 2019, they were no longer blocking the exit to the Safety Room, and students continued to use it as a quiet space with the door open. NPS 2 staff explained that instead of using the Safety Room as

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<sup>6</sup> For example, sometimes the box on the BER form for seclusion was checked, but there was no indication on the BER that the student went to the Safety Room.



seclusion when students were noncompliant or yelling, staff began sending students to the courtyard, which resulted in a decrease in the use of restraint.

District staff told OCR that they did not know that NPS 2 staff used the Safety Room, how often it was used, or whether it was used as a seclusion room. Further, IEPs and BIPs for District students placed at NPS 2 did not include a description of the Safety Room.

According to the restraint data, NPS 2 staff restrained all five District students, between one and two times each, for a total of seven times in the 2017-2018 school year. During the 2018-2019 school year, NPS 2 staff restrained all five District students a total of 16 times. Two students were restrained once each, one was restrained twice, one was restrained five times, and another was restrained seven times. In addition, of the 33 BERs OCR reviewed for District students placed at NPS 2, twenty-five reflected that both the restraint and seclusion boxes were checked, indicating that the students were removed to the Safety Room subsequent to a restraint. However, several of the BERs OCR reviewed did not contain a description of the incident. According to the BERs, students spent between five minutes and two hours in the Safety Room. OCR reviewed the records for the District students placed at NPS 2 and discusses one of these students below who was sent to the Safety Room and restrained to illustrate the types of violations and concerns OCR found.

#### **a. Student J**

Student J was [redacted content] years old when the District initially placed him at NPS 2 in [redacted content] 2017 with an IEP for [redacted content]. District records reflected that Student J had goals in all academic, social, emotional, and behavioral categories, as Student J [redacted content]. According to NPS 2 staff, prior to the 2018-2019 school year, Student J was frequently placed in the school's Safety Room, often with either the door closed or with a mat blocking the doorway. Student J consistently [redacted content] and when placed alone in the Safety Room, would [redacted content], and remain until the behavior ceased. Student J was not permitted to leave until exhibiting calm for 20 minutes, and if Student J acted out during the 20 minutes, the timer would be reset. Staff told OCR that there was not a record kept for every time Student J was placed in the Safety Room.

During the 2018-2019 school year, there were 12 incidents documented in BERs of NPS 2 staff restraining or sending Student J to the Safety Room. The BERs for these incidents do not consistently document the length of time of the restraints or the length of time Student J spent in the Safety Room. As a result, OCR could not determine how much time Student J may have lost in the provision of educational services during these incidents. There is also no information in the file for Student J reflecting that the District held IEP meetings after NPS 2 placed Student J in the Safety Room with the door shut or following a restraint. The District did produce documentation that Student J's parents were consistently notified of each incident and often consulted mid-incident on calming techniques.

NPS 2 staff were unsure of when NPS 2 permanently removed the door from the Safety Room but believed it was around [redacted content] 2019. However, Student J's [redacted content] 2019 BER had seclusion marked. Staff explained that following the change in state law

prohibiting seclusion, staff would take Student J outside to the large courtyard instead of the Safety Room for non-compliant behaviors. According to NPS 2 staff, Student J's behaviors changed after going to the courtyard and Student J was no longer restrained or secluded as frequently.

## **5. NPS 3**

NPS 3 served students in [redacted content]. All staff at NPS 3 were trained to use the same third-party methodology for behavior modification, de-escalation, and emergency intervention used by NPS 2. NPS 3 staff explained that students went to a Refocus Room (time away) following a restraint or for discipline. The room had a concrete floor and contained five doorless stalls and one main entry door. NPS 3 staff reported to OCR that students spent a range of time in the Refocus Room, up to the entire day if necessary, and that some fell asleep in the room. Staff stated that they would bring work for the students into the stalls.

According to the NPS 3's principal, at times, NPS 3 held meetings with parents to discuss how to reintegrate a student into the learning environment after an emergency intervention. However, NPS 3 staff explained to OCR that they did not share in detail with District staff and parents at IEP meetings how they implemented their behavior modification program with respect to time away and how that program was tailored to meet the students' needs. In addition, according to NPS 3 staff, teachers often created BIPs for students without a preceding FBA, although for more comprehensive BIPs, District staff were often involved. Finally, behavior analysts from NPS 3 did not typically participate in the IEP process for students placed at NPS 3.

According to the District's data, there were no restraints of District students at NPS 3 during the 2017-2018 school year. OCR determined that the District's reported data are incorrect based on OCR's review of student files. During the 2017-2018 year, there was at least one restraint of a District student. During the 2018-2019 school year, there were five restraints: two of one student and three of another student, only two of which were listed in District data. OCR reviewed the records for the District students restrained at NPS 3 and discusses one of these students below to illustrate the types of violations and concerns OCR found.

### **a. Student K**

Student K was [redacted content] years old during the 2018-2019 school year and received special education and related services under the IDEA categories of [redacted content]. Student K attended NPS 3 starting in [redacted content] and stayed at NPS 3 through the end of the review period. Student K had goals in the areas of [redacted content].

According to District records, Student K had a BIP that NPS 3 created when the District initially placed Student K at NPS 3 to address concerns about [redacted content]. The BIP was not created through the FBA process. The District's IEP team reviewed Student K's BIP annually and discussed it during an IEP meeting on [redacted content], 2018. The BIP did not address the use of time away, though a refocus room chart was presented during the IEP meeting. A full behavioral assessment was not conducted and presented until an IEP meeting in [redacted content] 2019 to determine if Student K needed a one-on-one aide and addressed other

behavioral concerns. According to NPS 3 staff, when Student K was having a difficult day, Student K had a tendency to [redacted content].

NPS 3 sent Student K to the Refocus Room over 100 times during the review period for [redacted content]. After an incident, Student K would often spend the remainder of the day in the Refocus Room, and according to staff, Student K would sometimes access the curriculum and sometimes sleep. Student K went to the Refocus Room 50 times in the 2017-2018 school year and at least 56 times in the 2018-2019 school year, though the detailed behavior data kept by NPS 3 was not fully consistent with the BER forms the District provided to OCR. Student K averaged 41 minutes per Refocus Room visit for over 2,200 minutes (over 38 hours) in the 2018-2019 school year. In addition, Student K had three prone restraints (prohibited by state law as of January 1, 2019) on [redacted content], 2019, [redacted content], 2019, and [redacted content], 2019. In each BER, Student K was described as attempting to [redacted content] and was subsequently placed in a prone restraint for as long as 4 minutes at a time. For each incident, Student K was required to go to the Refocus Room for the rest of the day; for one incident, he was in the Refocus Room for more than 5 hours.

OCR found that NPS 3 provided the District with detailed charts showing all of the restraints and time spent in the Refocus Room. However, the District produced no information to OCR to explain how Student K's IEP was implemented, either before a restraint occurred, during a restraint and/or use of the Refocus Room, or after the restraint and/or use of the Refocus Room. Although Student K spent over 38 hours in the Refocus Room during the 2018-2019 school year, the District also did not produce any information describing how instruction was made up or if compensatory services were offered or provided.

#### **IV. Analysis**

As described below, OCR identified violations and compliance concerns related to the evaluation and placement of students with disabilities who experienced restraints and time away, as well as compliance concerns related to the District's implementation of students' IEPs.

##### **A. Evaluation and Reevaluation**

OCR identified three instances where the District violated Section 504 and Title II by failing to convene an IEP meeting when it had reason to suspect students needed an evaluation or reevaluation. Student B experienced 22 restraints at District School 1 in the 2017-2018 school year, 14 of which occurred in [redacted content] 2018 and [redacted content] 2018. Despite the frequent restraints occurring over the course of two months, in addition to significant increases of time spent in the R&R room, the District did not reevaluate Student B until eight to nine months later, in [redacted content] 2018. Similarly, NPS 1 staff used multiple prone restraints with Student F for almost 8 hours between [redacted content] 2017 and [redacted content] 2018 (including a 45-minute supine restraint), and District staff reported that no IEP meeting was convened during that time period until Student F's mother requested an IEP meeting in [redacted content] 2018 due to her concerns about the frequency and length of the restraints. In addition, NPS 3 staff sent Student K to the Refocus Room on 106 occasions during the 2017-2018 and 2018-2019 school years, totaling over 38 hours in the 2018-2019 school year alone, and subjected Student K to a prone

restraint on [redacted content], 2019, but the IEP team did not complete an FBA until the IEP team meeting in [redacted content] 2019. Even when the IEP teams for these three students finally convened, the District produced no information indicating that they assessed if the repeated restraints and/or many hours in the Refocus Room had denied a FAPE and if compensatory services were required.

OCR's investigation revealed that overall, the District infrequently held IEP meetings after using restraints or seclusion, which led to compliance concerns regarding other occasions when the District may not have promptly reevaluated students when they exhibited new behaviors concurrent with receiving notice of an increase in the use of restraint. For example, District staff restrained Student A in [redacted content] 2017 and again in [redacted content] 2018, but OCR did not find evidence that the District convened an IEP meeting until [redacted content] 2018. The frequent use of restraint may have been an indication that the designed interventions for these students were ineffective, requiring the prompt reevaluation at IEP meetings, pursuant to Section 504 and Title II as well as District policy.

Further, the reason for not scheduling an IEP meeting was rarely documented on the BERs or elsewhere. For example, despite Student I's dozens of restraints for the same behavior at NPS 1, no IEP meetings were held subsequent to each restraint and no BIP was developed, and the file fails to explain why no meetings were held and no BIP developed. In addition, the fact that Student I did not experience restraint for the same behaviors once Student I attended a different NPS constitutes evidence that other interventions, developed through an IEP meeting, could have been used to manage Student I's behavior in the classroom with access to IEP services and instruction.

The District's inconsistency in holding IEP meetings after some restraints (which its own policy required) may have prevented the District from appropriately assessing whether a student required evaluation or reevaluation and ensuring that students were not denied a FAPE. OCR notes, however, that as the review period was ending, the District instituted a review process to ensure that District staff reviewed each BER to determine whether an IEP meeting was needed or whether other steps (such as additional training or the modification of a BIP) were necessary.

## **B. Placement Decisions**

OCR found that the District violated Section 504 and Title II because placement decisions were made by District teams who were not knowledgeable about the emergency procedures being used at the NPS. OCR also found that the District violated Section 504 and Title II because placement decisions were made by NPS staff who were not knowledgeable about the student, relevant data, and placement options. Finally, OCR identified a concern that the District made placement decisions with incomplete information due to its incomplete and inconsistent recordkeeping.

## **1. Decision-Makers Not Knowledgeable About Emergency Procedures**

OCR found that the District violated Section 504 and Title II because in some circumstances District staff who were making placement decisions for students in NPS placements were not knowledgeable about the meaning of the evaluation data or the placement options. For example, at NPS 1, District staff were not familiar with the emergency response methodology used by the school, had not toured the entire facility while District students were placed there, and told OCR that the emergency response procedures were not discussed during IEP meetings. Similarly, District staff told OCR that they did not know that NPS 2 used the Safety Room, how often it was used, what it actually looked like, and whether it was used as seclusion. In addition, at NPS 3, OCR learned that at IEP meetings, the team did not discuss how NPS 3 implemented its behavior modification program and how that program was tailored to meet the students' needs. This was especially problematic because of evidence that NPS 3 was using its Refocus Room as a punishment for students, given the high frequency in which it was used, NPS 3 staff statements that they used the Refocus Room for discipline, and the statements from NPS 3 staff that students sometimes spent the entire day in the room if needed and that some students fell asleep in the room. OCR found that this practice denied District Student K a FAPE. The District did not have any information about the practice and apparently had not observed the Refocus Room prior to placing students at NPS 3.

## **2. Placement Decisions Made Outside of a Group of Knowledgeable People**

Under Section 504 and Title II, a team of people knowledgeable about the student, their evaluation data, and placement options should have been involved in the FBA process and the development of BIPs, but this did not always happen for students the District placed at NPSs. Specifically, NPS 1 staff created BIPs for multiple District students placed there (including Students F, H and I) without the involvement of District staff, without any preceding FBA, and/or outside of the IEP process altogether. For example, OCR found that the District did not appropriately evaluate Student H to identify needed behavioral supports prior to making the decision to place him at NPS 1. And OCR found that once the District placed Student H at NPS 1, a BIP was developed without convening a group of knowledgeable people to evaluate Student H's needs to create a BIP that was individualized for Student H. OCR found that NPS 1's practice of requiring parents to sign a consent form for the use of emergency restraints (outside of the IEP or BIP) did not constitute the type of participation from a group of knowledgeable people that Section 504 requires.

For students who were placed at NPS 2 with a BIP, NPS 2 staff often made adjustments to the BIP on their own based on observed behaviors. NPS 2 and NPS 3 also often created new BIPs for students without an appropriate evaluation of behavioral supports and without input from the full group of knowledgeable people, including District staff and parents, required by the Section 504 regulations.

Similarly, as discussed above, the Classroom Team at District School 1 frequently met outside of the IEP process following a restraint to discuss the restraint, how to prevent a similar crisis in the future, what different strategies to try, and/or to develop a Crisis Management Plan for the student, any of which may have been placement decisions under the Section 504 regulations.

### **3. Incomplete and Inconsistent Recordkeeping**

OCR has a concern that incomplete and inconsistent record keeping limited or impeded the IEP teams' ability to make placement decisions with information from the full variety of sources required under Section 504. While some IEPs referenced restraints, many IEPs made no reference to restraints. Further, even when IEP teams discussed restraints and reviewed BERs at IEP meetings, the BERs were often insufficient to appropriately inform the IEP team's discussions. That is, the BERs often lacked descriptive and detailed information, infrequently detailed what provisions of a behavior plan were implemented prior to the incident, often included no reference to a behavior plan whatsoever (or sometimes incorrectly marked that a student had a BIP when they did not) and did not consistently include the amount of time a student spent away from class or the recovery time they required.

While OCR found that BERs were typically completed following a restraint, OCR identified a number of restraints (listed in behavior logs, time away logs, or elsewhere in a student's file) where there were no corresponding BERs and therefore no detailed record of what occurred or how a student's behavior plan was implemented. For example, behavior logs reflected restraints of Students F and I for which there were no corresponding BERs. Similarly, Student A was restrained in the R&R room according to the time away logs, but there are no corresponding BERs. As noted above, OCR also found a major discrepancy between the numbers of restraints that the District reported to the CRDC for the 2017-18 school year (reporting only two restraints) and the numbers reflected in the information the District produced to OCR in this compliance review (reporting 97 restraints for 28 students in District schools and 67 restraints for 18 students in NPSs).

BERs also did not provide information about the relevant time periods for restraints or seclusions to permit accurate calculations about how many minutes of educational services a student may have lost outside the classroom or while restrained and/or while recovering from a restraint. For example, while the time away log reflected that Student A spent 47 minutes in the R&R room related to two one-minute restraints, the corresponding BER did not list the amount of recovery time Student A required. Similarly, for the 12 incidents documented in BERs for Student J during the 2018-2019 school year in which Student J was restrained or sent to the Safety Room, the BERs did not consistently document the length of time the restraints lasted or the length of time spent in the Safety Room. As a result, for several instances involving long restraints or prolonged periods in the time away room, the District's records are incomplete and fail to document how much time Student J may have lost in the provision of educational services while in restraints or the Safety Room. OCR found no evidence that District staff followed up with NPS 2 to get this information, and this raises a compliance concern that the District lacked the information it needed to ensure a FAPE for its students placed at NPS 2. The BERs from NPS 2 also contained inconsistent information regarding use of the Safety Room, including whether it was used as seclusion.

The District also did not consistently have documentation regarding whether a student's IEP was implemented during the use of time away and or whether the students had been able to make up missed work. For example, Student K spent much of the day in the Refocus Room, often through the end of the day, totaling over 38 hours in the 2018-2019 school year. Despite this substantial amount of missed instruction, the District did not produce any information describing

whether or how Student K's IEP was implemented during that time or how instruction was made up. Without accurate documentation of the use of time-away spaces, the amount of time students spent there removed from class, and the recovery time, OCR is concerned that the District's IEP teams lacked critical information needed to make informed placement decisions for students at NPSs.

### **C. Concern about Implementation of IEPs and BIPs**

Finally, OCR identified a concern about whether the District was consistently implementing IEPs and BIPs because they were often vague or silent about whether certain interventions were to be used or how they should be used. Specifically, the IEPs and BIPs of students who experienced time away did not consistently include whether time away was to be used and, if so, how it should be used. For example, Student A spent over 30 hours in the R&R room, including at the start of several days when he had ended the prior school day in the room, even though his IEP and BIP did not provide for him to start the day there. This example raises a compliance concern because OCR found that this was a general practice at District School 1 and there was no evidence that IEP teams were discussing this practice to determine, individually, the FAPE necessity for the practice for each student.

In addition, OCR identified at least one student at NPS 1 (Student F) whose BIP included the use of NPS 1's behavior management methodology, but whose behavior report explicitly noted a prohibition against the use of physical interventions, who was still subsequently restrained multiple times while attending NPS 1. The District produced no evidence that the IEP was ever modified to provide clarity to staff about when or how physical interventions could be used.

In these instances, OCR has a concern that the IEPs may not have been implemented as intended. OCR notes that the incomplete and inconsistent record keeping described above may have also impeded the District's ability to ensure that IEPs and behavior plans were implemented appropriately and that students were not ultimately denied a FAPE.

### **V. Conclusion**

To resolve the violations and concerns identified in this letter, the Resolution Agreement requires the District to take a number of steps to ensure compliance with federal law, including creating and revising policies regarding restraint and seclusion, providing training to staff, implementing processes to maintain records and effectively monitor the use of restraint and seclusion, providing individual remedies for students who were restrained or secluded during the review period, and conducting a review to determine whether any other District students were denied a FAPE due to the District's or an NPS's use of restraint or seclusion from 2019 to the present, and to implement responsive remedies based on this review. When fully implemented, the Resolution Agreement is intended to address the compliance concerns and/or identified violations. OCR will monitor the implementation of the Resolution Agreement until the District is in compliance with the terms of the Resolution Agreement and the statutes and regulations at issue in this compliance review.

This concludes OCR's compliance review and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because they filed a complaint or participated in the compliance review process. If this happens, an individual may file another complaint alleging retaliation.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

If you have any questions regarding this letter, please contact Jessica Plitt, Civil Rights Attorney, at (415) 486-5525 or [jessica.plitt@ed.gov](mailto:jessica.plitt@ed.gov).

Sincerely,

/s/

Zachary Pelchat  
Regional Director

Enclosure (1): Resolution Agreement

cc: Betty Jo Wessinger, Assistant Superintendent (email only)