



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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REGION V  
ILLINOIS  
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WISCONSIN

October 5, 2018

Mr. Rupak Gandhi  
Superintendent  
Fargo Public Schools  
415 North Fourth Street  
Fargo, North Dakota 58102

*Sent via electronic mail to:* XXXXXXXXXXXXXXXXXXXXX

Re: OCR Docket #05-18-1287

Dear Superintendent Gandhi:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Fargo Public Schools (District) alleging discrimination on the basis of disability. Specifically, the complaint alleges the District subjected a XXXXXXXXXXXX student with a disability (Student) who attended XXXXXXXXXXXXXXXXXXXX to discrimination based on disability<sup>1</sup> during the 2017-2018 school year by (1) failing to implement the provisions of the Student’s Behavior Intervention Plan (BIP), (2) subjecting him to restraints and seclusion, and (3) XXXXXXXXXXXXXXXXXXXX.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 - 12134, and its implementing regulation at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance by the Department and a public entity, the District is subject to these laws.

During the course of the investigation, OCR interviewed the Complainant and District employees, and analyzed data provided by both the District and the Complainant. With respect to Allegation 2, prior to the conclusion of OCR’s investigation, the District expressed an interest in voluntarily resolving the allegation. The District signed the enclosed Resolution Agreement on October 3, 2018, to resolve Allegation 2. With respect to Allegations 1 and 3, based on the information obtained during its investigation, OCR determined that the evidence is insufficient to conclude the District discriminated against Student A on the basis of disability. The bases for OCR’s determinations follow.

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<sup>1</sup> At the beginning of the 2017–2018 school year, Student A was identified as a student with a primary disability classification of XXXXXXXXXXXX and secondary classification of XXXXXXXXXXXX. In the spring 2018 semester, Student A was identified as a student with XXXXXXXXXXXX.

The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

## **Applicable Legal Standards**

### *Discrimination Generally*

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

### *Free Appropriate Public Education (FAPE)*

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

The Section 504 implementing regulation, at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a FAPE to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Under the Section 504 regulation at 34 C.F.R. § 104.33(b), the provision of an appropriate education to each qualified person with a disability who is in the recipient's jurisdiction is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-disabled persons are met and are based upon adherence to procedures that satisfy the requirements for educational settings, evaluation and placement and procedural safeguards set forth in the Section 504 regulation, at 34 C.F.R. §§ 104.34 – 104.36. Implementation of an individualized educational program (IEP) developed in accordance with the Individuals with Disabilities in Education Amendments Act is one means of meeting this standard.

The Section 504 implementing regulation, at 34 C.F.R. § 104.35(c) states that in interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and 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.

### *Use of Restraint and Seclusion*

Section 504 prohibits the use of restraint or seclusion that constitutes disability discrimination. The use of restraint or seclusion could violation section 504 if the restraint or seclusion of a

student with a disability constitutes unnecessary different treatment or denies a student's right to a FAPE.

In determining whether the use of restraint or seclusion violates Section 504, OCR considers whether the response to restrain or seclude a student with a disability was justified, such as in situations where the student's behavior poses imminent danger of serious physical harm to self or others. OCR would also examine relevant data to determine if repeated use of restraint and seclusion was justified where alternative methods also could prevent imminent danger to self or others.

When a school district restrains or secludes a student with a disability for behavior that would not result in the restraint or seclusion of peers without disabilities, OCR may find that the school district engaged in unnecessary different treatment on the basis of disability prohibited by Section 504. Similarly, a school district that subjects a student to restraint or seclusion on the basis of assumptions or stereotypes about disability also engages in conduct prohibited by Section 504.

For a student already identified as a student with a disability, a school's use of restraint or seclusion could be evidence that the student's current array of regular or special education and related aids and services is not addressing the student's needs. Because the Section 504 FAPE obligation is ongoing, when a school district has reason to believe that the student's educational needs are not being met, it must consider different or additional approaches or services to address the student's behavioral needs, and if necessary, reevaluate the student, which could include evaluating the need for positive behavioral interventions and supports and other strategies to address the student's behavior that could mitigate or eliminate the need for restraint and seclusion.

Persuasive indicators that a student's needs are not being met appropriately would include: situations that would impede the student's learning or that of others, such as new or more frequent emotional outbursts by the student, or an increase in the frequency or intensity of behavior; a sudden change into withdrawn, non-communicative behavior; and/or a significant rise in missed classes or sessions of Section 504 services.

The use of restraint or seclusion may deny FAPE if its use had a traumatic impact on the student such that new academic or behavioral difficulties that manifest as a result of the use of the techniques could, if not addressed promptly, constitute a denial of FAPE. If there is reason to believe that the provision of FAPE services to the student has been adversely affected by the use of restraint or seclusion, such that the student's needs are not being met, a school has an obligation under Section 504 to: (1) determine the extent to which additional or different interventions or supports and services, including positive behavioral interventions and supports and other behavioral strategies may be needed; (2) determine if current interventions and supports are being properly implemented; (3) ensure that any needed changes are made promptly; and (4) remedy any denial of FAPE that resulted from the school's prior use of restraint or seclusion.

When the Section 504 team or the IEP team determines that the use of restraint or seclusion resulted in a denial of FAPE for the student, the team must determine whether the provision of compensatory educational services or other appropriate relief is warranted in order to ensure the student's continued equal access to the school's educational program. If compensatory services are warranted, the school must offer and provide them to the affected student. The Section 504 team or IEP team may also need to consider other placement options – including a self-contained classroom, a private setting, or a separate school – if the student's education cannot be achieved satisfactorily in the regular education environment with the use of supplementary aids and services as required by 34 C.F.R. § 104.34. Before changing a student's placement, however, the team must consider whether any supplementary aids, services or supports could be provided to maintain the student's placement in the regular education setting to the maximum extent appropriate to the needs of the student with a disability. The team must conduct a reevaluation of the student if they believe a significant change in placement is necessary.

### **Relevant District Policies and Procedures**

The District's Student Restraint Policy (AP 6250), provides:

It is the policy of the [District] to promote a safe and productive workplace and educational environment for its employees and students, and to ensure that every student in the [District] is free from the unreasonable use of physical restraint, and that physical restraint shall only be used with extreme caution in emergency situations, after other less alternatives have failed or been deemed inappropriate.

School personnel shall only administer a physical restraint when it is needed to protect a student and/or a member of the school community from imminent danger of physical injury. When physical restraint needs to be utilized, school personnel shall seek to prevent or minimize any harm to the student as a result of the use of physical restraint.

The Policy defines physical restraint as “the use of physical intervention to hold a student immobile or limit a student's movement by using body contact as the only source of restraint to deescalate dangerous behavior.” It defines dangerous behavior as “...behavior which may immediately result, or has resulted in harm to self or others.”

The Policy prohibits the use of mechanical and chemical restraints as well as prone restraints.<sup>2</sup> The Policy prohibits the use of physical restraint as a means of punishment or as a response to the destruction of property, disruption of school order, a student's refusal to comply with a school rule, or staff directive or verbal threats that do not constitute a threat of imminent danger of physical injury.

Under the Policy, only trained school personnel may administer physical restraints. Trained personnel are those individuals certified in Nonviolent Crisis Intervention.

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<sup>2</sup> The District defines mechanical restraints as “the use of a device to restrict or limit the movement of a student or the normal function of a portion of his or her body.” The District defines chemical restraints as “the administration of medication for the purpose of restraint.”

The Policy includes follow-up procedures and reporting requirements after a student has been released from a restraint. The follow-up procedures state that the principal, or administrative designee...shall...

- a. review the restraint with the student to address the behavior that precipitated the restraint;
- b. review the incident with school personnel who administered the restraint to discuss whether proper restraint procedures were followed;
- c. consider whether any follow-up is appropriate for the students who witnessed the incident; [and]
- d. notify parent/guardian of student who was restrained to inform them of the use of physical restraint...of their child.

The reporting requirements state:

- a. Any use of physical restraint by certified or non-certified staff, shall be reported<sup>3</sup> as soon as possible to the building principal or administrative designee both verbally and in writing. The written report will be submitted via PowerSchool no later than the next working day after the restraint was utilized.
- b. The principal of the building shall maintain an on-going record of all reported instances of any physical restraint.
- c. The principal or administrative designee shall inform the student's parents or guardians of the use of any physical restraint on their child on the same day that restraint was used. If attempts to contact the parent/guardian are unsuccessful, the principal or administrative designee shall document a description of notification attempts.
- d. The principal or administrative designee shall provide the Office of the Superintendent or designee with a copy of the written report of a physical restraint when such restraint has resulted in a serious injury to a student or staff member, or when an extended restraint (20 minutes or longer) has been administered.

The Policy prohibits the use of seclusion, as defined as the involuntary confinement of a student alone in a room or area that his or she is physically prevented from leaving.<sup>4</sup>

OCR interviewed School staff who were certified to administer physical restraints during the 2017-18 school year including the Principal, XXXXXXXXXXXX, and Student A's Special

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<sup>3</sup> The report contains the student's name, date of restraint, time restraint began and ended, site of restraint, whether the student has an IEP, information about staff administering the restraint, the name of witness(es), parent notification section, description section for precipitating activity, description of restraint and further actions to be taken by the restraint team.

<sup>4</sup> OCR verified during interviews with District staff that, at no point, is a child involuntarily confined alone in a room or area from which the student is physically prevented from leaving. At times, the School utilizes a designated space called the Crash Room (alternatively referred to as the safe room, reset room and cool-down room), which is a designated space at the School where students may go voluntarily to de-escalate, to seek a sensory break or to work if they need a different space. The Crash Room is not locked when in use. Staff never leave students unaccompanied in the Crash Room. Students are permitted to leave the Crash Room at any time, unless they present as dysregulated. In that event, Staff ensure the student is calm and ready to return to class before leaving the Crash Room.



that staff did not use a visual schedule, a cue card or provide him with sensory breaks, i.e., heavy-lifting opportunities. None of the staff interviewed by OCR recalled the Complainant expressing concern that Student A’s BIP was not implemented during the fall 2017 semester.

The staff who worked with Student A stated they were aware of Student A’s BIP and implemented it with fidelity. Student A’s special education teacher – who also served as his IEP case manager – stated that she was first notified that Student A had an IEP and a BIP in early August 2017 prior to the start of the 2017-2018 school year. She stated she was familiar with Student A’s IEP and BIP when the 2017-2018 school year started and implemented them. The Principal, classroom teacher, paraprofessional and XXXXXXXXXXXXX, stated they were all aware of Student A’s BIP and discussed how they implemented it. They each discussed instances where Student A was acting out and they utilized visual cues, communication boards and the token system to illicit Student A’s desired replacement behavior.

The Principal demonstrated her knowledge of Student A’s BIP by describing Student A’s visual cue card and visual schedule to OCR. She stated the visual cue card and the visual schedule for Student A were implemented during the fall 2017 semester. The Special Education Teacher similarly demonstrated knowledge of Student A’s BIP and stated she implemented it during the fall 2017 semester.

The classroom teacher and Special Education Teacher stated they provided Student A sensory breaks, which included allowing Student A to carry heavy items such as library books and recycling bins as a means to focus and de-escalate. The Special Education Teacher also stated she provided other forms of sensory breaks like allowing Student A to walk to the Crash Room<sup>7</sup> or leap onto the crash pad.<sup>8</sup> The paraprofessional confirmed that both the classroom teacher and the Special Education Teacher used the visual schedule and observed them provide Student A with the aforementioned sensory breaks. The classroom teacher and the Special Education Teacher stated they observed staff who worked with Student A also using frequent breaks and cooling off periods, per the BIP, to help Student A to deescalate.

*Allegations 2 and 3: Subjecting Student A to Restraint and XXXXXXXXXXXXXXXXXXXX*

The Special Education Teacher indicated she initially had concerns about Student A’s placement after his first behavior incident, which occurred in the first several days of school. She could not specifically recall Student A’s behavior during the first incident. However, she described his behaviors as intense. She stated that from the time he enrolled at the School, he would throw objects at staff and students, leave the room and the building, overturn furniture and climb on top of furniture and fixtures in the classroom. She also stated that Student A would kick and punch the walls very, very hard without wearing his shoes. The Special Education Teacher did not suggest to the parent or the IEP team that a re-evaluation of Student A was needed.

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<sup>7</sup> The Crash Room is described in greater detail below.

<sup>8</sup> The crash pad is a designated space in the Special Education Teacher’s room where the floor is covered by a large, covered mattress and many small pillows.

*Use of Restraints*

The Complainant alleges that School staff restrained Student A XXXX times during the first three months of the school year. According to the Complainant, the restraints occurred XXXX times in September (XXXXX), four times in October (XXXXXX) and one time in November on November XX. Of the XXXX dates provided by the Complainant, the District provided Reports for two dates: September XXXX and October XXXX. Other than the Reports, OCR reviewed District documentation including emails between staff and between staff and the Complainant describing incidents on September XXXX and October XXXX when Student A was restrained. The October XXXX email from the Special Education Teacher to the Complainant indicates the type of holds staff utilized on that day were “chair holds,” i.e., holds in the seated position.<sup>9</sup>

The Complainant stated to OCR that she was concerned that on at least one occasion, she believed Student A was subjected to a restraint for more than XXXXXXX. The Complainant also asserted that she believed the staff restrained Student A using a one-person, basket hold, which she described as a “hulk hold.”

Staff interviewed by OCR identified two types of restraints they utilize including the CPI Children’s Control Position and the Seated Position. In the Children’s Control Position, the primary individual conducting the restraint (the primary) gains control of the child’s arms from behind and crosses their arms in front of the child. The child’s arms should be positioned high on the child and secured by locking one arm under the other. The primary should be positioned behind the child while maintaining close body contact and standing to one side. In the Seated Position, the primary is seated next to the child, maintains close body contact and interlocks one arm with the child and uses the opposite hand to hold the child’s hand. In the event the child is kicking or thrashing his or her legs, the primary may interlace his or her leg with the child’s leg to secure it in place. In the Seated Position, if necessary, another individual may mirror the primary’s actions on the other side of the seated child. Each type of restraint requires the presence of a witness, also known as an auxiliary. The auxiliary is not required to position her or himself in any particular spot but should have a vantage point to observe the restraint.

The staff interviewed by OCR demonstrated the two types of restraints with the District’s counsel standing in the place of a child. OCR observed that all staff demonstrated the appropriate method to conduct both holds.

With respect to the use of restraints on Student A, Staff were unable to provide specific information about the duration of any single restraint. However, they indicated that any restraint was only as long as necessary, i.e., as soon as they felt Student A’s body calm or relax, they would release the hold. The restraint forms that OCR obtained indicate that the restraints ranged from 20 seconds to three minutes. OCR also reviewed an email from staff to the Principal describing a day during which Student A was restrained XXXXXXXXXXXXXXXXXXXX All of the staff OCR interviewed were unfamiliar with the term “hulk hold,” and denied using any other restraints other than the ones approved by CPI on Student A.

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<sup>9</sup> Student A was restrained for two separate events on October 25th.

When asked by OCR whether they followed the District’s procedures after Student A was restrained, staff were either uncertain of their responsibilities or noted that they did not always comply with the District’s reporting procedures. For example, staff were unclear about who was responsible for participating in a debrief or informal conference following a restraint to review the incident and determine whether the restraint was proper. Staff provided differing understandings about whether the Principal was required to participate in restraint debriefs. The Special Education Teacher indicated the Principal participated in all debrief meetings, whereas the other staff indicated the Principal participated in the debrief meetings only when she participated in the restraint. According to some staff, they did not recall participating in any debrief meetings following a restraint. The paraprofessional and classroom teacher both stated – despite participating in or observing staff restraining Student A – that they did not recall ever participating in any debrief meetings to discuss the use of restraints on Student A. Additionally, staff informed OCR that they did not always comply with the District’s reporting requirements after Student A was restrained. The School uses a five-page Student Restraint Report (Report), which staff are required to complete after the use of a restraint. Staff provide completed Reports to the Principal who either inputs the information into a District database or tasks her administrative assistant with inputting the information. No other School staff has access to the database.

OCR observed irregularities with respect to Student A’s Reports. First, in its narrative response drafted by the Principal, the District indicated that Student A was restrained nine times; however, the District provided only four restraint Reports. Second, Reports were not submitted within one working day of the restraint. The four Reports the District provided to OCR were all created on December XXXX, despite the fact that the restraints took place on September XX, October XX, October XX and October XX, 2017. OCR also determined from documentation provided by the District that School staff restrained Student A as early as the first week of school, although no Reports exist for these restraints. Moreover, none of the four Reports created to document restraints of Student A was complete. According to the Director of Student Support Services, she expects that all of the fields in the Report would be completed. All of Student A’s Reports have missing fields for (1) a description of the holds or restraint method used and why such holds were necessary and (2) information about the student’s behavior and reaction during the restraint. Despite these irregularities, OCR observed that in each of the four documented incidents, the Report indicates that Student A was restrained for conduct that included hitting, kicking, throwing objects/furniture in conjunction with physical violence to staff or students. Moreover, staff informed OCR that in each instance when restraint was used, they determined that Student A posed imminent danger of physical injury to himself or others. For instance, in some cases, the documentation reviewed by OCR describes Student A’s precipitating behavior as including throwing furniture, climbing on windows (XXXXXXXXXXXXXXXXXXXX), and attacking staff physically.

OCR further observed that the Reports show that the staff knew or suspected that Student A’s educational needs were not being met. Each of Student A’s Reports contains a “Further Actions to be Taken” section with a check mark indicating the need to complete a FBA, or functional behavior assessment. OCR interviewed several members of Student A’s IEP team including the Principal, XXXXXXXXXXXXXXXX, Special Education Teacher, Classroom Teacher and School Psychologist. Each stated that the members of Student A’s IEP team did not review Student A’s

Reports during the fall 2017 semester. Student A’s IEP team did not discuss the fact that staff used restraints on a regular basis, and whether this indicated that Student A’s educational programming was not fully addressing his needs.

*Student A’s IEP Team*

On October 12, 2017, the District sent a Notice of Meeting to the Complainant for Student A’s first IEP meeting that took place on XXXXXXXXXXXX 2017 to discuss conducting an additional evaluation to determine Student A’s educational needs/programming and to review and revise his IEP. The Notice of Meeting states that the IEP team provided the Complainant with a copy of the “Parental Rights for Public School Students Receiving Special Education Services – Notice of Procedural Safeguards.” The Notice of Procedural Safeguards includes notice of parents’ rights to request a due process hearing if they disagree with the identification, evaluation, or educational placement of their child with a disability or the provision of a FAPE to their child. The Complainant informed OCR that she did not file a due process complaint with respect to Student A’s placement or any of the team’s decisions during the 2017-18 school year.

At that XXXX 2017 IEP meeting, the IEP team developed a student profile for Student A to discuss his present levels of performance and determine his assessment needs. Student A’s IEP team also determined that Student A would be re-evaluated. As part of the reevaluation, the IEP team agreed to conduct a new FBA. The Complainant consented to the reevaluation. Despite being aware as early as XXXXX, 2017 – the incident date of the first Report – if not earlier when Student A was previously restrained, that the School needed to complete a new FBA for him, staff made no effort to convene an IEP meeting before XXXXX, 2017.

From October XXXX through the end of October, Student A continued to have behavior difficulties that necessitated the use of restraint. The Complainant requested another IEP meeting to discuss concerns with Student A’s programming and to share her feelings about the effects the restraints were having on Student A. By this time, the Complainant had already asked that School staff stop restraining Student A. Student A’s IEP re-convened on XXXXXXXXXXXX, 2017, and the Complainant shared with the team her belief that staff restraints were traumatic for Student A and were causing him to avoid coming to school.<sup>10</sup> The Complainant stated she had difficulty getting Student A to school in the morning, and Student A missed XXXX of school in late October and early November as a result. The Complainant also informed School staff in emails, that Student A had informed her that he “hated holds” and did not want to go to school. The IEP team discussed that the restraints were only used as a last resort due to safety concerns for Student A, staff and other students. According to the staff IEP team members, the holds were demonstrated to the Complainant at the meeting.

The IEP team discussed the goals of getting Student A to come to school and of building a positive association with school for Student A. To build a positive association with school, the IEP team discussed Student A’s preferred school activities, including receiving

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<sup>10</sup> The Complainant stated to OCR that Student A was restrained on four occasions between the October and November IEP meetings, on October XXXXXX and November X, despite the fact that she asked the School to stop restraining Student A around October XX, 2018. The District provided Reports for three restraints in the same time frame, on October XXXXX.

XXXXXXXXXXXXXXXXXXXX, attending art or music class and participating in snack time in his classroom. The IEP Team also discussed issues with Student A’s school tolerance and that his behavior issues arose when he was asked to perform a non-preferred task. Taking those factors into consideration, the IEP Team – including the Complainant – agreed that Student A would attend School for approximately XXXXX a day to participate in his preferred activities. The District issued a Prior Written Notice of Special Education that same day reflecting the IEP team’s decision. The Notice concluded with a statement that parents have protections under procedural safeguards and included a web address where they could be accessed. Student A’s revised IEP and XXXXXXXX took effect – with the Complainant’s consent – on November XX, 2017. The IEP Team agreed to revisit Student A’s progress on a periodic basis to determine whether adding more XXXX to his day was appropriate.

Student A’s IEP team reconvened nearly monthly after the November IEP meeting. The Complainant received proper notice of the purpose of the meetings. The team met on December XX, 2017 to review Student A’s reevaluations, which included an update to his BIP based on the completed FBA and other evaluation data. The team met next on January XX, 2018 to review and revise his IEP. At this meeting, the IEP team provided Student A with a full time one-to-one paraprofessional to aide with academic tasks, transitions, social/emotional regulation, and to keep him on track. The January IEP also identified additional sensory supports for Student A including a weighted lap bag/vest, a visual timer to assist with transitions and different movement or seating options.

Student A’s IEP team met again on January XX, 2018 to consider XXXX Student A’s school day. However, at that time, the IEP team agreed to continue with Student A’s current schedule. The team met next on February XX, 2018, to discuss Student A’s progress and XXXX his school day from XXXX. The IEP team convened again on April 13, 2018, at which time the IEP team agreed to XXXX Student A’s XXXX with the hope of having Student A XXXX school by the end of the school year. At the May XX, 2018 IEP meeting, the IEP team agreed to lengthen Student A’s school day to XXXX by May XX, 2018.

## **Analysis**

### **Allegation 1**

The complaint alleged that that the District subjected Student A to discrimination based on disability by failing to implement the provisions of his BIP during fall 2017. During the course of OCR’s investigation, the Complainant provided specific examples of Student A’s BIP provisions that she believed staff did not implement including not using a visual schedule, not using cue cards and not providing him with sensory breaks including the opportunity to lift heavy items. The Complainant believed the BIP was not being implemented because District staff had to restrain Student A on multiple occasions in August, September and October 2017.

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. In this case, all of the School staff that OCR interviewed demonstrated their awareness of Student A’s BIP, affirmed that they implemented its provisions during the fall 2017 semester and stated they

observed other staff implementing Student A’s BIP by utilizing the visual schedule, cue cards and sensory breaks for Student A.

Based on the above, OCR determined that the evidence is insufficient to conclude that the District subjected Student A to discrimination based on disability by failing to implement his BIP.

### **Allegation 2**

Prior to the conclusion of OCR’s investigation, the District expressed an interest in voluntarily resolving Allegation 2. On October 3, 2018, the District submitted a signed Resolution Agreement to resolve this allegation.

Pursuant to the Agreement, the District will: (1) modify AP 6250 to ensure that it includes adequate record-keeping requirements to properly document all incidents of student restraint; (2) provide effective training to all staff who are trained in CPI and are authorized to restrain students; and (3) convene Student A’s IEP team to determine whether Student A was denied a FAPE during the fall 2017 semester in connection with Student A’s conduct, the restraints used on Student A and its effects on Student A’s absences from school, and the delay by the School in initiating and completing Student A’s functional behavior assessment. OCR will monitor the District’s implementation of the Resolution Agreement.

### **Allegation 3**

The complaint alleged that that the District subjected Student A to discrimination based on disability by XXXX school day. Student A began XXXXXXXXXXXXXXXXXXXX student. Within the first several days of the start of the school year, Student A engaged in dangerous behavior, i.e., behavior which may immediately result, or has resulted in harm to self or others. When Student A exhibited this dangerous behavior, School staff physically restrained him to prevent him from harming himself or others.

According to the Complainant, the use of physical restraints made it difficult to get Student A to go to school. After missing more than XXXX of school, Student A’s IEP team convened with the goal of getting Student A to attend school and build a positive association with school. At a properly-noticed IEP team meeting on November XX, 2017, the IEP team – including the Complainant – agreed to XXXX Student A’s XXXX with a focus on Student A’s preferred activities. The Complainant received written notice of the IEP team’s decision as well as notice of procedural safeguards. She did not pursue a due process hearing. The District appropriately convened several subsequent IEP meetings to discuss Student A’s progress, and to XXXX Student A’s XXXX as the team determined was appropriate based on Student A’s needs. Student A’s IEP team eventually placed Student A on a XXXX by the end of the 2017-2018 school year.

OCR notes that the District’s action to provide Student A with XXXXXXXXX for a finite period of time to re-acclimate him to school was a placement decision made by a team of individuals knowledgeable about Student A and the placement options. Under longstanding OCR policy, except under extraordinary circumstances not present in this case, OCR does not assess the

appropriateness of a school district's educational decision made by a group of knowledgeable persons convened pursuant to the IDEA or Section 504, as long as the school district complies with the procedural requirements of Section 504 in making that placement determination. To the extent the Complainant disagrees with a placement decision, a due process hearing is the proper forum for challenging the appropriateness of the District's decisions regarding Student A's placement, including XXXX. For these reasons, OCR determined that there is insufficient evidence that the District discriminated against Student A on the basis of disability when the District XXXX.

This concludes OCR's investigation of the complaint 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. 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, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR looks forward to the District's monitoring report, which is due December 14, 2018. OCR would like to thank you and your staff, especially Mr. Joseph A. Wetch, Jr., Counsel, for the courtesy and cooperation extended to OCR. If you have any questions, please contact Mark Erickson at (312) 730-1574 or by e-mail at [mark.erickson@ed.gov](mailto:mark.erickson@ed.gov).

Sincerely,

Aleeza Strubel  
Supervisory Attorney

Enclosure

cc: Mr. Joseph A. Wetch, Jr., via electronic mail only