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OFFICE FOR CIVIL RIGHTS

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August 27, 2021

Mr. Brad Sale, Superintendent
Parker Unified School District
1608 Laguna Avenue
Post Office Box 1090
Parker, Arizona 85344

via email only to bsale@parkerusd.org

Re: **Parker Unified School District**
OCR Compliance Review 08-19-5002

Dear Superintendent Sale:

The Office for Civil Rights (OCR) of the U.S. Department of Education (“Department”) completed its compliance review of Parker Unified School District (“District”). This compliance review was initiated by letter dated January 29, 2019, to determine whether the District’s use of restraint and seclusion during the 2017-2018 and 2018-2019 school years denied students with disabilities a free appropriate public education (FAPE).

OCR is responsible for enforcing Section 504 and Title II, which prohibit discrimination on the basis of disability in any program or activity receiving Federal financial assistance from the Department or by a public entity, 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.

During the investigation, OCR reviewed District documents, including CRDC data and related data provided by the District; District policies and procedures; special education records for all District students with disabilities reportedly subjected to restraint and seclusion; discipline records for students not identified as students with disabilities and reportedly subjected to physical restraint. In addition, OCR interviewed 33 District staff members, including those reportedly involved in restraint or seclusion, special education staff and administrators at all District schools and alternative programs, and the former and current Exceptional Student Services Directors. OCR also interviewed a former District staff member, the superintendent and assistant superintendent; and on May 7, 2019, viewed, in-person, all of the District’s seclusion rooms and time out rooms.

LEGAL STANDARDS

Definitions

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

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

OCR defines “mechanical restraint” as the use of any device or equipment to restrict a student’s freedom of movement. The term does not include devices implemented by trained school personnel or used by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.¹

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

Section 504 and Title II

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

The Section 504 regulation, at 34 C.F.R. § 104.35(a), provides that a school 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.²

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 school district shall: (1) draw upon information from a variety of sources, including physical condition and adaptive behavior;³ (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

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

² 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).

³ 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.

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 34 C.F.R. § 104.34, which requires placement in the regular educational environment to the maximum extent appropriate.

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

Generally, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II.⁴

FACTS

The District is located in Arizona, has five schools and two alternative programs serving 1,904 students. See Figure 1.

Figure 1: Grades served and total student populations at each District school and program (as of April 4, 2019)

Name	Grades Served	Total Student Population
Blake Primary School (“Blake”)	Preschool – 2	395
Wallace Elementary School (“Wallace ES”)	3 – 5	381
Le Pera Elementary School (“Le Pera”)	K – 8	235
Wallace Junior High School (“Wallace JHS”)	6 – 8	369
ABLE Program (“ABLE”) ⁵	6 – 8	Up to 20
Parker High School (“Parker HS”)	9 – 12	485
Parker Alternative (“Ombudsman”)	9 – 12	39

According to the District, it was serving 356 students with disabilities, or 18.7 percent of the total student population. Blake had a significantly higher percentage of students with disabilities than other District schools: 36 of the 37 students in Blake’s pre-school program were identified as students with disabilities and Blake had two self-contained classrooms for students with disabilities, whereas Wallace ES had one and Le Pera did not have any. According to Le Pera’s principal and special education teacher, Le Pera students who needed a self-contained special education setting were assigned to Blake or Wallace ES. ABLE (Alternative Behavior Learning Environment) is a behavioral management program serving grade 6 through 8, including students with disabilities. Although ABLE receives students from Le Pera, District staff considered ABLE as an extension of Wallace JHS, though it also received students from Le Pera.

See Figure 2.

⁴ 28 C.F.R. § 35.103.

⁵ ABLE is administered by the District. The District reports data about students in ABLE, including student population data, with each student’s base or sending school – *i.e.*, Le Pera or Wallace JHS.

Figure 2: Student populations at each District school and program (as of April 4, 2019)⁶

	Blake	Wallace ES	Le Pera	Wallace JHS	Parker HS	Ombudsman
Students with Disabilities	115	73	37	59	72	0
Students without Disabilities	280	308	198	310	413	39
Total Students	395	381	235	369	485	39
% Students with Disabilities	29.1	19.2	15.7	16.0	14.8	0.0

As seen in Figure 2, the District did not have students with disabilities attend Ombudsman in the 2018-2019 school year. As discussed later in this letter, this was because the District had a practice that required parents⁷ of students with disabilities to revoke Section 504 Plan and IEP services before enrolling at Ombudsman.

Restraint and Seclusion Recordkeeping and Reporting

OCR's investigation revealed that although the District's policies correctly define physical restraint⁸ and seclusion as discussed immediately below, the District did not consistently collect accurate and detailed information about restraint and seclusion.⁹ As became evident during interviews, District staff, including the XXXX, were not knowledgeable about the District's definition of restraint, and how it differs from escorts or safety restraints. Similarly, the XXXX and other District staff were not knowledgeable about the District's definition of seclusion and how it differs from time-outs.

For example, the District's data response listed eight students who experienced one instance of seclusion each during the 2017-2018 school year. In the same data response, the District annotated that while staff initially recorded the incidents as a "seclusion," none met the definition of a seclusion. During OCR interviews, all District staff stated that any such instances marked as seclusions were removals to other spaces with staff supervision. However, the District did not maintain records of when the eight reported seclusions occurred, how long each student was secluded, and what staff were involved.

While in many instances there was no record-keeping of either type of incidents, when there was a record, the District did not standardize the collection of information. For example, the District's discipline referral forms did not have a field for restraint and seclusion; yet the District's online database, School-Wide Information System (SWIS), included a field titled, "Seclusion/ Restraint," with a dropdown menu that includes "Restraint," "Seclusion" and "Seclusion & Restraint." Therefore, in many

⁶ ABLE is not included in this chart to avoid a double count.

⁷ Throughout this letter, a reference to parent or parents includes parents, guardians, emancipated minors or adult students.

⁸ District policy does not contain a definition for mechanical restraint.

⁹ Pursuant to 34 C.F.R. 100.6(c), recipients are required to permit access to records and other sources of information as may be pertinent for OCR to ascertain compliance with Title VI. Section 504, at 34 C.F.R. 104.61, incorporates this provision by reference.

instances, staff who enter information from referral forms into SWIS have to speculate, based on narrative comments, if any, on referral forms, about whether a restraint and/or seclusion occurred.

Additionally, logs of restraint and seclusion incidents for the 2017-2018 school year at Blake were, according to the District, “inadvertently shredded” after information was compiled for the District’s data response to OCR.¹⁰

The District informed OCR that, on August 16, 2019, all schools except Ombudsman and ABLE began using a form titled “Parker Unified School District Restraint and Seclusion Documentation” and special education teachers were trained on use of the form.¹¹ The form provides check boxes and lines for narrative responses for special education teachers to record details about the incident, the antecedent behavior, notice, and follow-up after three incidents have been logged. OCR saw the use of the form in one instance – an incident involving Student F attending XXXX, as discussed below. Although the form may be a standardized tool for special education staff to record several details about each incident, the form does not ask staff to identify whether the incident involved a restraint, seclusion, or both. This lack of clarity presents challenges for office staff tasked with accurately entering the data into SWIS.¹²

District Restraint and Seclusion Policy and Other Relevant Policies

Available on the Arizona School Boards Association webpage,¹³ the District’s policies are, for the most part, not fully incorporated into schools’ handbooks for students, parents and guardians, or staff.

The District’s restraint and seclusion policy (“Policy JLDB”) defines restraint as any method or device that immobilizes or reduces the ability of a student to move their torso, arms, legs, or heads freely, including physical force or mechanical devices. The policy defines seclusion as the involuntary confinement of a pupil alone in a room from which egress is prevented. The policy specifies restraint and seclusion may be used when the student’s behavior presents an imminent danger of bodily harm to the student or others and less restrictive interventions appear insufficient to mitigate the harm and requires schools to establish reporting and documentation procedures when restraint and seclusion is used.

The District’s Section 504 policy on Child Find (“Policy IHBA”) states that it is the District’s responsibility to identify and evaluate students who need special services or programs in order to receive a FAPE. This policy also includes the following statement: “Students may be eligible for services under provisions of Section 504 even though they do not require services pursuant to IDEA.”

The District’s Section 504 policies on identification, evaluation, and placement are addressed by an accompanying regulation (“Regulation IHBA-RA”). Regulation IHBA-RA describes three steps to the District’s identification and referral procedures. Any student who needs or is believed to need special

¹⁰ The District’s narrative response to OCR reads, “Please note that the details of the incidents of restraint and seclusion for 2017-2018) are not available. The teacher ... responsible for maintaining those records inadvertently shredded the logs after the information was compiled for the district’s report.” During an interview with OCR, the teacher reported that she shredded the individual student data because she did not realize that she was supposed to preserve the records and no one directed her to destroy the records.

¹¹ Completion of the form precedes the entering of data into SWIS.

¹² Beyond issues of standardizing methods for collecting data on restraints and seclusions, this form will be discussed in greater detail later in the letter.

¹³ See Arizona School Boards Association catalog: <https://policy.azsba.org/asba/Z2Browser2.html?showset=allmanuals> (last visited 2/13/2020).

education or related services may be referred for an evaluation of the student's individual needs by a parent, teacher, or certified school employee. The regulation requires that the evaluation be completed by individuals knowledgeable about the student, the student's school history, the student's individual needs, the meaning of evaluation data, and placement options; and the Superintendent is tasked with monitoring the evaluation process to ensure that qualified personnel participate. When the District considers a referral, staff review a student's records, including academic, social, and behavioral records, before deciding whether to conduct an evaluation. If an evaluation was requested by a parent and is denied, the District will inform the parent of the decision and their procedural rights.

Regulation IHBA-RA includes three steps to the District's evaluation procedures. The District will evaluate the nature of the student's disability and its impact on the student's education and consider any behaviors that interfere with the student's participation in the educational program. Prior to making a final determination of eligibility under Section 504, the District will invite the parent to an eligibility determination meeting. The final decision will be put in writing by the District and the District will notify the parent of the Section 504 procedural safeguards, including the right to an impartial due process hearing.

Regulation IHBA-RA addresses placement procedures under the heading of "Plan for services." The regulation states that the District shall be responsible for determining what special services are needed for an eligible student. In making that decision, the District shall consider all available relevant information, drawing upon a variety of sources, including comprehensive assessments conducted by the District. Parents will be invited to an eligibility meeting and given the opportunity to examine all relevant records. If a student is found eligible, the District will develop a written plan that describes the student's disability; the special education or related services needed; how those services will be provided and by whom. The District will then inform all school personnel who work with the student of the plan. The District will also notify parents of its final decision regarding the service(s) it will provide.

Regulation IHBA-RA states that eligible students shall be placed in the regular education environment with supplementary aids and services unless the District demonstrates that such a placement cannot be achieved. If a student is not found eligible for services, the record will state the reason(s) why services are not needed.

Regulation IHBA-RA further states that the District will monitor the progress of eligible students and the effectiveness of their plan annually. The District will determine whether special education or related services are appropriate and necessary, and whether the student's needs are being met as adequately as the needs of a student without a disability.

Use of Restraint During the 2017-2018 and 2018-2019 School Years

The District's former Exceptional Student Services Director ("Former Director") reported to OCR that the District inadvertently over-reported restraint to the CRDC for 2015-2016.

In its data response, the District indicated that, during the 2017-2018 school year, District staff restrained students at Blake, Wallace ES, and Wallace JHS. Le Pera, Parker HS, ABLE, and Ombudsman staff told OCR that they were not aware of restraints during the 2017-2018 and 2018-2019 school years. However, because the District had not implemented a standardized method for its schools to record restraints nor ensured that staff were aware of the District's definition of restraint, OCR could not confirm the accuracy of those school staff members' assertion.

Data Response: number of students reported to be restrained and number of restraints in the District during the 2017-2018 SY and 2018-2019 SY:

School	School Year	Students With Disabilities		Students Without Disabilities	
		Students	Incidents	Students	Incidents
Blake	2017-2018	12	12	3	11
	2018-2019	5	97	0	0
Wallace ES	2017-2018	3	14	3	13
	2018-2019	0	0	0	0
Wallace JHS	2017-2018	0	0	0	0
	2018-2019	1	4	0	0

Although recordkeeping does not allow OCR to confirm, staff at Wallace ES told OCR that the District's data response incorrectly reported the use of restraints at that school. All seven Wallace ES staff members interviewed by OCR¹⁴ reported that no students were restrained during the 2017-2018 and 2018-2019 school years. When asked about the discrepancy between the data response and interview statements, the XXXX, XXXX, and XXXX, as well as the XXXX, said that escorts of students and other touching of students that did not meet the definition of restraint were incorrectly reported as restraints. OCR reviewed the records for students identified as having been restrained at Wallace during 2017-2018 and 2018-2019 school years and did not find any mention of restraint or escorts in the students' individual records. With the understanding that OCR could not access incident records to confirm the accuracy of staff member assertions, OCR did not find evidence of restraints at Wallace ES.

During an interview with OCR, the XXXX acknowledged instances when restraint was used during the 2017-2018 and 2018-2019 school years. However, she also explained that of the 120 incidents reported for Blake in the data response, she incorrectly reported some contact with students as restraints. For example, she reported having identified any touching of a student (*e.g.*, holding a student's hand to lead them) as a restraint. However, in addition to mistaken reporting regarding some students, OCR also found evidence of underreporting of some students. OCR reviewed 80 Blake office referral forms including forms for Students G, H, and I. The completed forms for these three students correspond to some of the dates of restraints for these students identified in the District's data response. These forms represent a contemporaneous, handwritten account of the incidents resulting in a referral by the XXXX and or other staff members, and they confirm that 5 instances identified as restraint on the data response for Students G, H and I at Blake did in fact constitute restraint. OCR was also able confirm through witness interviews¹⁵ that 70 of the restraints for Students F¹⁶, B and E also met OCR's definition of restraint.

Students Not Identified as Having a Disability

With the absence of incident records at Wallace ES, the lack of systems for collecting restraint data, and the destruction of Blake's underlying restraint records, statements regarding the total number of restraints at the District may be understated. Nonetheless, the District indicated in its data response that, during the 2017-2018 school year, there were six District students without disabilities who were

¹⁴ The seven staff members were X - sentence redacted - X.

¹⁵ Office referral forms did not exist for Students F, B or E so OCR was unable to cross-check the restraint incidents reported in the District's data response for these students.

¹⁶ Student F was a student at Wallace JHS.

subjected to a total of 24 physical restraints; and during the 2018-2019 school year, there were no District students without disabilities who were subjected to physical restraint. In terms of the information provided in the data response, three of the six students without disabilities attended Wallace ES; for reasons explained above, OCR did not find evidence of restraints at Wallace ES. At Blake, on the other hand, three Blake students not previously identified as students with disabilities, Student G, Student H and Student I, were identified on the District's data response as having been restrained one time, four times, and six times respectively.

Student G

During the 2017-2018 school year, Student G was in XXXX at Blake. According to the XXXX, general education behavioral interventions attempted for her included a check-in/check-out system, collaborating with her social worker, speaking with the XXXX when she was the school psychologist, and communicating with her guardian.

OCR requested records from Student G's reported restraint on October 13, 2017, but her records were destroyed. Nevertheless, OCR reviewed a corresponding handwritten office referral form penned, in part, by the XXXX. During OCR's interview, the XXXX described the restraint as follows: [Student G] pulled books from shelves and tore pages, and attempted to push over furniture. A bookshelf nearly fell over, and the room was "demolished." Staff evacuated other students. When the XXXX was called, Student G was biting, kicking, and spitting. The XXXX and the XXXX ("XXXX") when she was the XXXX carried Student G to an unfurnished classroom. The office referral form corroborates the XXXX's recollection of this incident, and it constitutes a restraint. Her behavior that precipitated the restraint was among the most serious that OCR reviewed during this compliance review and resulted in a 3-day out-of-school suspension.

According to Student G's other discipline records, the October 13th incident was preceded by at least five written discipline referrals between January 2015 and May 2016; and at least 25 written discipline referrals between February 2017 and November 2019.¹⁷ Between February 2017 and November 2019, her behaviors included hitting, punching, grabbing, kicking, scratching, spanking, throwing objects, and hiding. The consequences imposed included conferences, parent contacts, verbal redirection, recess timeouts, being sent to a "time-out room," in-school suspension (ranging in length from 20 minutes to one hour), and out-of-school suspension. Adding the suspension served for the October 13, 2017, incident, she served a total of 39 days of out-of-school suspension between January 2015 and November 2018.

According to the XXXX, Student G was not referred for an evaluation because she was gifted and doing well academically, and her behaviors were rooted in her home life. Her 2016-2017 school year XXXX teacher also told OCR that she recalled Student G having "major meltdowns" where she would throw items, rip items from walls, and hurt others. She also believed the root cause of Student G's behavior was in her home life and she had no academic concerns about her. Similarly, Student G's 2017-2018 school year XXXX teacher told OCR that she believed that her behaviors were rooted in her home life. The teacher explained that, if she suspected that a student had a disability, she would raise her suspicion with the XXXX when she was the XXXX or the XXXX. She did not recall if she suspected that Student G had a disability. She did, however, acknowledge that her behavior was atypical and that she had regular discussions with the XXXX when she was the XXXX and XXXX regarding her behaviors.

¹⁷ According to the XXXX, Student G was withdrawn from the District from August 5, 2016, to October 18, 2016.

The XXXX acknowledged the possibility that a gifted student may also require special education services. But she did not suspect a disability and supported her position by stating that the “proof [is that she] is doing well at XXXX” and described her as “flourishing” during the 2018-2019 and 2019-2020 school years. However, her 2018-2019 and 2019-2020 XXXX discipline records indicate that, she had eight discipline referrals for punching, shoving, kicking, cursing, name-calling, defiance, disrespect, and throwing a chair. Even though her discipline records for 2019-2020 include four referrals for behavior like the earlier incidents,¹⁸ the Superintendent told OCR that her behaviors resulting in discipline significantly decreased since XXXX and her home life stabilized. The Superintendent told OCR that she was not restrained during the 2019-2020 school year or 2020-2021 school year through January 25, 2021.¹⁹

Student G had numerous disciplinary referrals prior to the October 2017 incident. The October 2017 incident put her, other students and staff in danger and resulted in her one restraint; she continued with similar serious behaviors on a frequent basis. Nonetheless, the Superintendent reported to OCR that, as of January 25, 2021, Student G had never been referred for an evaluation, evaluated, or provided with an IEP or Section 504 plan.

Student H

During the 2017-2018 school year, Student H was in XXXX at Blake.²⁰ According to Student H’s teacher, the school’s positive behavioral interventions and supports (PBIS) team developed, and the District implemented, a behavior plan as part of her general education program. The XXXX described her interventions as including a check-in/check-out system, monthly staff meetings about students receiving interventions, and communication with her guardian.

OCR requested records from Student H’s four restraints reported by the District in its data response, but the District responded that the records were destroyed. Student H’s XXXX teacher said that she did recall her being restrained a few times. OCR reviewed coinciding office referral forms for the four reported restraint dates. Contrary to the District’s data response, the XXXX indicated in her interview that Student H was never restrained but instead was “subjected to escorts”, which involved the XXXX holding her hand, putting an arm around her shoulder, and walking next to her. The XXXX’s assertion is possibly supported by the contemporaneous, narrative description of incidents on December 13, 2017, and February 28, 2018, wherein the use of the terms “CPI”²¹ or “CPI transport” on the office referral might have misidentified those instances as restraint.

However, a February 8, 2018, office referral form includes the following: “[Student H] got mad in Reteach that she got a 4 on her test. She threw papers, her glasses, and items on her desk to the ground. She refused to go to the office. I ([XXXX]) came she refused to walk with me so I CPI carried her to room.” In addition, an April 16, 2018, office referral form includes the following: “[Student H] refused to line up with her class and was holding rocks. When I ([XXXX]) showed up she refused to walk to the office. I had to CPI carry her to room. She continued to scream and not sit in chair.” Contrary to the XXXX’s assertion that Student H was not subject to any restraints, OCR found evidence of two restraints

¹⁸ OCR did not obtain 2020-2021 discipline records to date for Student G, or any other students subject to this compliance review.

¹⁹ As discussed later in this letter, OCR has ongoing concerns about the accuracy of the District’s restraint and seclusion data gathering systems.

²⁰ According to the Superintendent, Student H was not a student in the District during the 2016-2017 SY.

²¹ District staff use “CPI” as shorthand to describe various restraint techniques identified in trainings attended.

– one on February 8, 2018, and another on April 16, 2018-- for Student H, with the possibility of two additional restraints; she served a total of six-and-a-half days of out-of-school suspension for the underlying behavior.

According to Student H’s other discipline records, the February and April 2018 incidents resulting in the restraint occurred in the context of significant other behavioral incidents with resulting discipline. Student H had at least 33 written discipline referrals between November 2017 and November 2019.²² Similar to her behaviors leading to the 2018 restraints, her behaviors for these referrals included throwing objects; attempting to run away; hitting, spitting, biting, pushing, and fighting; threatening to choke herself; threatening to kill other students; and attempting to cut another student’s hair. Her consequences included conferences, parent contacts, recess timeouts, being sent to a “time-out room”, in-school suspension (ranging in length from 15 minutes to two hours), and out-of-school suspension (ranging in length from one school day to five school days, for a cumulative 19.5 school days).

According to the XXXX, Student H was not referred for an evaluation because staff did not believe Student H had an emotional or behavioral disability but rather that the behaviors were due to “trauma”, and she was adjusting to living with a guardian. The XXXX also pointed to the implemented interventions; however, based on the evidence, the interventions were not effective in stopping the behaviors that precipitated the use of restraint.

Student I

During the 2017-2018 school year, Student I was in XXXX at Blake. OCR requested records from Student I’s six reported restraints, but the District responded that no such records were available. OCR found coinciding discipline referral forms for five of the six dates of reported restraints. On October 24, 2017, the XXXX wrote that he “had to be CPI removed to calm down room.”²³ The office referral form for a November 3, 2017, incident did not describe any actions by the teacher or the XXXX that would constitute restraint. During an incident on November 13, 2017, the XXXX annotated that she “team CPI walked” him to the seclusion room. On February 9, 2018, the XXXX wrote “I put him in a CPI hold...and sat with him until he calmed down.” On February 13, 2018, the XXXX annotated that she “team walked [him] to the time out room.” The XXXX told OCR that she only recalled the November 14, 2019, restraint as meeting the OCR definition; she said that she could not recall many details but that it lasted two to three minutes and involved holding his arms and legs to prevent self-harm. OCR finds that Student I was restrained at least twice with the possibility of up to five restraints during the 2017-2018 school year.

OCR considered restraints in the context of significant other behavioral incidents during that same school year. During the 2017-2018 school year, Student I had 14 discipline referrals with consequences including 30.5 days of out-of-school suspension, among other disciplinary consequences. The XXXX and Student I’s XXXX teacher told OCR that his behaviors were rooted in his home life.

In December 2017, XXXX staff initiated an IDEA evaluation of Student I. His XXXX teacher completed the Behavior Assessment Scale for Children – 2nd Edition (BASC-2). On January 23, 2018, XXXX, who was also a school psychologist, observed him for a functional behavioral assessment (FBA). On January 31, 2018, the XXXX, who at the time was the school psychologist, observed him for the FBA. On February 5,

²² Five of the referral copies were illegible.

²³ For purposes of consistency in this letter, the ‘calm down room’ is the seclusion room.

2018, the IDEA evaluation team²⁴ met. The team included a resource teacher, the principal, the XXXX school psychologist, and his teacher; his parent was invited but did not attend. The team's evaluation report included the following:

- “[Student I]’s behaviors have been escalating since the beginning of the school year.”
- “His mother stated that she sees similar negative behaviors at home.”
- “[He] had had difficulty both in the classroom and during lunch.”

The team concluded, “The student does not meet the criteria as a student with a disability under the IDEA. Is not eligible for special education services at this time. ...” The team also wrote that Student I “does not meet the criteria of an educational disability at this time.” As mentioned above, District policy IHBA states: “Students may be eligible for services under provisions of Section 504 even though they do not require services pursuant to IDEA;” nonetheless, the team stopped with their IDEA determination rather than going on to make a determination of eligibility pursuant to Section 504.

On January 16, 2020, the XXXX told OCR that Student I is doing significantly better at XXXX; however, his discipline records indicate that, during the 2018-2019 and the first half of the 2019-2020 school years, he had at least 16 written referrals for behaviors such as hitting, kicking, banging, scratching, and throwing objects. He has also said, “I want to kill myself,” “I want to die,” and “I hate my life,” and has hit himself in the head, stabbed himself with a pencil, and scratched himself. Two referrals mention CPI; disciplinary consequences included 8 days of out-of-school suspension as well as numerous other disciplinary consequences during the 2018-2019 and first half of 2019-2020 school years.

During the 2020-2021 school year, Student I was in the XXXX at XXXX, had a staff member assigned to him to do check-in/check-out, and received interventions and supports on social skills as part of his general education program. The District has not revisited its 2017 IDEA evaluation determination and as of January 15, 2021, never engaged in a Section 504 evaluation for him.

Students with Disabilities

In 2017-2018, the District reported 26 restraint incidents for students with disabilities districtwide; in 2018-2019, the District reported 101 restraint incidents for students with disabilities districtwide.

Of the 2018-2019 restraints, the District reported three students with disabilities who were restrained numerous times: Student F; Student B; and Student E.²⁵ Specifically, 95 of the 101 reported restraints involved one of these three students. As described below, although there may be some instances of reporting incidents that would not meet the definition of restraint among the six instances involving other students, OCR found that there were many more restraint incidents for Student B and Student E than captured in the 101 total restraints reported by the District.

Student F

²⁴ In the District, the IDEA evaluation team is referred to as a “Multi-Disciplinary Evaluation Team”.

²⁵ During the 2017-2018 school year, ten other students with disabilities were reportedly subjected to one physical restraint each. The District's data response did not include any additional information about their restraints. During the 2018-2019 school year, three other students with disabilities were reportedly subjected to restraint. One student was reportedly restrained twice for a total of three minutes; one student (P.M.) was reportedly restrained twice for a total of eight minutes; and one student was reportedly restrained once for a total of two minutes. Both of P.M.'s restraints involved him being unwilling to return from recess. Although recordkeeping on restraints was unavailable, OCR reviewed these students' IEPs.

During the 2018-2019 school year, Student F was in XXXX at Wallace JHS. According to District's data response, he was subjected to four restraints during that school year.

Student F's areas of eligibility for services were XXXX, XXXX, and XXXX. Pursuant to his January 16, 2018, IEP, he was in a self-contained classroom, with a one-to-one aide. His accommodations were a consistent daily routine, preferential seating, minimization of classroom distractions, a quiet area for independent work, and provisions for physical movement. Staff responsible for implementing his plan told OCR that IEP services were implemented, but without recordkeeping, OCR had no way to confirm.

Student F's reported restraints were August 31, October 23, October 25, and October 26, 2018. His special education teacher ("Teacher B") told OCR that, on August 31st, he was physically restrained when he bit or attempted to bite an aide. Teacher B also shared that the restraint lasted approximately one minute, the student did not miss instructional time, and the guardian was notified. Teacher B told OCR that the October 23rd restraint occurred on the playground.²⁶ Finally, she told OCR that the October 25th and October 26th restraints which each lasted less than two minutes, occurred when he was knocking over computer equipment and attempting to bite another student.

Student F's January 16, 2018, IEP, in effect at the time of the physical restraints, did not address the use of restraint. Nor did he have a behavioral intervention plan (BIP) or other document that addressed the use of restraint. Additionally, the District did not possess any service logs or other records reflecting the provision of IEP services and accommodations for him.

According to Teacher B, after the fourth restraint, Wallace JHS staff decided to hold an IEP team meeting to consider providing Student F with a second aide, along with other accommodations. However, before the meeting was held, his guardian removed him from the District.

According to the Superintendent, Student F reenrolled in the District and an IEP team meeting was held on May 9, 2019, shortly before the school year ended. He was reevaluated at the beginning of the 2019-2020 school year, and an IEP team meeting was held on October 30, 2019, and although there is no record of discussions regarding his restraints, the team discussed the results of the evaluation and updated his IEP. This reevaluation resulted in his primary disability category remaining XXXX and his secondary disability noted as XXXX and XXXX.

For the 2019-2020 school year, Student F was restrained on August 23 and December 10, 2019. The District's Restraint and Seclusion Documentation form identified the student's antecedent behavior, the behavior immediately prior to the restraint, the location of the behavior, which staff witnessed the behavior, the duration of the restraint, how the guardian was notified, and the staff who completed the form. The first restraint was for 15 minutes but included the repeated application and removal of the restraint, as well as the use of a quiet room. The second restraint was for 2 minutes. The form has a field to select whether the incident was the first, second or third restraint or seclusion and instructs staff that following a third incident an IEP, 504 or Behavior Team meeting must be held.

Student B

²⁶ OCR was unable to determine how long this restraint lasted.

During the 2018-2019 school year, Student B was in XXXX at Blake with an IEP for XXXX, XXXX, and XXXX. His most recent evaluation regarding his XXXX disability was on August 24, 2017.

The 2018-2019 school year began on August 1, 2018. Student B's IEPs included behavior-related services and accommodations, including:

- 30 minutes per week of "social/emotional" special education;
- a one-on-one aide at all times;
- a harness or an adult holding his hand when out of the classroom;
- frequent rewards to encourage positive behavior; and
- a weighted blanket, etc. to calm him.

His IEP specified: "Emergency procedures, including physical interventions, may be used if [he] poses an imminent risk to his own safety or the safety of others. NVCPI will be used as a last resort, when all other intervention strategies have been exhausted."²⁷ According to Teacher A, "emergency procedures" was used synonymously with restraints.

According to his August 27, 2018, IEP, his recurring, problematic behaviors included screaming, pushing, engaging in self-injurious behaviors, including slapping his face and banging his head on the floor, spitting, slapping, kicking, attempting to bite, and running away from staff. His IEP described the impact as, "[his] behaviors have caused injuries to his 1:1 aide and himself, disrupt his peers during academic instruction, and cause unsafe situations for him and his classmates [his] inability to control his emotions and body and the intensity of his outbursts are a danger to himself, his peers, and the classroom staff."

The XXXX told OCR that "[T]he student does not have any discipline records, the student does not have an FBA or BIP and there are no service delivery logs[.]" According to Teacher A and Aide A, the two staff responsible for implementing the IEP, there was not a time when a failure to provide Student B with his services or accommodations led to a restraint; however, without recordkeeping OCR has no way to confirm.

Teacher A and Aide A both reported that the de-escalation strategies attempted by staff included speaking calmly, re-direction with a stern voice, calling his name when he ran, or offering a preferred activity. Teacher A reported that restraints could last from one minute to 45 minutes and that she and Aide A attempted to make up services that Student B missed while being restrained.

At the beginning of the 2018-2019 school year, Student B had a modified schedule. He was in a self-contained setting for 4.5 hours per day, from 10:00 a.m. to 2:30 p.m. Teacher A told OCR that his behaviors were worsening during this period because of significant home life changes. Quarterly IEP team meetings to discuss behavior were held with his parents. According to data provided by the District, he was restrained 25 times from August 1, 2018 to August 24, 2018. Teacher A acknowledged that he was not reevaluated²⁸ and was unable to provide a reason.

On August 27, 2018, Student B's IEP team met, but no reevaluation was conducted prior to reaching the decisions made in this meeting. The team reduced his school time to one hour per day, after the regular

²⁷ NVCPI refers to "non-violent crisis intervention."

²⁸ Nor was an FBA conducted or a BIP drafted.

school day (2:30 p.m. to 3:30 p.m.), four days per week, in a self-contained classroom with Teacher A and Aide A. Teacher A told OCR that the schedule change was because he struggled behaviorally when other students were present, and providing services after school was designed to reduce his external stimuli. The prior written notice (PWN) for the August 27, 2018, IEP team meeting read, "Staff may use reasonable force upon [him], as necessary, to maintain order and control for the purpose of providing an environment conducive to safety and learning."

Although the District's data response reported that Student B was not restrained for the six months following the August 27, 2018, IEP team meeting, Teacher A disputed that assertion. Teacher A told OCR that, although Student B's restraints decreased after the August 27th meeting, the restraints continued occurring three to five times per week. Aide A told OCR that she concurred with what Teacher A reported.

On October 27, 2018, Student B's IEP team met and decided to continue Student B's four-hour per week schedule. On March 18, 2019, Student B's IEP team met again. According to Teacher A, Student B's absenteeism was a significant obstacle to progress. The PWN from the meeting indicates that the team, with his father's concurrence, decided to continue his four-hour per week schedule.

Although the District's data response reported that Student B was restrained twice on February 27, 2019, three times on March 21, 2019, and once on March 25, 2019, Teacher A told OCR that the data "sounded incomplete". Even considering his excessive absences, the restraints were under-reported based on information provided by Teach A and Aide A.

On May 7, 2019, Student B's IEP team met; the PWN noted, "[H]is attendance has been inconsistent due to moving to various new home environments." There is nothing in the PWN or IEP team notes to indicate that this meeting was preceded by a reevaluation or that the team discussed a need for him to be reevaluated given the high number of restraints during that school year. Instead, he was to continue his four-hour per week schedule in the upcoming school year at Wallace ES.

Student E

During the 2018-2019 school year, Student E was in XXXX at Blake. His only evaluation was conducted on April 4, 2016, with his team determining eligibility for XXXX, XXXX, and XXXX.²⁹ According to his IEP, his "recurring inappropriate behaviors" included: pushing, kicking, hitting, spitting, attempting to bite, and self-abuse; tantrums, and throwing objects; running away from his aide; and property destruction.

During the 2018-2019 school year, Student E received his special education services (10.25 hours per week) in a self-contained special education classroom with a 1:1 aide. His IEPs in place during the 2018-2019 school year specified, "He will be mainstreamed for P.E., Music, recess, developmentally appropriate activities, and field-trips with a designated 1:1 instructional aide, behavior permitting." He spent most of his time with Teacher A and Aide A. The accommodations section of his IEPs specified, "NVCPI: Emergency procedures, including physical interventions may be used if [he] poses an imminent risk to his own safety or the safety of others. NVCPI will be used as a last resort when all other intervention strategies have been exhausted." According to his IEP: "Staff may use reasonable physical force upon [him], as necessary to maintain order and control for the purpose of providing an environment conducive to safety and learning." His IEPs included:

²⁹ Information on evaluations current as of January 2020.

- 300 minutes per week of “social/emotional” special education in a self-contained setting;
- a one-on-one aide always; and
- a weighted backpack or compression vest.

Teacher A and Aide A both reported that the de-escalation strategies attempted included speaking calmly, re-direction with a stern voice, calling his name when he ran, offering a preferred activity, distracting him, and creating distance between him and any student who become upset. Teacher A reported that restraints could last between one minute and 15 minutes and staff attempted to make up services that Student E missed while being restrained during “non-service” times, such as physical education class and computer lab.

According to the District’s data response, Student E was restrained four times in August 2018, six times in September 2018, and in three separate instances on October 8, 2018, October 12, 2018, and October 17, 2018. On October 17, 2018, Student E’s IEP team met for an annual review.³⁰ No significant changes were made to his IEP. According to the District’s data response, Student E was restrained on October 26, 2018, six times in November 2018, three times in December 2018, 14 times in January 2019, 20 times in February 2019, and three times in March 2019. Teacher A told OCR that he was restrained once or twice a week and therefore, the data provided by the District seems accurate. Aide A also told OCR that the numbers of restraint reported by the District seemed accurate.

On May 13, 2019, Student E’s IEP team met again, and the team added an addendum to his IEP for 10 days of extended school year services to address regression attributed to absences. No other significant changes were made to his IEP. OCR asked Teacher A why the IEP team did not reevaluate Student E given the number of restraints used. She was unable to provide a reason.

Student E’s only evaluation was in April 2016; in the 2018-2019 school year, when he was subject to 60 restraints, his IEP team met twice but did not reevaluate him and, other than adding extended school year services, did not make any significant changes to his IEP.

Use of Mechanical Restraints During the 2017-2018 and 2018-2019 School Years

The District indicated in its data response that during the 2017-2018 school year, there were two District students subjected to mechanical restraint (Student A and Student B); and during the 2018-2019 school year, there were two other District students subjected to mechanical restraint (Student C and Student D). All four are students with disabilities, attended XXXX, and were reportedly subjected to one mechanical restraint, except Student C, who was subjected to two such restraints.

During District staff interviews, OCR was told that the reported uses of mechanical restraint involved the use of a small child walking harness with a leash during field trips. The XXXX explained that the use of such a harness was included in four students’ IEPs and that the District mischaracterized the use of harnesses as mechanical restraints.

OCR reviewed these students’ IEPs, and except for Student B, did not find the XXXX’s assertion corroborated by the IEPs. Only Student B’s IEP included mention of the use of a harness. In interviewing other staff regarding these students, OCR heard descriptions of use of the harnesses consistent with the

³⁰ His previous IEP team meeting was on October 23, 2017.

XXXX's description and no actual examples of mechanical restraint were described. While the District has policy definitions for restraint and seclusion, it does not have a definition for mechanical restraints. Although witnesses all described the use of harnesses and not actual mechanical restraints, without recordkeeping beyond the notation in Student B's IEP, there is no way to confirm.

Use of Seclusion During the 2017-2018 and 2018-2019 School Years

The District has seclusion rooms at Blake³¹ and Wallace ES; during the April 2019 onsite, OCR observed two rooms carpeted on four walls, floor and ceiling with a crash bar on the door for exiting. No similar rooms were available at La Pera, Parker HS, ABLE, or Ombudsman. As provided above, the District's policy definition of seclusion lacks the elaboration found in the CRDC definition but it is consistent; its definition is 'the involuntary confinement of a pupil alone in a room from which egress is prevented.' Although eight seclusions were reported by the District in its 2017-2018 CRDC data, the Former Director told OCR that the District had been inadvertently over-reporting seclusions to the CRDC.

In the District's data response, it again reported eight students, all of whom were students with disabilities as being secluded once each in 2017-2018. Also included in the data response was a note explaining that these instances were inaccurately reported as seclusions. Seven of the students included in the data response attended Blake; the remaining student attended Wallace ES. In interviews held after the district provided its data response, staff stated there were no seclusions, as defined by OCR and the District's policy, at either school. The Wallace ES principal and dean, as well as the former Director, speculated that some staff thought seclusion included a student being sent to in-school suspension or to the time out room. Other staff told OCR that they believed that a student had to be reported as secluded whenever the student was removed from the classroom and taken by a staff member to the time out room or the seclusion room in their respective school.

Without speaking to the details of the eight students identified in the data response, those staff also stated that students were never left alone in a space from which the student was physically prevented from leaving. However, the District did not record 2017-2018 incident dates for the eight students who were in the seclusion room or another space, how long they were in that space, what staff were involved, or any other contemporaneous information that could have allowed OCR to confirm how a seclusion room, or another space, was used; whether it met the definition of seclusion; and whether its use resulted in a denial of FAPE.

Regarding the 2018-2019 school year, the District indicated in its data response that no students were secluded. Although all witnesses, including senior administrators, lacked an understanding of the District's policy definition and described all incidents as a mischaracterization of 'seclusion', without recordkeeping, there is no way to confirm whether in 2018-2019 seclusions occurred in any of the schools.

Failure to Provide FAPE at Ombudsman

While investigating this compliance review of the District, OCR identified Section 504/Title II issues at Ombudsman that were not originally part of this compliance review.³²

³¹ Blake also has a time out room with a classroom set up managed by the Behavior Modification Coordinator.

³² When, during the course of the investigation of a complaint, OCR identifies compliance concerns and/or violations involving issues that were not raised in the complaint, OCR will address any compliance concerns and/or identified violations in the resolution letter or letter of finding and the resolution agreement, or, depending on the nature of the compliance concerns,

As described by the Current Director, Ombudsman is an alternative high school for students with behavioral issues, or due to reasons other than behavior, may need a shortened school day to graduate high school. Ombudsman is structured in two-to-four-hour blocks of instruction offering a morning or afternoon schedule. The school is staffed with one general education teacher and an assistant and is comprised of a single classroom.

During a May 2019 interview with the Former Director, OCR asked why the District had not reported any students with disabilities at Ombudsman. She informed OCR that it was “intentional” and explained that “before a student with a Section 504 Plan or IEP could enroll at Ombudsman, the parent had to revoke [special education and related] services for the student.” The Current Director acknowledged the practice reported by the Former Director. The Current Director told OCR that the practice stopped at the end of the 2018-2019 school year and that no currently-enrolled District students had been subjected to this practice.

The Current Director explained that, in the 2020-2021 school year, Ombudsman students with disabilities received their specialized instruction listed in their IEP or 504 plans from the school’s general education teacher. She also explained that for students with disabilities at the school, the Parker High School special education teacher’s role was limited to “overseeing the paperwork side of it.”

As of April 2021, three students were on IEPs and four students were on Section 504 Plans. OCR reviewed each student’s IEP and although placement decisions were made by each IEP team, what appears to be a significant change of placement was not preceded by a reevaluation. Their placement now included a shortened school day and related statements about LRE may have been driven by what is offered by Ombudsman rather than the individualized needs of the student. Similarly, the percentage of time in the general education setting appears to have been increased to allow for placement at Ombudsman. Services previously delivered by a special education teacher were to be provided by a general education teacher. (For at least two of the three students on IEPs, the IEP retroactively described behavioral challenges as the impetus for the Ombudsman placement.)

Also, the IEP of each of the three students provided for specialized instruction of similar frequency and duration which calls into question whether the services were individualized to meet the students’ needs. For example, each student received 30 minutes per month, per content area (e.g., reading comprehension, written expression, math calculation, etc.). Those 30 minutes were delivered to each student in 10-minute sessions.

Three of the four students on Section 504 Plans at Ombudsman had their qualifying disability listed as a specific learning disability and one student’s qualifying disability was listed as autism. For three of the four students, the District provided OCR with Section 504 Plans from the 2019-2020 and 2020-2021 school years. For the fourth student, Student Z, the District only provided her 2018-2019 Section 504 Plan. As explained by the Current Director, this student withdrew in XXXX and when she returned in XXXX, the District failed to reinstate her Section 504 Plan. Following the April 15, 2021, interview with OCR, the Current Director reported that she scheduled a Section 504 meeting for Student Z for the week of May 5, 2021 “to review and revise the student’s plan.”

provide technical assistance, or consider the compliance concerns for a possible compliance review or directed investigation. CPM, Article III. Article IV, which in part describes compliance reviews, incorporates the provisions of Article III by reference.

In addition to the District's error that left Student Z without her 504 services for at least 15 months, OCR found other record-keeping discrepancies for Student Z as well as the other students on Section 504 plans. For Student Z, while her plan listed her school as Ombudsman, the location of her services was Parker High School and staff responsible for her services was listed as Parker High School staff. Student W's 2019-2020 plan listed him as being in XXXX grade, but his 2020-2021 plan listed him as being in the XXXX grade. Both plans listed his school as Wallace ES with the location of plan services as Parker High School. Student X and Student Y had their schools listed as Parker High School.

Additionally, three of the students have Section 504 Plans that mention access to a resource room as an accommodation (Student X's plan does not). The plans for two of those students indicate that the resource room is staffed by a "teacher," while the third student's plan (Student Z) indicates that it is staffed by a "special education resource teacher." Given that Ombudsman is comprised of a single classroom with one general education teacher and an assistant, students with resource room services and/or special education teacher service providers do not appear to have access to such services and/or provider.

Lastly, OCR gathered evidence regarding the use of restraint and seclusion at Ombudsman. In a May 15, 2019, interview with the Previous Ombudsman Director³³, she told OCR that she had not read the District's policy on restraint, rather, she followed Ombudsman's restraint policy. She said Ombudsman trains all staff in CPI, but she has not used restraint during her time at the school. She said Ombudsman staff "don't touch the students, we try to corral them and then call the cops." She also told OCR that there were no seclusions. When the Current Director was asked if there were restraints or seclusions at Ombudsman, she said there were not; she also said that there were no seclusions given that the school consists of one large classroom. Although all other District schools began using the District's Restraint and Seclusion documentation form in August 2019, Ombudsman did not.³⁴

LEGAL ANALYSES AND CONCLUSIONS OF LAW

Failure to Evaluate Resulting in a Denial of FAPE

OCR found that the District violated Section 504 when it failed to conduct an IDEA and/or Section 504 evaluation of Student G and Student H and failed to conduct a Section 504 evaluation of Student I following its determination that he was not eligible under the IDEA.

Regarding Student G and Student H, the District staff who should have identified a need to evaluate these students seemed unaware of how underlying dangerous behaviors leading to a restraint can implicate the District's obligation under Section 504 to identify, refer and evaluate these students. Significant behavioral incidents prior to and following the restraint incidents should have heightened the urgency for evaluation even further.

Student G was restrained at least once; and Student H was restrained two to four times. Their disciplinary record shows that their misbehavior was frequent: Student G had at least 31 written disciplinary referrals from January 2015 to November 2019 and Student H has had at least 33 written disciplinary referrals from November 2017 to November 2019. From the beginning of the 2018-2019

³³ The former Ombudsman Director served in this capacity during the 2017-2018 and 2018-2019 school years.

³⁴ The former Ombudsman Director also told OCR that she did not have access to the District's SWIS tracking system.

school year through November 2019, Student G has had at least eight referrals; and Student H had at least 18 referrals. They missed an extensive amount of educational time: Student G had at least 39 school days of out-of-school suspension (OSS); and Student H had at least 10.5 days of OSS. They were sent to timeout or in-school suspension, sent home early, or otherwise removed from the classroom, countless times. Their behaviors were varied, serious, and atypical. The seriousness of the behavior that led to the restraints and similar behaviors before and after each incident, the frequency of the behavioral management and disciplinary measures mentioned above, and the resulting loss of instructional time that was described by staff, were sufficient to signal a need for evaluation.

Nonetheless, the XXXX explained the reasoning for not evaluating Student G was because she is gifted. However, a student who experiences behavioral challenges in school may have a disability, even if the behavioral challenges are not accompanied by academic challenges. The XXXX also indicated that the cause of Student G's and Student H's misbehaviors was their home lives. The quality of a student's home life is an insufficient reason to not evaluate that student. The fact that a student experienced or is undergoing a traumatic event, does not excuse the school district from its obligation to evaluate that student. The District had reason to suspect a disability and yet Student G and Student H have not been evaluated to determine whether they have a disability and may be eligible for services under Section 504 or the IDEA.

Regarding Student I, OCR found that he was restrained at least twice with the possibility of up to five restraints during the 2017-2018 school year. These incidents leading to restraint occurred within the context of significant other misbehavior and disciplinary consequences including 30.5 days of out-of-school suspension in that same year. In December 2017, staff initiated an IDEA evaluation. However, when the team concluded that he was not eligible as a student with a disability under the IDEA, it did not proceed with applying the evaluation data to a Section 504 analysis to determine if he was eligible as a student with a disability under Section 504. Subsequent reports of misbehavior and discipline suggest that general education interventions were not sufficient. The District had reason to suspect a disability and yet it never evaluated the student under Section 504, nor did it revisit its 2017 IDEA evaluation determination as the behaviors that precipitated the restraints continued.

The District's failure to conduct an IDEA and/or Section 504 evaluation for Student G and Student H and the failure to conduct a Section 504 evaluation for Student I were violations of Section 504.

Additionally, the District's Restraint and Seclusion Documentation form, implemented on August 16, 2019, raises new concerns for OCR to the extent that it is used for a student not previously identified as a student with a disability. Specifically, there is an absence of the option to refer such a student for a Section 504 or IDEA evaluation.³⁵

Failure to Re-Evaluate and Revise Resulting in a Denial of FAPE

Student F was subjected to four physical restraints and after the fourth restraint, Wallace JHS staff scheduled an IEP team meeting, and following a period of unenrollment, promptly reevaluated him and developed a new IEP thereby meeting its obligations under Section 504.

³⁵ Following a third incident and for students not previously identified as having a disability, it appears that the only follow up check box is for a PBIS Tier 3 Behavior Team review meeting.

In 2018-2019, Student B was physically restrained 25 times in the first 18 school days of the school year and continued to be restrained 3-5 times per week for the remainder of the year. Early in the school year, and without a reevaluation, his IEP team reduced his school day and increased the restrictive nature of his environment – one hour on four days per week after school hours – while repeated restraints continued each week. When the IEP team convened again in October 2018 and May of 2019, there still was no re-evaluation as they continued this restrictive placement, a reduced school day, as well as continued use of restraints. The repeated use of restraint should have suggested to the team that his current array of services may not have been sufficient to provide FAPE and that a reevaluation was necessary to assess whether additional or different services were needed.

In 2018-2019, Student E was restrained at least 60 times. Student E's IEP team met once for an annual review and another time to add extended school year services to address regression. Like with Student B, and despite the volume of restraints that he experienced, his IEP team did not discuss whether he should be reevaluated or initiate a reevaluation.

The records show that Student B and Student E were restrained multiple times each week during the 2018-2019 school year. Yet despite being repeatedly restrained, the District failed to identify the need for, or to conduct a reevaluation of, either student. Therefore, OCR found that the District failed to reevaluate Student B and Student E and revise their IEPs, as necessary, to ensure the provision of FAPE.

Additionally, the District's Restraint and Seclusion Documentation form, implemented on August 16, 2019, raises new concerns for OCR to the extent that it directs staff to convene a meeting after a third restraint or seclusion without considering individualized needs and circumstances that may warrant reconvening of an IEP or 504 team after the first or second incident.

Missed Instruction or Services Resulting in a Denial of FAPE

During the 2018-2019 school year, Student F's restraints occurred: while the class was watching a movie and lasted one minute; two were in the computer lab and lasted less than two minutes; and one occurred at recess for undetermined time. Based on the evidence available to OCR, there is insufficient evidence to indicate that the restraints Student F experienced resulted in missed instruction or services.

In contrast, Student B was restrained three to five times per week throughout the 2018-2019 school year with restraints lasting between one minute and 45 minutes. While OCR was unable to determine the total amount of time he was restrained over the school year due to a lack of record keeping, there was an excessive amount of time when he was restrained and staff responsible for IEP implementation acknowledging a need to make up services. Under such circumstances, it is sufficient to conclude that he missed instruction and services and the District made no efforts to assess and/or offset this loss.

Similarly, Student E was physically restrained at least 60 times during the 2018-2019 school year. Staff responsible for implementing the IEP and conducting the restraints said the restraints lasted between one minute and 15 minutes. While OCR was unable to determine the total amount of time due to a lack of record keeping, the excessive amount of time restrained and the acknowledgement by staff of a need to make up services is sufficient to conclude that he missed instruction and services. As with Student B, the District made no efforts to assess and/or offset this loss for Student E.

Given the volume of restraints of Student B and Student E and the failure of the District to convene IEP meetings to review the missed services and determine whether compensatory services were needed, OCR has concerns that both Student B and Student E may have been denied FAPE.

Mechanical Restraints

District staff disputed the reported incidents of mechanical restraints and consistently pointed to child walking harnesses with leashes as the only form of mechanical restraint utilized in the District even though that would not meet the CRDC definition. Except for one IEP that addressed harnesses, OCR cannot confirm whether or not mechanical restraints occurred and if yes, whether students were denied a FAPE due to a lack of recordkeeping. OCR has a compliance concern that the District may have used mechanical restraint in a manner that resulted in students with disabilities being denied a FAPE during the 2017-2018 and 2018-2019 school years.

Seclusions

Although district policy defines seclusion consistent with the Department's definition, there appears to be a widespread misunderstanding of actions categorized as seclusion. District staff disputed the reported seclusions by stating that the door to the room was always open and students were never left alone but the District provided no evidence about any of the eight reported seclusion incidents to back up their assertions in these specific instances.

Furthermore, even if the use of a separate room did not constitute seclusion, the lack of recordkeeping did not allow OCR to determine how much time the students spent in the separate room, what instruction and/or services they missed, and whether they may require compensatory services. OCR finds a compliance concern with regard to the District's practice of removing students from their regular classroom without sufficiently documenting or tracking how or if it provided these students their special education and related services. Regarding incidents that meet the definition of seclusion, given the lack of record keeping, OCR cannot confirm whether any students were secluded.

District's Obligation to Provide FAPE at Ombudsman School

The Former Director informed OCR, and the Current Director confirmed, that until the 2018-2019 school year, it was the District's practice to ask parents with students wishing to enroll at Ombudsman to waive their right for their students to receive special education and/or related services. School districts may not require parents of students with disabilities to waive any rights afforded to students with disabilities under Section 504, including their child's right to receive regular or special education and related aids and services. To require such a waiver might violate the right of students with disabilities to FAPE under Section 504. Although the Current Director informed OCR that there are not any currently-enrolled students who were subject to this past practice, there were students who have subsequently moved on from the District. OCR did not have access to the files for previously enrolled students. Based on the statements by the two administrators confirming the past practice and the absence of students with disabilities reported at Ombudsman in earlier years, OCR finds this past practice raises a compliance concern.

Turning to current practices, OCR found that once the District started to enroll students on IEPs or 504 plans at Ombudsman, it failed to establish a reliable system to ensure students were receiving a FAPE.

In particular, the District failed to reevaluate students who were placed at Ombudsman prior to a significant change in placement as required by Section 504 at 34 CFR 104.35. Further, placement decisions were of similar frequency, duration and location calling into question whether decisions were individualized. Special education services were not delivered by a certified special education teacher, relying instead on the Ombudsman general education teacher to provide the students' special education services. Based on the evidence gathered to date, OCR finds a compliance concern regarding the provision of FAPE of students on IEPs or 504 plans at Ombudsman.

Regarding Student Z, there were additional lapses that go beyond a compliance concern and result in a violation. When Student Z returned to the District in XXXX, and although she was previously on a 504 plan, the District failed to reinstate her on a Section 504 plan and provide services.³⁶ In April 2021, the Current Director told OCR that the District scheduled a Section 504 team meeting to review Student Z's plan and recommence services for her.

Last, OCR has a compliance concern regarding the failure to keep accurate records for all students on IEPs or Section 504 plans at Ombudsman. A failure to keep accurate records of the location and provision of Section 504 services could impact a parent's or student's rights to be provided with notice of services, an opportunity to examine relevant records, and a review procedure, as required by the Section 504 regulations.

Conclusion

District leadership acknowledged the issues identified by OCR with respect to its Section 504 obligation to evaluate, to reevaluate, to address missed instruction resulting from restraints or seclusions, to provide FAPE at all its programs and schools and to address deficits in training and recordkeeping and is committed to addressing these issues in a timely manner and expressed an eagerness to work on ensuring the issues are resolved. The District has indicated it is willing to receive technical assistance from OCR and the Office of Special Education and Rehabilitative Services (OSERS).

To resolve the issues identified in this compliance review, the District agreed to the attached Resolution Agreement ("Agreement"). When the Agreement is fully implemented, all review issues will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. A failure to implement the Agreement according to its terms would require us to re-open the review for further proceedings.

This concludes OCR's investigation of the compliance review and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in an OCR compliance review. This letter is not a formal statement of OCR policy, and it 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 participated in a compliance review. If this happens, the individual may file a complaint with OCR alleging retaliation.

³⁶ Depending on the nature of her absence for the beginning of the school year, a reevaluation may have also been warranted.

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, 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.

OCR thanks you for your patience with the delay in our investigation of this matter. We also want to acknowledge the courtesy and cooperation that you and your staff extended to OCR during the investigation. OCR looks forward to working with you and your staff during the monitoring phase. If you have any questions, please contact OCR's primary contact for this compliance review, XXXX, at XXXX, or XXXX.

Sincerely,



Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure

cc: Paul Olson, Assistant Superintendent (polson@parkerusd.org)
XXXX, Exceptional Student Services Director ([XXXX](#))
Kathy Hoffman, Arizona Superintendent of Public Instruction (adeinbox@azed.gov)