



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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September 28, 2023

Sent via email only to: gandhir@fargo.k12.nd.us

Dr. Rupak Gandhi
Superintendent
Fargo Public Schools

RE: OCR Docket #05-19-5001

Dear Dr. Gandhi:

This letter is to advise you of the outcome of the above-referenced compliance review of the Fargo Public Schools (District), which the U.S. Department of Education, Office for Civil Rights (OCR) initiated on January 29, 2019. OCR's compliance review examined whether the District's use of restraint and seclusion denies students with disabilities who participate 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 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.

OCR enforces Section 504 and Title II, which prohibit discrimination on the basis of disability by recipients of federal financial assistance from the Department of Education (Department), or by public entities, respectively. The District receives federal financial assistance from the Department and is a public entity. The District is therefore subject to Section 504 and Title II.

Methodology

During this investigation, OCR reviewed District records and documentation, including the District's policies and procedures, all versions of its Student Restraint Report (restraint report) form, which the District uses to document and report each restraint, and records of staff training regarding restraint and seclusion. OCR reviewed education records for all District students who were reported to have been restrained during the 2017-18 and 2018-19 school years. For the 2017-18 school year these records reflected 86 students in all, involving 376 incidents of restraint; for the 2018-19 school year these records reflected 88 students, involving 326 restraints. OCR has also reviewed documentation related to the only incident the District reported as seclusion, as well as several other incidents that may constitute seclusion but were not reported as such. OCR conducted an in-depth review of the cumulative special education records for 38 District students (Selected Students) and restraint reports for the Selected Students from the 2018-19 school year. Twenty-eight of the Selected Students are discussed in this letter. OCR identified the Selected Students for comprehensive review because they experienced more than five restraints during the 2018-19 school year.

On October 27-30, 2019, OCR conducted in-person site visits to ten elementary, middle, and high schools and interviewed 43 District staff, including: the Superintendent and Director of Special Education (SPED Director), ten principals, special education teachers and staff, paraprofessionals and case managers, as well as counselors and positive behavior interventionists/technicians. OCR also conducted a meeting with over 30 parents and members of the community. OCR requested and reviewed additional documentation related to information obtained during its site visits including documentation on the number of calming rooms used throughout the District during the 2019-2020 school year and the District's use of the Ukeru system. Finally, OCR reviewed documentation and conducted interviews related to three individual cases that were filed with our office during this investigation.

Legal Standards

Definitions

“Mechanical restraint” refers to the use of any device or equipment to restrict a student’s freedom of movement. The term includes the use of handcuffs or similar devices by law enforcement officers or other school security to prevent a student from moving the student’s arms or legs. The term does not include devices used by trained school personnel or 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, such as:

- 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.

“Physical restraint” refers to a personal restriction, imposed by a school staff member or other individual, 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 includes a touching or holding of the hand, wrist, arm, shoulder, or back of a student for the purpose of inducing a student to walk to a safe location, when the contact does not continue after arriving at the safe location. Encouraging, inducing or forcing a student to walk to a safe location in a way that involves methods utilized to maintain physical control of a student should be considered a physical restraint.

“Seclusion” refers to the involuntary confinement of a student in a room or area, with or without adult supervision, from which the student is not permitted to leave. Students who believe or are told by a school staff member that they are not able to leave a room or area, should be considered secluded. The term does not include: a classroom or school environment where, as a general rule, all students need permission to leave the room or area such as to use the restroom; a behavior management technique that is part of an approved program, which involves the monitored separation of a student in an unlocked setting, from which the student is allowed to leave; or

placing a student in a separate location within a classroom with others or with an instructor, so long as the student has the same opportunity to receive and engage in instruction.

Section 504 and Title II

The Section 504 regulation at 34 C.F.R. § 104.33 requires school districts to provide FAPE to all qualified students with disabilities in their jurisdictions, regardless of the nature or severity of the disability. An appropriate education is defined as the provision of 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.¹

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;² (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, which requires placement in the regular educational environment to the maximum extent appropriate.

OCR interprets the Title II regulation, at 28 C.F.R. §35.130(b)(1)(ii) and (iii), to require districts to provide FAPE to the same extent required under the Section 504 regulation.

¹ 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).

² 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.

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 district personnel, to suspect that the student has a disability, as defined under Section 504, the 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 in need of special education or related services, a district's repeated use of restraint and 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. If the use of restraint or seclusion has a traumatic impact on a student with a disability, the traumatizing effect could manifest itself in new academic or behavioral difficulties and needs (*e.g.*, new types of misbehavior and/or new diagnoses, impaired concentration, increased absences, or social withdrawal). If district personnel are aware of behaviors that are sufficiently severe to interfere with a student's individual educational needs, and those behaviors remain unaddressed by district personnel, it could result in a denial of FAPE for that student. Examples of proper steps may include re-evaluating the student or making necessary adjustments to the student's Section 504 plan or IEP. Such adjustments may include conducting a functional behavior assessment (FBA) and/or developing a behavior intervention plan (BIP) and adding supports like counseling, a one-on-one aide, or positive behavioral interventions and supports (PBIS) strategies. Further, the repeated restraint or seclusion of a student could impact FAPE if the student does not receive the regular or special education and/or the related aids and services required by the student's IEP or Section 504 Plan; does not receive supplemental services and modifications that the student needs; or is not in an appropriate setting in which to receive those services.

Background

The District is the second largest school district in North Dakota. It serves more than 11,190 students in kindergarten through twelfth grade. The District has 16 elementary schools, three middle schools, and four high schools, which includes one alternative high school.³

According to the District's 2021-2022 annual report, which is the most recent report published on the District's website, students with disabilities account for 14.4% of the District's student population.⁴ During the 2018-19 school year, ten of the District's schools offered a Setting C program—where students spend less than 40% of their school day with their general education peers—for students with autism spectrum disorder, who have an intellectual or emotional disability, or who have multiple disabilities. From January through May 2018, the District also operated a Setting D program for elementary school students (grades K through 5) at Agassiz, where, according to the Principal, students with emotional disabilities received all of their instruction—and so spent 100% of their day—in a separate school setting. On November 26,

³ The District's elementary schools are Bennett, Centennial, Clara Barton Hawthorne, Eagles, Ed Clapp, Horace Mann Roosevelt, Jefferson, Kennedy, Lewis and Clark, Lincoln, Longfellow, Madison, McKinley and Washington. The District's middle schools are Ben Franklin, Carl Ben Eielson, and Discovery. The District's high schools are Davis, North, South, and Dakota.

⁴ <https://drive.google.com/file/d/0B1-SQirIj3kjOEtFWmhBVXV4VEE/view?resourcekey=0-eZLBz-xnlvTPKYFvJwYw9w> (last viewed September 26, 2023).

2019, the District’s Board of Education approved a proposal to build a Setting D program for elementary students adjacent to Lewis and Clark.

Facts

The District provided OCR a copy of its Student Support Services-Student Restraint Report for the 2017-18 school year. According to the District’s report, of the 376 documented incidents of student restraint that school year, 373 were at the elementary level, two at the middle school level, and one at the high school level. Kennedy accounted for the most restraints, with a total of 104, followed by Ed Clapp with 72 restraints and Washington with 64. The District noted that Kennedy and Washington operate Setting C programs for students with behavioral problems. According to the District’s data, 21% of the restrained students were in kindergarten, 27% in first grade, 16% in second grade, 21% in third grade, 11% in fourth grade and 5% in fifth grade. Of the students restrained that year, 70% were students with disabilities.

Restraint Report and Policy

The District also provided OCR a copy of its Student Restraint Policy (Restraint Policy), which was in effect as of the 2017-2018 school year. According to that Policy, the District seeks “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 restrictive alternatives have failed or been deemed inappropriate.” The Restraint Policy accordingly provides that:

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 Restraint 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.” “Dangerous behavior” is defined under the Restraint Policy as “...behavior which may immediately result, or has resulted in harm to self or others.” The Restraint Policy further prohibits the use of mechanical restraint,⁵ as well as the use of restraints while a student is lying on the ground (prone). According to the Policy, only school personnel who have received training in nonviolent crisis intervention (NCI) strategies may administer physical restraints. OCR observed that typically a school’s special education teachers, paraprofessionals, crisis intervention staff, and school administrators all receive that training.

The Restraint Policy includes follow-up procedures and reporting requirements after a student has been released from a restraint. The Policy specifically states that a principal or administrative designee must do the following:

⁵ 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 as a means to manage or address student behavior.”

- 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 the parent/guardian of student who was restrained to inform them of the use of physical restraint...of their child.

Finally, under the Restraint Policy, any use of physical restraint must be reported orally and in writing to the building principal or administrative designee as soon as possible, but no later than the next school day. Principals are required to maintain records of all reported restraints, and it is the principal's responsibility to inform parents that their child was restrained on the day of the restraint. Under the Restraint Policy, the only restraints that principals must report to the Office of the Superintendent are those that either result in injury to a student or staff member or a single restraint that lasts 20 minutes or more. The District instructs its staff to use the restraint report form to document and report each restraint. According to the District, because school resource officers (SROs) are not District employees, the District does not train them on NCI strategies and does not require them to comply with the District's Restraint Policy.

The Restraint Policy also prohibits the use of seclusion, which it defines as the involuntary confinement of a student alone in a room or area that he or she is physically prevented from leaving. The Restraint Policy does not prohibit the use of "calming rooms" or spaces to help a student calm if the space is used as a behavior management technique that involves the monitored separation of the student in a non-locked setting for the purpose of calming inappropriate behaviors.

Training for District Staff on Restraint

Nonviolent Crisis Intervention Strategies

The District told OCR that it uses the Crisis Prevention Institute's (CPI) NCI strategies, which educate staff on how and when to use behavioral emergency techniques and interventions with students. The District further indicated that it regularly trains its special education teachers, paraprofessionals, crisis intervention staff, and school administrators on NCI strategies, and provided OCR with the name, title and most recent training dates for 500 NCI-trained District staff who participated in training at some time during the 2018-19 school year. According to the District, it provided NCI training to a greater number of its staff in the three years prior to the initiation of the compliance review, due to an increase in "aggressive student behaviors." As noted above, the District does not consider SROs its employees and does not require them to participate in NCI training. The CPI-certified District employees whom OCR interviewed were current in their training and reported that they participate in training annually.

According to the NCI training documentation, the training addresses prevention and de-escalation strategies, assessing risks with crisis behavior, using disengagement and/or holding

skills, and post-intervention responses. That documentation explains that the training is designed to prepare staff to use certain types of restraints when necessary to prevent students from self-harming or harming others. In most cases, the staff involved in the restraints that OCR reviewed were NCI-trained.

There were exceptions, however. According to the documentation OCR reviewed, in 16 of the 376 restraints documented during the 2017-18 school year, the District reported that a non-NCI trained District employee administered the restraint alone, without the assistance of other District staff who had received NCI training. These restraints involved six staff members at Lewis & Clark, Kennedy, Washington, and Discovery. For the 2018-19 school year, the District reported that in another 15 incidents of the 326 restraints reported that school year a non-NCI trained District employee administered a restraint alone. These restraints involved 8 staff members at Lewis & Clark, Lincoln, Agassiz, Kennedy, Washington, Ben Franklin and Discovery Middle Schools and North High School. Regarding one of these incidents, District witnesses told OCR that a non-NCI trained paraprofessional restrained XXXXXXXX in a prone position during XXXX class. The paraprofessional subsequently was reminded that XXXX was not permitted to restrain a student and XXXXXXXXXX for the District.

OCR also reviewed documentation showing that in several instances during the 2017-2018 and 2018-2019 school year non-NCI trained employees administered restraints with the assistance of NCI-trained employees. District witnesses told OCR about a restraint that occurred XXXXXXXX XXXXXXXX. During that incident, a non-NCI trained teacher held XXXXXXXX's XXXX XXXX XXXXXXXXXX. The XXXXXXXX Principal also stated to OCR that he believed that there may have been one incident during the 2019-20 school year when a non-NCI trained employee participated in a restraint at his school. However, he could not recall the details.

Ukeru System

During the 2018-19 school year, the District piloted a “restraint-free crisis management” system called Ukeru. The Program was initially piloted in three schools, namely Roosevelt-Horace Mann, Kennedy and Lewis and Clark. It is now the default crisis intervention method in the district and has been implemented in all elementary schools and some middle schools and one high school. As of the beginning of the 2022-2023 school year, every school in the District has a team with Ukeru-certified staff each with their own trainer. District officials informed OCR that all staff who are currently NCI-trained and certified will eventually be required to be Ukeru-certified.

According to the District, the goal of the Ukeru method is to build an environment focused on comfort rather than control so if there is a crisis, staff de-escalate a student's behavior by using verbal and non-verbal communication. If the initial interventions are unsuccessful at de-escalating a behavior, Ukeru also teaches physical techniques to minimize the need for physical restraints. The physical techniques include a system of blocking techniques with the use of pads to protect both the student and the staff members during a behavioral incident. District officials assert that restraints are only to be used as a last resort, during incidents where either there is a risk of imminent physical harm to the student or other students and staff, or the staff is not able to de-escalate the behavior using the Ukeru method.

The District does not require the staff to document every time Ukeru is used to de-escalate a behavior in the same way they are required to report the use of restraints or seclusions. Local press reported in an article from March 2021 that the parent of XXXXXXXX stated during a District Board of Education meeting that she had requested data from the District showing the use of Ukeru as an alternative to restraint and was informed the District did not have such data.⁶ Despite not requiring staff to document the use of Ukeru, District officials informed OCR that staff often use students' behavior logs to describe the use of Ukeru to de-escalate a student's behavior and added that if a student repeatedly needs Ukeru interventions, District staff may refer the student to his/her IEP team to determine whether the student needs additional services.

District Record Keeping

Documenting Student Restraint

The District primarily documents student restraints by its personnel in what it calls a restraint report. Each report lists a student's name, date of restraint, the time when the restraint began and ended, the site where the restraint occurred, information about staff administering the restraint, the name of any witnesses to the restraint, and whether the student has an IEP. The restraint report does not specifically track other students with disabilities who receive services pursuant to a Section 504 plan, rather than an IEP. The restraint report also contains sections to describe how the student's parent was notified, what precipitated the behavior that resulted in the restraint, a description of the type of restraint used, and further actions to be taken by the restraint team, such as determining whether disciplinary action is required or whether the student's behavior plan needs to be reviewed or amended. Lastly, the restraint report has a place for staff to recommend the student be assessed for an FBA or referred to his or her IEP team for support. District policy requires staff to complete a report whenever they restrain a student. According to the Superintendent, the District uses those reports to identify when staff have improperly restrained a student, in violation of District policy.

The District modified the restraint report in December 2018. The modified report now notes that the only justification for initiating a physical restraint is to protect either students or staff from imminent physical injury. It also added a "staff debrief" section in which staff who attended the debrief are listed and can enter a summary of the discussion. Lastly, the report requires staff to describe efforts to deescalate the student's behavior.

Apart from the restraint report, OCR found that in some cases District staff would also document a restraint in a behavior log maintained as part of a student's discipline record when the restraint was used in connection with a behavioral incident resulting in student discipline. In addition, staff at both Roosevelt-Horace Mann and Kennedy told OCR that those schools separately document restraints on an internal debrief form that is completed immediately after the incident and before completing the required restraint report.

⁶ <https://www.inforum.com/news/local/fargo-sees-drop-in-teacher-injuries-restraint-of-students>.

Restraint Reports: 2018-19 School Year

OCR reviewed all restraint reports for the 2018-19 school year that the District provided. The behavior of students that triggered a restraint included classroom and building elopement, kicking, hitting, biting, charging at and attacking classmates and staff, and other unsafe behavior such as climbing on and throwing furniture.

OCR interviewed 43 District staff familiar with the restraint report. At most schools, the principal or another designated administrator in the building is responsible for completing the restraint report. General education and special education teachers, paraprofessional staff, behavior interventionists, special education case managers, and school administrators provide information about a restraint incident to the person responsible for completing the restraint report. But they do not thereafter review the report for accuracy or rely on it when discussing the student's educational programming, special education placement and/or services.

The Superintendent told OCR that he assumed the District staff would address improper student restraints through corrective actions and believed that the District's SPED Director or Associate Superintendents would follow up on such incidents. The Superintendent could not confirm that this in fact happens and acknowledged that he did not know whether the District's monitoring of restraint practices through completed restraint reports is a "robust process." The Superintendent stated that he receives an email each time a restraint report is completed and scans the report to see how long the restraint lasted. He stated he uses the information in conversations with staff about alternatives to the use of restraint and said that these conversations resulted in the implementation of new programs such as the Ukeru system described above.

The SPED Director told OCR that she tries to spend approximately an hour a week reviewing restraint reports to ensure they are complete, looking for patterns to see what the student was doing that caused staff to restrain the student and looking to ensure the use of restraint was proper. She stated that after reviewing restraint reports, she occasionally reminded District staff through principals and Area Service Coordinators of the need to reconvene a student's team to determine whether the plan the student had in place at the time of the restraint was appropriate. The SPED Director did not know whether Area Service Coordinators for the District, who report to her, review all restraint reports for schools in their region or follow through with her suggestions. OCR interviewed principals at eight District schools, and only two recalled ever receiving feedback from the SPED Director or an Area Service Coordinator about a restraint report at their school.

OCR requested the District provide a list of administrative staff who review restraint reports, the frequency with which staff review the reports, and what actions staff take to address incomplete, inadequate, or inaccurate reports. The District's response indicated that most of the senior administrators (Superintendent, Associate Superintendents, SPED Director, and SPED Area Service Coordinators) do not review the restraint reports, nor do they address or take any action in response to incomplete, inadequate, or inaccurate reports. The District indicated that most principals review the restraint reports on a regular basis, i.e., after every restraint, daily or weekly, and according to the District, the Principals generally assert that the restraint reports are

complete and accurate. The Principals indicated that if a restraint report was not complete, they would follow up with staff who were involved in the restraint to obtain any missing information and include it in the report.

Most school staff OCR interviewed, including teachers and case managers, told OCR that they did not recall receiving feedback on the restraint reports from the principal or designated administrator who was responsible for completing them. Additionally, except for one school staff member, they all reported that they did not know how the restraint report is used to monitor whether the use of restraint was consistent with District policy and, if not, whether a student's IEP team needed to reconvene.

Of the 326 restraint reports that OCR reviewed from the 2018-19 school year, 115 (35%) were not timely completed. The District's records indicate that 33 of the reports were completed ten or more school days after staff restrained a student and that one report was completed 35 days after the restraint. Moreover, 12 of the 59 restraint reports that included a referral to the student's IEP team were not completed within two days of the restraint.

The District provides the restraint report to parents who request a copy. Some parents informed OCR that the restraint reports the District provides are not adequately completed by District staff. For example, parents reported that they could not always tell what was happening before their child's behavior escalated. Parents also expressed concern that it was not possible to tell from a restraint report whether school staff were following the student's IEP, BIP, and/or crisis plan prior to restraining a student. In the restraint reports, OCR similarly observed that District staff did not consistently include descriptions of what the student and staff were doing before the student's behavior escalated, including whether de-escalation techniques were used. Restraint reports also did not consistently state whether staff first responded to the escalated behavior by implementing specific provisions in the student's IEP, BIP, and/or crisis plan to de-escalate the conduct without having to restrain the student.

Some parents shared that because the District is not required to provide restraint reports to parents who have not requested them, they may not hear that their child was restrained until an assigned paraprofessional calls or sends them a text message to let them know there was an incident that day with their child. Others stated that they may be told that their child "blew up" in school, but they do not have information about the context for the incident, how the school handled it, and whether the child was restrained. These parents noted that District staff are not always forthright about whether a restraint was used, and at times will simply state that the child was "transported" to the office without explaining that the transport was a CPI transport during which the student was restrained.

Although the forms include a section where staff may recommend a student for assessment, for an FBA or refer a student to their IEP team, the evidence indicated that staff did not consistently follow up on such recommendations. OCR reviewed several restraint reports concerning students who were repeatedly referred to their IEP team but the evidence did not indicate that their IEP teams met in response to the referrals.

The District's Use of School Resource Officers (SROs)

The District contracts with the Fargo Police Department (FPD), which provides seven SROs to serve in the District's middle and high schools. Although the District and FPD entered into a Memorandum of Understanding (MOU) through which the District pays for 50% of the cost of each school-based SRO, the District does not consider SROs District employees. OCR informed the District that it would like to interview several SROs; the District shared OCR's request with the SROs, but the SROs declined.

Parents and community members reported to OCR that in their experience, SROs do not complete restraint reports following an incident.⁷ The District—including the Superintendent and several principals—later confirmed to OCR that because SROs were not District employees, they were not bound by the District's Restraint Policy and were not required to complete restraint reports following an incident. The Superintendent told OCR that he nevertheless encouraged SROs to follow the District's policies through communications with the SRO supervisor. However, the District does not train SROs on CPI holds or its Restraint Policy.

According to parents, the fact that the District has not viewed SROs as bound by the Restraint Policy has led to the underreporting of restraints and lack of complete data on the District's use of restraint. The SPED Director acknowledged that in the case of high school students, the District may be under-reporting restraints that are used when a student fight is broken up.⁸ OCR found evidence of such underreporting in one XXXXXX student's (XXXX) behavior log, which revealed several examples of an SRO and, on several occasions, an officer from the FPD, helping to break up fights in which XXXXX was restrained. In one incident, although XXXXXX's behavior log notes that on XXXXXX, XXXX, XXXXXXXX had to be restrained multiple times during an incident at XXXXXXXXXX, none of the multiple restraints by the SRO were reflected in corresponding restraint reports.

The SPED Director told OCR that the District has communicated during principal meetings that SROs should not physically restrain students and should not be members of a school's restraint team unless there is potential criminal conduct. In the event an SRO physically restrains a student, the SPED Director said she would expect the principal to complete a restraint report. However, the XXXXX Principal informed OCR that when an SRO or police officer restrained an XXXXX student, neither the School staff nor the SRO or the police officer completed a restraint report. Instead, the Principal explained, such SRO/police administered restraints were documented in the student's behavior log.⁹

The District also provided documentation showing that five SROs handcuffed XXX different students during the 2018-19 school year, even though the Restraint Policy prohibits the use of such mechanical restraints. The XXX students ranged from XXX to XXXX grade and attended

⁷ It is not clear from the documentation whether District staff participate in or witness student restraints by SROs.

⁸ The District reported to OCR in response to our data request that there was only one restraint of a high school student in 2017-18 and five restraints of high school students in 2018-19.

⁹ Notwithstanding the Principal's assertion, OCR found that XXXXX staff completed restraint reports on five occasions for an XXXXXX student, XXXXXX, who was restrained by an SRO at the school.

four different schools; one was a student with a disability. None of those uses of mechanical restraints was documented in a restraint report.

Some parents told OCR that the District is increasingly relying on SROs to handle problematic student behavioral incidents for which a restraint report is not created. Some teachers and administrators acknowledged calling the police when a student's behavior occurred off District property or involved significant injury or threat of injury to students and/or staff. However, the District employees OCR interviewed denied relying on SROs to handle most cases involving challenging student behavior.

FAPE

OCR reviewed the special education records and restraint reports for 38 District students (Selected Students) during the 2018-19 school year. OCR selected those students based on the reported number of times they were restrained; any student restrained more than five times during the 2018-19 school year was included in OCR's sample.¹⁰ OCR also reviewed 2017-18 special education records pertinent to this investigation. In all, the Selected Students were restrained 274 times, for a total of 1,274 minutes. Their restraints account for 70% of the restraints that the District reported in the 2018-19 school year.

Failure to evaluate

The special education records and restraint reports for the Selected Students indicate that the District failed to timely evaluate students for special education and related services. In particular, the District did not take into consideration whether the frequent use of restraints to address the students' behavior was appropriate or if additional services or alternative placement was necessary. Among these students, at least four XXXXXX students were frequently restrained (XXXXXX, XXXXXX, XXXXXX, and XXXXXX) were removed from their general education XXXXXX classroom before the District's initiation or completion of an evaluation for special education and related services and placed in the most restrictive setting offered by the District, the XXXXXXXX Program at XXXXXX. XXXXXX's parents objected to XXX removal from the classroom which they felt "stripped XXXXXX of socialization with XXX peers." The District failed to document whether it changed XXXXXXXX's placement at XXXXXX following proper procedural safeguards when XXXXXX was similarly removed from the general education classrooms before the completion of XXX special education evaluation because of what the District described as XXXXXXXX "unsafe behaviors." From the start of the school year until XXXXXXXX, when the District evaluated XXXXXXXX and determined the student needed an IEP, XXXXXX staff had restrained XXXXXX XXX times.

A general education XXXXXXXX student, XXXXXX, was restrained thirteen times during a four-month period by XXXXXX staff. Although the first restraint report indicates that a BIP should be created, the District did not complete the special education evaluation process or develop a BIP for four more months during which XXXXXX was restrained XXXXX times. On an XXXXXXXXXX restraint report, school staff indicated XXXX XXXXXXXX XXXXXX

¹⁰ For several of these students OCR also considered documentation of restraints in the 2017-18 school year, as warranted.

needed a special education evaluation. The District's records show that a team was not convened until XXXXXXXXXXXX, and the process was not completed until XXXXXXXXXXXX. XXXXXXXX was restrained XX times during the 2018-19 school year before the District completed his evaluation.

Failure to re-evaluate

According to the records OCR reviewed, even after the District had reason to believe that several of the Selected Students needed to be re-evaluated for additional services, the District either failed to do so, or failed to do so timely. In some cases the staff who administered the restraints had referred the students to the "IEP/504 Support Team for decision-making." For example, OCR observed in two of the XXXXXX occasions XXXXXXXX, a XXXXXXXX student at XXXXXXXXXXXX, was restrained during the 2018-19 school year the staff referred him to his IEP team, but his special education records show that the District did not reconvene XXXXXXXX's IEP team to discuss his behaviors or restraints during the school year. Likewise, XXXXXXXX, a XXXXXXXX student at XXXXXXXX, was restrained on XXXXXXXX, and the restraint report of that incident shows staff referred him to his IEP team, yet his special education records show his IEP team did not reconvene. The records of XXXXXXXX, XXXXXXXX, XXXXXXXX, XXXXXXXX and XXXXXXXX, on the other hand, show that although their IEP teams reconvened after staff referred them to their teams to discuss the behaviors that prompted their restraints, those meetings were held several weeks or months after the referral. For example, XXXXXXXX and XXXXXXXX were restrained at their respective schools in XXXXXXXX; the reports of those incidents indicated that their IEP teams needed to meet to discuss their behavior and restraints, but their special education records show their teams did not meet until XXXXXXXXXXXX. The most egregious example of this problem was XXXXXXXX's case. XXXXXXXX, a XXXXXXXX student at XXXXXXXX during the 2018-2019 school year, was restrained on XXXXXXXXXXXX; in the restraint report of that incident staff stated that his team needed to complete an FBA to address XXX behavior. XXX IEP team did not complete the assessment or create a BIP until XXXXXXXXXXXX.

In other cases, the students exhibited escalating behaviors that resulted in frequent restraints, likely indicating their need for a re-evaluation—yet the District never offered one, or it offered a re-evaluation after significant delay. The SPED Director acknowledged that a student's IEP team should reconvene if there is a pattern of escalating behaviors that results in restraints to discuss the student's programming or whether a new FBA or BIP is needed. Nevertheless, among the Selected Students, OCR observed that the IEP teams of several students who exhibited escalating behaviors and were restrained on multiple occasions did not reconvene or they delayed in reconvening. For example, XXXXXXXX, a XXXXXXXX student who received special education and related services in a XXXXXXXX program at XXXXXXXX during the 2018-19 school year, exhibited a pattern of escalating behaviors during the XXXXX of XXXX that resulted in XX restraints during a two-month period. However, XXXXXXXX's IEP team did not meet until XXXXXXXXXXXXXXXX, to consider additional services. Similarly, XXXXXXXX, a XXXXXXXX student who received special education and related services at XXXXXXXX, also exhibited a pattern of escalating behaviors that resulted in XX restraints during XXXXXXXX and XXXXXXXXXXXX, yet his IEP team did not meet until XXXXXXXXXXXX.

In some cases, the District did not document the reason for a delay in re-evaluating a student, whether it was to try interventions, lack of parental consent, or scheduling issues. In other cases,

the District acknowledged that it failed to re-evaluate a student due to staff oversight. For example, the IEP team of XXXXXXXX, a XXXXXXXX student at XXXXXXXX with an IEP and BIP in place for XXXXXXXXXXXXXXXX, was supposed to reconvene during the XXXXXXXX to conduct his annual review. XXXXXXXX's XXXXXXXX IEP states that the team failed to reconvene due to "XXXXXXXXXXXX." During this delay, the staff at XXXXXXXX restrained XXXXXXXX XXXX more times.

The SPED Director also told OCR that she expected a student's IEP team to consider information contained in a restraint report when making determinations about a student's placement and services. Yet the District did not document that such information was considered when developing or modifying students' educational programs and could not demonstrate for most students that escalating behavior and frequent restraints were factors that team members considered in assessing student needs. Among the Selected Students, most exhibited escalating behaviors that resulted in multiple restraints, but the District did not document its efforts to address those behaviors or whether the restraints were an effective method to modify behavior. Specifically, the District either did not reconvene the student's IEP team or, where the student's team reconvened after the incidents, the team did not document whether they discussed and addressed the student's behavior or other deescalating techniques that could avoid the need for the restraint.

Two students who received services for XX did not receive appropriate adjustments to their plans to potentially reduce restraints. In the case of XXXXXXXX, a XXXXX XXXXXXXXXXXX student who received services for an XX during the 2018-19 school year, the District provided OCR an XXXXXXXX prior written notice to conduct an FBA to adjust the student's "behavior goal" for the year. Although XXXXXXXX staff restrained XXXXXXXX XXXXX times from XXXXXXXX until the end of the school year, the District did not complete the FBA or revise XXX IEP or services that year and offered no explanation why it failed to do so despite parental participation. Similarly, the District failed to reconvene the IEP team of XXXXXXXX, a XXXXXXXX student who received services for XXXX at XXXXXXXX, to revise XXX BIP or to discuss XXX behaviors at school, despite evidence that XXXXXXXXXXXX's BIP and IEP were not adequate to address escalating behaviors that resulted in XX restraints during the 2018-19 school year.

Other students, such as XXXXXXXX, who attended numerous District schools and was restrained XX times during the 2018-19 school year, did not have a team meeting to consider whether an updated IEP and services were needed, despite information provided to the District about changed circumstances and new diagnoses. In the XXXXXXXX, XXXXXXXX was diagnosed by a private behavioral clinic with XXXXXXXXXXXXXXXXXXXXXXXX, and XXXXXXXXXXXXXXXXXXXXXXXX. The new diagnostic information was faxed to the District on XXXXXXXXXXXX, with a recommendation that XXXXXXXXXXXX's IEP "should be updated to reflect the diagnosis XXXXXXXXXXXX" XXXXXXXX's IEP was not updated until XXXXXXXXXXXX and did not reflect his XXXXXXXX diagnosis until XXXXXXXXXXXX, when services were added to address his XXXXXXXX.

Failure to Implement IEP/BIP Provisions to Minimize the Need for Restraints

The special education records and restraint reports of the Selected Students indicate that the District failed to implement specific provisions of some students' IEPs and/or BIPs that aimed to prevent student behaviors from escalating and minimize the need for restraints. OCR observed in the restraint reports that the District did not consistently describe staff efforts to implement a student's IEP, BIP, and/or crisis plan to de-escalate student behavior. Some parents noted that even in cases where the District had not followed a student's IEP, BIP, and/or crisis plan, staff proposed modifications to a plan or a change to the student's placement to a more restrictive setting. These parents were concerned that the District had not exhausted less restrictive alternatives.

The IEPs and/or BIPs of several of the Selected Students included provisions to de-escalate the students' behavior, such as providing the student with frequent breaks, a cooling off period at a place in the classroom or in the special services room, minimal attention to behavior to prevent escalation, and avoiding physical contact with the student. However, the restraint reports for some students did not document staff efforts to implement provisions of these students' respective BIPs to de-escalate the student's behavior prior to a restraint. For example, XXXXX XXXXXXXX student, XXXXXXX, had a BIP in effect in 2018-19 that directed staff to guide XXXXXXXX through potentially escalating situations, but restraint reports from XXXX incidents in the fall of XXXX do not describe staff efforts consistent with XXXXXXX's BIP. Similarly, the BIP of a XXXXXXX XXXXXXXX student, XXXXXXX, provided that as a last resort, CPI-trained staff needed to XXXXXXX XXXXXXXX to a XXXXX (XXXXXXXXX, XXXXXXX, , or XXXXXXXXXXXX) if XX could not be calmed down with de-escalation strategies and he and/or others were not safe. However, the restraint reports of X of the XX times XXXXXXXX was restrained during the 2018-19 school year do not describe efforts by staff to de-escalate XXXXXXXX or indicate whether the staff attempted to XXXXX XX XXXXXXXX before restraining him from X to XX minutes on each of these occasions.

Missed Instruction

As noted above, during the 2018-19 school year, the Selected Students collectively missed a total of 1,274 instructional minutes while they were restrained by District staff.¹¹ OCR asked multiple District witnesses how they ensure frequently restrained students can meet their goals and are not denied FAPE. The Superintendent stated that in such cases a student's IEP team does not account for minutes but rather considers overall whether the child made progress to meet their instructional and/or other IEP goals. In contrast, the SPED Director acknowledged a concern about missed instruction and services for students who are restrained "frequently." The SPED Director stated that she has directed principals to be "cognizant" of when students may be missing instruction and services. However, the SPED Director was not sure if the District had a specific plan to ensure that students in those circumstances do not miss educational services. The Principals at XXXXXXXX and XXXXXXXX believed case managers accounted for missed service minutes. According to the Principal at XXXXXXX, case managers keep track of student attendance for services and can detect when a student misses services and needs to make them

¹¹ This total count does not include at least one restraint of a Selected Student, XXXXX, that was performed by an SRO and for which a restraint report was not created, or the first restraint of XXXXXXXX, described below.

up. The Principal at XXXXXX believed this was a district-wide procedure. The XXXXXX Principal believed that the case manager at XXXXXX maintains a log of meetings with students to make up missed instruction. The Case Manager and the Principal of XXXXXXXX also indicated that their schools were taking steps to ensure that frequently restrained students do not lose instruction or services necessary to receive FAPE as a result of the restraints. However, the special education records and documentation the District provided regarding XXXXX, XXXXX, and XXXXXXXX students do not bear out those assertions.

OCR interviewed five case managers at different District schools. None of these witnesses stated that they are keeping track of missed instructional minutes and educational services lost because of restraints, although several indicated that school staff would ensure that students who miss instruction or services due to a restraint make up the lost instruction or services. OCR reviewed the special education records for the Selected Students and did not find a log of missed instruction and educational services for any of the students. OCR's review of the Selected Students' records also found that District staff did not discuss missed instruction due to restraints in the students' IEP meetings, although in some cases the IEP team discussed when a particular student's behavior interfered with the student's learning and progress towards IEP goals.

OCR observed that several students missed significant instructional minutes because of restraints, and the documentation did not indicate whether compensatory services were considered or provided due to missed instructional minutes. For example, XXXXXX was restrained for a total of XXX minutes during a XXX-month period in the 2018-19 school year, but there is no evidence XX received compensatory services for the missed instruction. The documentation also does not indicate that XXXXXX, a XXXXXX XXXXXX student, received compensatory services after XXX received XX out-of-school suspensions, on XXXXX, for XX days, and on XXXXXXXXXX, for XXX a day, in connection with behavior that resulted in his repeated restraint. As stated above, staff stated in the restraint report of the XXXXXXXXX incident that XXXXXXXXX's team needed to complete an FBA to address his behavior, but the IEP team did not timely complete the assessment and the BIP was not finalized until XXXXXXXXXX.

School Exclusion

OCR observed in student behavior logs and restraint reports that District staff contacted parents to pick children up early from school on occasions when the child's behavior had become dysregulated although the IEPs of the majority of those students did not document that the team had determined that a shortened school day was appropriate to meet their needs. Some parents shared with OCR their concern that the District excludes students from school when District staff cannot manage their behavior by calling their parents to pick them up before the end of the school day.

The SPED Director informed OCR that she has counseled principals that when their staff call a parent to pick up a child because staff cannot manage the child's behavior, they are essentially issuing an out of school suspension for the student, without documenting it as such. The SPED Director told OCR that she was not aware of how often this practice occurred in the District. But she said that on one occasion, when a parent called her to complain that they were being asked to

take their child home, she called the principal of the school and explained that even if the principal believes the parent agrees to take the child home, doing so is a suspension and should not happen.

The District's standard IEP form includes a section on the length of school day in which the team indicates whether the student will attend school for the full day. If the team determines that a student will attend school "for a shorter or longer school day than peers," the IEP form requires an explanation of why this deviation is necessary. The District did not consistently document in students' special education records that IEP teams first attempted additional supports and services to ensure full-day programming for students with disabilities.

Post-Traumatic Stress Disorder (PTSD) and the Impact of Restraints

Several parents reported to OCR that the District failed to consider the impact of its use of restraints on individual students when considering the array of services and placement options in making IEP determinations. According to the parents, the District has normalized the use of restraint without adequately considering these significant, long-term consequences on the impacted students. OCR found evidence that several students who were repeatedly restrained were diagnosed with PTSD but were not reevaluated or provided services to address this additional diagnosis.

XXXXXXXX's Parent provided OCR a XXXXX of a XXXXXXXX, restraint which shows XXXXXXXX—then a XX-year-old XXXXXX student in XXXXXX—in a room in the XXXXX building for XX minutes, XXX of which he spent in XXXXXXXX. The XXXX indicates that XXXXXXXX spent a part of the time XXXXXXXX on the floor in the room, while the XXXXXXXX Principal restrained his XXXXXX. According to his Behavior Log, XXXXXX would not separate from a XXXXXX who was trying to XXXXXXXX, and when the SRO stepped in to XXXXXXXXXXXX XXXXXXXXXXXX, XXXXXXXX XXXXXXXX to XXXXXXXX the school and XXXXXX XXX XXXXX. XXXXXX's Parent reported that XXXXXX began to experience nightmares and night terrors after the XXXXXXXX restraint. A behavioral counseling facility diagnosed XXXXXXXX with PTSD on XXXXXXXX, as a result of "XXXXXX XXXXXXXX XXXXXX." The Parent informed OCR that she gave a copy of the counselor's report to XXXXXXXX's Lead Teacher; however, the XXXXXXXX Principal informed OCR that the District had no record of receiving that diagnosis.¹² XXXXXXXXXXXXXXX's team did not re-evaluate him or modify his IEP or placement in XXXXXXXXXXXXXXX, nor do his special education records indicate whether the team discussed his PTSD diagnosis or any additional services for XXXXXX. Nearly one year later, XXXXXXXX's XXXXXXXX, XXXX IEP notes that an outside agency diagnosed him with PTSD on XXXXXXXX. XXXXXXXX's special education records do not indicate that the team discussed whether the restraints had caused his PTSD, and if so, how to remedy the effects.

OCR's review of XXXXXXXXXXX's special education records indicates that XXXXXXXXXXX's parent informed his IEP team during a XXXXXXXXXXX meeting that XXXXXXXX had developed PTSD after being restrained at school. OCR found no documentation indicating that subsequent to the XXXXXXXXXXX meeting, XXXXXXXX's IEP team considered whether he had PTSD as a

¹² The District did not provide the report from the counselor to OCR as part of XXXXXXXXXXX's special education file.

result of school restraints, and if so, whether he required compensatory or remedial services to address the trauma.

The District also told OCR that in XXXXXX, staff at XXXXX received an FBA from an outside service provider that diagnosed one of its students, XXXXXX, with PTSD “due to school-based trauma, XXXXXXXXXXXX.” The diagnosis was supported in part by a trauma screen completed by XXXXXX’s parent, the results of which indicated that XXXXXX met the diagnostic criteria for PTSD. OCR reviewed XXXXXXXXXXX’s special education records, including the FBA, as well as his 2017-18 and 2018-19 school year restraint records. During the 2018-19 school year, while he was a XXXXXXX at XXXXX, staff restrained XXXXXXX XXX times. The XXXXXXXXXXXXXXX XXXXXXX XXXX XX these restraints and determined that XXXXX staff XXV used excessive force by improperly restraining XXXXXXX. The records indicated that on XXXXXXXXXXX, staff dragged XXXXXXX by XXXXX from XXXXXXXXXXX XXXX when XXX XXX XXX XXXXXXXXXXX to XXXXX or XXXX. XXXXXXX’s IEP team reconvened over a month later on XXXXXXX and changed his placement to the XXXXX program at XXXXX for the following school year. On the advice of XXXXXXXXXXX’s private therapist, his parent XXXXXXX XXXX the District XXXXXXXXXXX XXXXXXXXXXX of the 2018-19 school year so he XXXXX XXXXXXXXXXXX. XXXXXXXXXXX’s revised IEP did not provide specific services to address the PTSD.

Additionally, the District informed OCR that it learned about the PTSD diagnosis of another student, XXXXXXX, during the student’s IEP team meeting. The District stated that during the XXXXXXXXXXX meeting of XXXXXXXXXXX’s IEP team, the XXXXXXX Specialist at a private clinic shared XXXXXXX’s PTSD diagnosis with his team. This diagnosis was provided during a discussion of a new placement for XXXXX, who attended XXXX XXXXX District schools during the 2017-18 school year, while a student in XXXX. Although XXXXXXXXXXX’s special education records indicate that the XXXXX Specialist put the team on notice that XXXXXXX had PTSD which caused him to be “emotionally heightened” while at school, the documentation the District provided OCR does not indicate XXXXXXXXXXX’s IEP team considered how to address his needs.

Use of Calming Rooms/Spaces¹³

District staff interviewed by OCR confirmed that pursuant to the Restraint Policy, they are prohibited from involuntarily confining a student alone in a room or area from which the student is physically prevented from leaving. At times, however, District schools utilize designated rooms or spaces for purposes of calming a student during a behavior incident. At other times, the District refers to these spaces as calming rooms or spaces, crash rooms, safe rooms, reset and/or cool-down rooms. Hereinafter, OCR refers to these rooms collectively as calming rooms or spaces.

The District explained that calming rooms are designated spaces within 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 District reported to OCR that calming rooms are not locked when in use and

¹³ While calming spaces are excluded from the Restraint Policy’s definition of seclusion, OCR considered whether the District’s use of these spaces constituted seclusion based on parental assertions.

that staff do not leave students unaccompanied in them. According to the District, students are permitted to leave a calming room at any time, unless the student is behaviorally dysregulated. In that event, school staff first ensure the student is calm and ready to return to class before allowing the student to leave the calming room. Some students have use of a calming room written into their IEP or BIP as a tool to help the student re-regulate following a behavior incident.

According to updated documentation provided by the District, seven District elementary schools, two District middle schools, and one District high school had a designated calming room during the 2019-20 school year. Only two of the ten schools that have a designated calming room maintain logs documenting when the room was used (Bennett Elementary and South High). The Bennett log indicates that between September 2018 and February 2019, three different students spent time in the School's calming room on four separate dates for a total of one hour and 18 minutes. The most time any one student spent in the calming room was 40 minutes. In contrast, the log provided for South High indicates that for the first two months of the 2019-20 school year, the calming room was used 39 times for 25.5 hours. The District did not provide information on how many different students used the calming room at South; however, at least three students spent over an hour each in the calming room. The District reported that an additional seven elementary, two middle, and one high school utilize calming spaces within classrooms. The District informed OCR that it does not maintain logs for the use of these classroom calming spaces. However, several witnesses interviewed by OCR indicated that individual student behavior logs would reflect whether a student spent time in a calming room or calming space within the classroom. The Eagles Principal stated that while the school does not maintain a log of time students spend in a calming room, when a student is restrained in the school's calming room, the restraint report for the incident would document use of the room. The Lincoln Principal reported that there would be "no way to track" how many students were placed in a calming space at the school during a given school year.

Several parents told OCR that they believed the District regularly secludes students with disabilities notwithstanding its written Policy prohibiting the practice. Regardless of the name given to these rooms or spaces, one parent noted that if there is not a doorknob on the inside such that a student cannot leave the room, this amounts to seclusion. Other parents indicated that they are concerned that students are being placed in rooms from which they cannot leave. The Agassiz Principal noted that in some cases a student may be prevented from leaving a room, but because they are not alone in the room at that time, the District would not view this as seclusion. OCR was unable to obtain information substantiating the parents' concerns or otherwise confirming whether students were left alone while in these spaces. Moreover, due to the poor record keeping on the use of these rooms and spaces, OCR was unable to fully assess the extent to which these rooms and spaces were used to seclude students in ways that created FAPE evaluation and implementation issues and/or resulted in missed instruction.

Individual OCR Complaints

OCR investigated two individual complaints that were filed with OCR by the parent(s) of two individual District students—XXXXXX and XXXXXXXX—after OCR initiated this compliance review.

XXXXXXXX

XXXXXX was an XXXXXX student during the 2018-19 school year, with a primary disability of “XXXXXXXXXX” (XXX). On XXXXXXXX, XXXXXX’s IEP team placed him in the XXXXX program at XXXX to help him to regulate his emotions and to improve academic proficiency. At that time, XXXXXXXX’s IEP team also revised his BIP to address XXXXXXXX’s behaviors, including XXXXX XXXXXXXX and XXXXX when XXXX by XXX. The BIP provided that when XXXXX came to school very heightened, staff were to XXXX XXXX to the XXXXX XXXX and XXX XXXX XXXX XXXXXXXX to XXXX XXXX and XXXX XXXXX. If after XXXX XXXXX XXXXXXXX did not XXXX XXX XXXXXXXX and XXXXXXXX, the BIP directed staff to XXXXX the XXXX or a school XXXXXXXX.

XXXXXX’s Parent alleged that in XXXXX, an SRO at XXXXX handcuffed XXXXX instead of implementing the provisions in his IEP and BIP to address his behavior. XXXXXXXX’s Behavior Log shows that on XXXXXXXX XXXXX was XXXXX XXXX in the hallway that included XXXX and XXXX of XXXX. The Case Manager told him to stop XXXX XXXX and redirected him. The Principal also tried to redirect XXXXXXXX several times and then radioed the SRO for help. XXXXXXXX XXXX at the Principal and XXX him in the XXX. The SRO handcuffed XXXXX and XXXX him.

The Principal stated to OCR that the XXXXX incident was XXXXXXXX XXXXX XXXX XXX restrained during the 2018-19 school year. The Principal stated, and the Behavior Log confirms, that on XXXXXXXX the school convened a threat assessment meeting for XXXXXXXX that XXXXXXXX’s parent, the Case Manager, the SRO, the Principal and other staff members attended. The Principal stated that staff concluded during the meeting that XXXXXXXX’s IEP and BIP were implemented during the XXXXXXXX incident.

XXXXXXXX

XXXXXX was an XXXXXX student during the 2018-19 school year at XXXXXXXX School who received services pursuant to an IEP for XXX. XXXXXXXX’s IEP in effect at that time noted that he “XXXXXX XXXXX XXXX XXXX. When [XXXXXX] is over-stimulated or upset, it is best to XXXX him XXX to XXX XXXX XXXX XXX XtX XXXX XXXX XXXXXXXX.”

On XXXXXXXX, the District created a BIP for XXXXXXXX. The BIP stated that staff would walk XXXXXXXX to a XXXXX “XXXX XXXX” or the XXXXXXXX XXXX when he becomes angry and call his parents to reset. The BIP did not mention use of restraints.

Documentation provided to OCR by the District indicates that XXXXX staff restrained XXXXX XXXX during the 2018-19 school year. XXXX staff restrained XXXX on XXXXXXXXXX, but did not create a restraint report for the incident. This restraint was the subject of X XXXX complaint. At the end of the investigation XXXXXXXXXX XXXX XXXXX with the District, XXXXX concluded that the District failed to follow its policies when it secluded XXXXX and subjected him to a XXXX restraint, neither of which are permitted under District policy. XXXXX also found that the District failed to follow XXXXX’s BIP that

required staff to XXXXX “XXXXXX XXXXX and XXX XX XXX XXX to XXX XXX and XXX he XXXX inform the teacher when XX XXX XXX.” XXX asked the District to train XXXXX case managers on the use of BIPs, review the District’s restraint/seclusion policy with all administrators and school staff, and conduct a CPI review with school staff. XXXXX concluded that the District XXXX with its request and XXX its investigation on XXXXX. XXXX did not decide whether the XXXXXXXXX restraint denied Student 24 a FAPE.

XXXXXXXXXX staff restrained XXXXXXXXX a second time on XXXXXXXX XX, XXXX, during XXXX. The restraint report stated that a paraprofessional took XXXXXXX to XXX XXXX, “like I would if I was XXXXXXX XX XXXXX-XXX,” resulting in a XXXX restraint. The paraprofessional was not CPI certified and did not follow XXXXXXX’s BIP before restraining him. XXXXXXX’s behavior further escalated as a result of the restraint, and he eloped from the school and missed instruction for the remainder of the day while staff attempted to deescalate and return him to the building.

In response to the two incidents, the District revised XXXXXXX’s BIP on XXXXX XX, XXXX, to indicate that staff were to avoid restraining XXXXXXX. The District’s documentation indicates that in revising the BIP, the team drew on information discussed during an XXXXX XX, XXXX meeting, shortly after the XXXXX XX, XXXX gym incident. XXXXX XX’s BIP was modified to address specific triggers in the XXXX class setting. His IEP team developed a new IEP on XXX X, XXXX, which addressed situations that may trigger and escalate XXXXXXX’s behaviors. The team also added new behavior goals to the IEP and provided additional interventions and supports, including adaptive XXXXXXX XXXXXXX and XXXXX and participation in a small XXXXX regulation XXXXX group. The District disclosed to OCR that XXXXXXX is a student who has been identified as having PTSD. OCR found no documentation indicating whether XXXXXXX’s IEP team considered the need to provide him with compensatory services or otherwise address the impact of either restraint on XXXXXXX.

Analysis

FAPE Violations

OCR has determined that the District’s use of restraints during the 2017-18 and 2018-19 school years denied students with disabilities who were repeatedly restrained a FAPE, in three respects.

Failure to Timely Evaluate and Re-evaluate

The District failed to timely evaluate students for special education and related services despite their behaviors and/or repeated restraints. The evidence establishes that before the District evaluated three of the Selected Students the students continued to be subjected to restraints to manage their behavior. The District also failed either to re-evaluate or to timely re-evaluate several of the Selected Students to determine whether they were in need of additional services in light of referrals to the IEP teams from staff who administered the restraints and/or evidence that the students exhibited escalating behaviors that resulted in frequent restraints. The evidence establishes that, similar to the students who were not timely evaluated for special education and related services, the students who were either not re-evaluated or not timely re-evaluated

continued to be restrained. Moreover, even when the IEP teams reconvened to re-evaluate students, OCR found that teams did not consistently consider the escalation of students' behaviors resulting in restraints in determining whether the students' current array of regular or special education and related aids and services was sufficient to provide FAPE.

OCR also obtained information indicating that the District failed to consistently re-evaluate some District students who were repeatedly restrained and were diagnosed with PTSD by outside entities to determine whether the restraints to which they were subjected contributed to the new diagnosis and whether they needed additional services. Furthermore, the evidence established that by restraining some of the Selected Students, the District failed to implement provisions of their IEPs and/or BIPs that aimed to prevent student behaviors from escalating and minimize the need for restraints.

Loss of Educational Services

The District also deprived several Selected Students of a FAPE by denying them educational services during and after a restraint. OCR determined that the District was not able to demonstrate that students received services or instruction during, and in some cases after, a restraint. Many students also lost services and instruction when their parents were asked to take them home early from school because of behavior incidents. Although the SPED Director indicated that she has instructed principals to stop this practice, the District's documentation including attendance records, behavior logs, restraint reports, IEPs, and other records demonstrate that students with behavioral challenges continued to be sent home from school early or were provided a shortened school day when staff were not able to consistently manage their behavior. District witnesses provided conflicting testimony as to whether the District considers missed services and instruction for restrained students. The evidence obtained by OCR indicates that the IEP and 504 teams of impacted students did not assess how the loss of services and/or instruction impacted FAPE for the students, and whether additional services, including compensatory or remedial services, were necessary.

XXXXXX XX

Lastly, in connection with XXXXXX one of the two students on whose behalf individual complaints were filed with OCR, OCR determined that the District denied XXXXXXXX a FAPE. The preponderance of the evidence establishes that in addition to violating its own policy by subjecting him to XXX XXXX restraints during the XXX-XX school year, the District also violated Section 504 by failing to implement his BIP. Before XXXXX was restrained on XXXXX XX and XXXXXX XX, XXXX, District staff did not provide him appropriate attention nor the time he needed to calm down, as his BIP at the time required. While the evidence indicates that subsequent to these two restraints, XXXXXXXX's IEP team met and revised his IEP and BIP, the District's documentation does not indicate whether the District considered the impact of the restraints on XXXXXXXX's receipt of FAPE, including whether he required compensatory or remedial services.

Concerns

In addition to the Section 504 violations described above, OCR has concerns with the inadequate documentation the District kept regarding several matters relevant to this compliance review. For instance, the District does not track or monitor the use of its calming rooms and spaces. Although the information OCR obtained from staff witnesses and from visiting seven calming rooms at five District schools indicates that these rooms and spaces are not intended to be used to seclude students, even when students are directed to the calming room by staff, OCR is concerned that the District's lack of documentation regarding the use of these rooms and spaces prevents OCR and the District from determining whether they are used to seclude students or were used in an excessive and/or unnecessary manner and in ways that may be in violation of Section 504 because it results in the denial of educational services to individual students.

With respect to the documentation of restraints, OCR is concerned that the District's restraint report only tracks students with disabilities who receive services pursuant to an IEP, but not students who receive services through a Section 504 plan. OCR also determined that 35% of the restraint reports the District provided for the 2018-19 school year were not timely completed. Delays in completing restraint reports not only impede the District's ability to timely determine whether a restrained or secluded student was denied FAPE, but also call into question their accuracy and reliability. Moreover, OCR observed that even timely completed restraint reports were deficient because they did not always include a description of a student or staff's precipitating behavior or consistently describe specific measures taken to comply with a student's IEP, BIP or crisis plan to de-escalate and defuse student behavior before resorting to restraint. Furthermore, the evidence OCR obtained establishes that the District did not require staff to complete a restraint report for restraints performed by SROs on District property or in a District program or activity. Without this information, the District cannot effectively rely on restraint reports to monitor staff practices, determine whether a student's current array of services is effective to meet the student's needs, or consider the impact of restraints on individual students' receipt of FAPE.

OCR's investigation found that District administrators and senior staff did not take steps to address incomplete or untimely restraint reports. Additionally, District administrators and staff do not utilize restraint reports to monitor restraint practices in the District on a regular, systemic basis or to consider whether an individual student was properly restrained or was negatively impacted by the restraint. District administrators provided conflicting testimony on how they use the restraint reports to monitor restraints across schools, and school-based staff consistently testified that they have not received feedback or direction from senior administrators outside of their school based on information presented in a restraint report.

OCR observed that the District did not maintain documentation of the instructional minutes and educational services students missed as a result of being subjected to restraints. Additionally, the District did not document the steps its staff took to ensure students were not missing instruction or services as a result of their restraints.

Because of the record-keeping problems identified above, OCR is concerned that the District may not be providing accurate reporting to the Civil Rights Data Collection (CRDC) of such

activities. For instance, OCR observed that the District reported 348 incidents of restraint to the CRDC for 2017-2018, while OCR reviewed 376 incidents for the same school year. Further, the District's 2015 CRDC report disclosed no instances of student restraints or seclusions.

Although the District reported to OCR that staff often use students' behavior logs to document the use of the Ukeru system to de-escalate a student's behavior and to support a referral to the student's IEP team, it clarified that staff are currently not required to document every instance that Ukeru is used. OCR is concerned by this practice because it prevents OCR and the District from accurately determining whether all students who repeatedly require Ukeru interventions are provided a FAPE by being referred in a timely manner for either evaluation or re-evaluation for appropriate special education and related services. Additionally, OCR is concerned that in not documenting every instance the staff uses Ukeru on a student, the District is also not documenting the instructional minutes and educational services the student missed as a result.

Lastly, OCR is concerned that the District may have violated the Section 504 rights of many students with disabilities whose behaviors resulted in restraints by not placing them in the least restrictive environment. OCR observed that the District placed students in more restrictive settings without documenting that the students' IEP and/or BIP had been fully implemented and were nonetheless inadequate to address the students' behavior in a less restrictive setting.

XXXXX XX

Regarding XXXX XX, OCR has concerns regarding the incident when the SRO subjected XXXXXX XX to a mechanical restraint on XXXX XX, XXXX. In this instance, District staff did not document the restraint using its restraint report, consistent with their failure to document SRO and/or law enforcement restraints of other students.

The District did record the facts leading to the incident in XXXXX XX's Behavior Log. According to that log, prior to restraining the student the staff did implement his BIP providing that staff had to direct XXXXXX to XXXXX room, give him XXXX opportunities to calm down, and XXXX the XXX or a school administrator if XXXXX failed to comply. The Behavior Log entry for this incident shows that XXX XXXXX XXXXXX to use XXXXX behavior and to go into a room to XXXX XXXXX failed to comply each time, used XXXX, made a XXXXX gesture to the Case Manager, and hit the Principal. When the XXX, who was present during part of the incident because XXXXXX had approached him, was not able to prevent XXXXXX from striking the Principal, he called for back-up and handcuffed XXXXXXXX. After he was handcuffed, XXXXXXXX stopped fighting but proceeded to XXXXX and XXXXX at the XXXXXX. Based on this information, OCR concludes that there is insufficient evidence to establish that the District denied XXXXXXXX a FAPE. However, OCR has concerns regarding the use of untrained XXXXs that are not required to follow the Restraint Policy. The Restraint Policy specifically prohibits the use of XXXXXX restraints and in this case, XXXXXX was XXXXX in violation of the policy.

Conclusion

The District agreed to implement the enclosed Resolution Agreement, which, when fully implemented, will address the evidence obtained and the allegations investigated. The

Agreement requires the District to review and revise its policies and procedures regarding restraint and seclusion, including a statement regarding the limited involvement of SROs in managing student behavior; develop and implement a record-keeping system and procedures to ensure District personnel adequately and accurately documents each restraint and/or seclusion; implement a monitoring program to assess the District's use of restraint and seclusion on a monthly basis; provide effective training on the District's policies and the use of restraint and seclusion; and provide certain individual student remedies. Please review the enclosed Agreement for further details. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the terms of the Agreement and the statutes and regulations at issue.

This concludes OCR's investigation of this compliance review. This letter 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint against the District with OCR.

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

We appreciate the District's cooperation in the resolution of this compliance review. If you have any questions, please contact Alonzo Rivas, the OCR attorney assigned to this compliance review, at Alonzo.Rivas@ed.gov.

Sincerely,

Adele Rapport
Regional Director

Enclosures

cc: Tara Brandner (brandnt@fargo.k12.nd.us)