



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

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SAN FRANCISCO, CA 94102

June 29, 2017

Matt Wayne, Ed.D.  
Interim Superintendent  
Hayward Unified School District  
24411 Amador Street  
Hayward, CA 94544

(In reply, please refer to case no. 09-14-5004)

Dear Dr. Wayne:

The U.S. Department of Education (Department), San Francisco Office for Civil Rights (OCR), has completed its compliance review of the Hayward Unified School District (District) in the above-referenced matter. The compliance review, which was initiated on September 15, 2014, examined the District's policies, procedures, and practices related to the use of restraint and seclusion with its students with disabilities.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

Prior to OCR concluding its review and reaching a compliance determination, the District expressed its interest in addressing possible deficiencies identified by OCR in the review by entering into a Resolution Agreement (Agreement). OCR has determined that such an Agreement is appropriate. The facts gathered to date, legal standards, and OCR's analysis of the facts pursuant to the applicable legal standards is stated below.

### **FACTS GATHERED TO DATE**

The District serves the city of Hayward, California and provides services to approximately 21,000 students through 21 elementary schools, five middle schools, three high schools, an alternative high school, an adult education center, and a center for pre-school children.<sup>1</sup> This review focused on the use of restraint and seclusion with students with disabilities during three academic school years: 2012-2013, 2013-2014, and 2014-2015. During these three years, the enrollment for the District and with respect to students receiving services under the Individuals with Disabilities Education Act (IDEA) was as follows:

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<sup>1</sup> <http://www.husd.us/Demographics> (last visited May 25, 2017).

District Enrollment and Special Education Enrollment<sup>2</sup>

|  | 2012-2013                                    | 2013-2014                                     | 2014-2015                                     |
|--|--|---|---|
| Total District Enrollment                                  | 21,939                                       | 22,272  | 22,555  |
| Total Enrollment of Students receiving services under IDEA | 2,050<br>(9.3% of total District enrollment) | 2,284<br>(10.2% of total District enrollment) | 2,409<br>(10.6% of total District enrollment) |

**A. Documented Instances of Restraint or Seclusion**

At the time that OCR initiated this compliance review in 2014, the most recent available data regarding the District's use of restraint and seclusion was for the 2010-2011 school year. For that school year, the District reported to the Department through the Civil Rights Data Collection (CRDC) that students receiving IDEA services in the District were subjected to 573 instances of restraint and 110 instances of seclusion during the school year. According to the same data, there was no instance of use of either restraint or seclusion with a student who did not have a disability.<sup>3</sup> Data for instances of restraint and seclusion was not collected for CRDC for the 2012-2013 school year. For the 2013-2014 school year, the District reported through the CRDC zero instances of any students in the District being subjected to restraint or seclusion.<sup>4</sup> The District, however, reported to OCR in 2014 that from August 2013 to October 2014, restraint was used 631 times and seclusion was used 407 times all with students identified as receiving services through IDEA. Again, the District did not report any restraint or seclusion for students without disabilities.

|                               | 2010-2011<br>(reported to<br>CRDC) | 2013-2014<br>(reported to<br>OCR) |
|-------------------------------|------------------------------------|-----------------------------------|
| Instances of Use of Restraint | 573                                | 631                               |
| Instances of Use of Seclusion | 110                                | 407                               |

Consistent with its responsibilities to provide a free appropriate public education to every student with a disability residing in its jurisdiction, the District contracts with nonpublic school (NPS) providers to provide special education and related services to some District students with disabilities. Of the instances of restraint and seclusion reported to OCR for the 2013-2014 school year, the vast majority of instances occurred in the NPS setting where the District had placed students with disabilities. District students in those settings were subjected to restraint on 596 occasions and to seclusion on 388 different occasions, or 94% and 95% of reported instances in the District, respectively.<sup>5</sup> The District's data also reflected that 60 District students received the entirety of reported instances of restraint or seclusion and, of those 60 students, 54 were attending an NPS placement.

<sup>2</sup> <http://dq.cde.ca.gov/dataquest/SearchName.asp?rbTimeFrame=oneyear&rYear=2016-17&cName=Hayward&Topic=Enrollment&Level=District&submit1=Submit>

<sup>3</sup> For the 2010-2011 school year, see: <http://ocrdata.ed.gov/Page?t=d&eid=30335&syk=6&pid=751>.

<sup>4</sup> For the 2013-2014 school year, see: <http://ocrdata.ed.gov/Page?t=d&eid=30335&syk=7&pid=2023>.

<sup>4</sup> For the 2013-2014 school year, see: <http://ocrdata.ed.gov/Page?t=d&eid=30335&syk=7&pid=2023>.

<sup>5</sup> The District's placement of students in a NPS setting is governed by District Board Policy 6159.2.

Based on the District's initial response, OCR reviewed the incidents being reported as restraint and seclusion and determined that District students placed in Seneca NPS (Seneca) were subject to most of the reported instances.<sup>6</sup> In this regard, students placed by the District at Seneca were subjected to 499 of the instances of restraint and 305 of the instances of seclusion or, 84% and 79% of total reported instances, respectively.

## **B. Applicable Policies and Procedures Related to Restraint and Seclusion**

During the 2012 through 2014 school years, the provision of services for District students placed in Seneca programs was proscribed by a Master Contract (contract) entered into between the District and Seneca.<sup>7</sup> The District's contract with Seneca provides procedures regarding the use of behavior interventions; it describes the circumstances under which restraint and seclusion can be used and refers to such instances as "emergency interventions". The contract states that:

emergency interventions shall not be used as a substitute for a Behavior Intervention Plan (BIP), and instead may only be used to control behavior that is unpredictable and spontaneous. For an emergency intervention to be used, the behavior must pose a clear and present danger of serious physical harm to the individual with exceptional needs, or others. Before emergency interventions may be applied, the behavior must be of the kind that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior.

The contract requires that when staff members use an emergency intervention, they shall complete an emergency report and send it to the District within twenty-four hours.

If an emergency report is completed, the contract requires an Individualized Education Program (IEP) meeting to be scheduled within two days to review the emergency report and determine whether a functional behavioral assessment should be conducted and an interim plan implemented for any student who does not have a Behavior Intervention Plan ("BIP") or Positive Behavior Intervention Plan ("PBIP"). For students who already have a BIP or PBIP, the IEP team is required to convene within two days to review and modify the BIP or PBIP if a "new serious behavior has been exhibited or existing behavioral interventions have proven to be ineffective."

In addition, the contract requires that Seneca maintain a written policy regarding emergency interventions and emergency reports. Seneca's written policy regarding emergency interventions is titled, "Seneca Family of Agencies Crisis Intervention Policy," and provides guidelines for the use of emergency interventions, which are referred to as "crisis intervention" in the policy. As a philosophy, it states that physically restrictive interventions should only be used as a last resort and that staff should use a wide range of less-restrictive interventions as often as possible. In addition to what is required under the contract, the policy states that staff should review each incident of crisis behaviors with each other and with the student, to determine how the situation can be avoided in the future.

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<sup>6</sup> A second program, Building Blocks, was also identified as having a large number of reported uses of restraint and seclusion. The District informed OCR that Building Blocks was a subsidiary of Seneca.

<sup>7</sup> OCR reviewed the contract in effect during the 2014-2015 school year and also the most recent 2016-2017 contract with District NPS providers, including Seneca. There are no substantive differences in the relevant sections of the two contracts reviewed with regard to restraint and seclusion and the procedural and other requirements prior to use of emergency interventions.

The policy states that upon intake to a Seneca program, information will be obtained from the student and family members to create an Emergency Prevention and Intervention Plan (EPIP), the purpose of which is to provide Seneca staff with information on the student's trauma history, potential crisis behaviors, effective interventions, and any "crisis interventions to avoid due to physical limitations or history of trauma." The policy states that any students who may be subjected to a crisis intervention will have a current EPIP that is updated at least every 3 months. The EPIPs are referred to in every emergency report created by Seneca. Specifically, the emergency report has a standard question that is included in every report asking, "Does client have a Behavior Intervention Plan (EPIP) that addresses this category of behavior?"

Although the emergency reports refer to the EPIP as a "Behavior Intervention Plan" for students, EPIPs are not reviewed by or agreed to by the student's IEP team. Each EPIP reviewed by OCR for the students described herein was created and signed by a single individual, usually a therapist/clinician, who may or may not have been a member of the IEP team. The EPIPs were specifically stamped "Confidential Not Part of Educational Record."

The policy requires additional procedures to be followed in the event of any use of restraint or seclusion for a student. First, it requires the creation of an emergency report for each use of restraint or seclusion. Each emergency report is usually two to three pages in length. The first page includes student and school site information, such as the student's name, age, and district. It also contains the date, time, and location of the incident, a list of behaviors, a list of less restrictive interventions used, whether "separation" with or without physical intervention was used, a list of the restraints or seclusion used with a start time, whether the student was able to reintegrate back into the program after the incident, the names of the staff involved, and a list of who was notified. Each emergency report also includes a narrative that provides an explanation of the incident and the interventions used. Following the narrative is a brief description of how the school reintegrated the student and any administrator follow up. An administrator is required to approve the report, and spaces for the name of the administrator and date of approval are included. Finally, each report must be distributed to the District and certain Seneca staff, and the emergency report describes the distribution list.

The policy also requires that staff notify an administrator immediately upon every use of restraint or seclusion; all members of the treatment team are required to review each use for appropriate changes to existing plans, procedures, or training of staff; the administrator is required to ensure proper documentation was created and that individual plans were followed; and the administrator is required to assess trends and patterns in the use of seclusion and restraint that may be occurring. The program director and assistant directors are required to review data at least every six months in order to identify whether restraint and seclusion are only used as emergency intervention, to identify opportunities to reduce the occurrence and increase the safety of seclusions and restraints, and to identify any process changes that need to be made.

### **C. Review of Student Records**

Below is a summary of OCR's review of the records for the nine District students with special needs who were placed at Seneca by the District during the 2012-2013, 2013-2014, and 2014-2015 school years and who accounted for the largest numbers of reported incidents of the use of restraint and seclusion. OCR requested from the District the two most recent psycho-educational assessments; two most recent IEPs and any addendums including BIPs or similar documents; Behavioral Emergency Reports (emergency reports or BERs) for the 2012-2013 through 2014-2015 school years; any Seneca Emergency Prevention & Intervention Plan; and, any Seneca

Center agency-wide treatment plan. OCR's review includes a summary of all documents received on the request to the District. The records reviewed by OCR show that during the 2012 through 2014 school years, these students were subjected to at least 1,190 instances of restraint. District records show that during these school years, students were subjected to at least 517 instances of seclusion. As described below, the emergency reports were inconsistent in identifying lengths of time students with disabilities were subjected to restraint or seclusion. The emergency reports also were inconsistent in identifying other forms of removal of students with disabilities from regular instruction and the lengths of time for those instances.

#### 1. Student A

Student A was nine years old and was in the latter part of his fourth grade year during the 2013-2014 school year when the District placed him in a Seneca program in March of 2014. He received special education services pursuant to an IEP based on a qualifying disability under the category of Emotional Disturbance. Prior to being placed at Seneca, Student A had a Functional Analysis Assessment (FAA) in February 2014 and a manifestation determination meeting in March 2014 regarding behavioral incidents resulting in 10 days of suspension. His most recent IEP had taken place the previous fall in November XX, 2013 and his most recent behavior support plan (BSP) was dated June X, 2013. Neither the November IEP or the June 2013 BSP provided for the use of restraint or seclusion as an intervention for Student A. The manifestation determination meeting notes from the March X, 2014 meeting indicate that Student A had engaged in behavior "requiring physical restraint". The notes did not describe the restraint and no emergency report was provided to OCR describing the restraint.

While at the Seneca Program in that first year, an IEP was held on May XX, 2014. The IEP states that Student A's behaviors led to a significant amount of time outside of the classroom and that Student A was to be provided with the standard elements of the Seneca program related to behavioral supports and interventions throughout the school day, specifically staff proximity, being able to check in with staff, positive reinforcement, use of the level system, and being reminded of coping skills when upset. The IEP provided Student A with 50 minutes per week of individual counseling and 50 minutes per week of group counseling. The IEP had one behavioral goal stating that Student A would use coping skills to manage overwhelming negative feelings in adaptive ways as evidenced by his ability to stay in the classroom, engage appropriately in classroom activities, and interact positively with his peers. The IEP referenced a BSP. The BSP provided is dated June 2013 and listed strategies to be used for persistent problem behaviors such as removal of attention and de-escalation.<sup>8</sup> According to the District, during that 2013-2014 school year while placed at Seneca, Student A was not restrained or subjected to seclusion.

During Student A's fifth grade year in the 2014-2015 school year from July 2014 through January 2015<sup>9</sup>, Seneca staff restrained Student A at least 90 times for a total of 252 minutes, as documented in 28 emergency reports. The emergency reports also document instances of the use of "Interim time out of both Sec. and Rest" for a cumulative period of time that totals 413 minutes.<sup>10</sup> With very few exceptions, the use of a "hands-on" adult escort is documented as lasting one

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<sup>8</sup> Unlike the other students' records provided to OCR, the District did not provide to OCR for Student A an EPIP.

<sup>9</sup> Because this information was requested from the District at the end of 2014, it does not include reports after January 2015.

<sup>10</sup> As noted further herein, the emergency reports do not identify whether the "Interim time out" constituted seclusion. Also the emergency reports did not always identify for what length of time the "interim time out" lasted.

minute. However, the hands-on escort describes movement from different locations in the school. It also describes situations where staff described Student A as struggling, resisting, and flopping.

Twenty-five out of 28 of the emergency reports for Student A, reflect several instances of Student A being placed outside of his regular classroom and in a C.O.R.E. or crisis classroom, though the reports did not document the minutes for those incidents as required by policy, so the records do not reflect how long Student A was removed from his regular instruction. The other three emergency reports state that Student A was placed in another environment that was not his regular classroom. His removal from the regular classroom was, at times, extremely lengthy including up to almost the entire school day and sometimes occurred on consecutive days. For example: the October X emergency report states Student A was removed from the classroom at 9:12 a.m., was not “reintegrated” into the program, and his situation will be discussed the following day; and, the October X emergency report states that Student A was removed at 12:24 p.m. and not “reintegrated” into the program. The emergency reports do not reflect that Student A received any instruction when he was removed from the classroom; rather, they state that he was required to do things, such as reflect on his behavior, complete his consequences, complete therapeutic tasks, and self-regulate.

The number of emergency reports for Student A increased as the first semester of the 2014-2015 school year progressed. Specifically, there was one emergency report created in July 2014, three created in August, five created in September, nine created in October, five created in November, two in December, and three in January 2015 for Student A. During an October XX, 2014 incident, the emergency report reflects that Student A made suicidal statements, including “I want to hang myself,” and “... will you kill me? I want to die.” The emergency report does not provide information to identify whether Seneca staff responded to the suicidal statements and if so, how they responded to them.

According to the records provided by the District to OCR, there were no IEPs held for Student A during the same time period from July 2014 through January 2015. (The IEP in effect was the one from the end of the prior school year in May 2014.) Out of the 28 emergency reports, 22 of them completed for Student A stated at the conclusion that no follow-up was necessary. The remaining six emergency reports, had as a follow-up action the statement that either Student A would continue to be monitored and supported or Student A would continue to be monitored and supported and staff would intervene when necessary.

OCR’s review of the emergency reports revealed that, out of the 28 emergency reports, 18 show that Seneca staff used a form of restraint with Student A, even though his described conduct did not pose a clear and present danger of serious physical harm to himself or others, as is required by the District’s contract with Seneca. Ten out of the 28 emergency reports (August XX, August XX, September X, September XX, September XX, October X, November X, November XX, January X, and January XX) describe Student A’s refusal or failure to comply with directives or instructions from the staff resulting in the use of restraint or seclusion. The November XX emergency report indicated that Student A was in the crisis room as “assigned consequence time”, indicating that removal may have been being used as a form of discipline in contravention of policy.

On at least two occasions, Seneca staff relied on past behavior and not current behavior to justify use of restraint, also contravening policy requirements. Specifically, the November XX emergency report states that Student A was subjected to a standing restraint for banging a chair. However, the standing restraint was used with Student A after he had ceased banging the chair and was attempting to return to the classroom. Similarly, the November XX emergency report describes that Student A was in the crisis classroom to reflect on the previous day’s behavior and states that

because of Student A's "previous unsafe behaviors" staff initiated a standing restraint to help him to his designated area. The September X, 2014 emergency report reflects that staff initiated an escort of Student A because he was running around the campus. Once the escort was initiated, Student A began to struggle and push staff, which caused the staff to then increase the restraint used to a "wall restraint." The September X, 2014 emergency report reflects that staff placed Student A in a "basket hold"<sup>11</sup> and escorted him after he refused to listen to their directives and continued to wander toward his peer. The September X emergency report further notes that Student A was unable to state what triggered him and expressed that he did not think he did anything wrong and did not understand why he was being escorted/restrained.

With regard to seclusion, the emergency reports are vague. Some reports identify that Student A was provided an "Interim Time Out" and identify a length of time. Others state that Student A was escorted to the "seclusion area" but do not identify the length of time that Student A was in seclusion, even though required by policy.

Contrary to the requirements in the contract between Seneca and the District, no IEP was convened within two days of emergency interventions to review emergency reports prepared for Student A. The contract required that the IEP team review the emergency report and review Student A's BSP to determine whether it needed to be modified during the period of time he was at Seneca. The documents do not reflect that the District held an IEP team meeting to conduct this review for Student A while he attended the Seneca program.

All of the emergency reports state that Student A has a "Behavior Intervention Plan (EPIP)" that "addresses this category of behavior." No EPIP was provided to OCR for Student A. Even if an EPIP was created for Student A, there is no evidence that the EPIP was discussed at IEP meetings, reviewed by the IEP team, or incorporated into Student A's IEP as behavior interventions.

## 2. Student B

In the 2012-2013 school year, Student B was six years old and in the first grade. He received special education services pursuant to an IEP based on a qualifying disability under the category of Other Health Impaired with a secondary disability of Speech and Language Impairment. His IEP in effect was created on March XX, 2012 and included a BSP. The March XX, 2012 BSP provides interventions such as creating structure for environmental changes (e.g. time increment behavior chart), explanations of positive behavior, close supervision reinforcements of positive behavior, prompts and redirection. The BSP also provides that physical interventions may be used to prevent Student B from physically harming himself or another, doing serious property damage, or to prevent him from running away from school grounds. It also states that physical interventions are only appropriate if Student B is an imminent danger to himself or others and less intrusive options are not available.

During the 2012-2013 school year, Seneca staff restrained Student B 74 times as documented in 36 emergency reports from September 2012 to May 2013. The District convened an IEP for Student B on April XX, 2013. In addition to Student B's BSP, the IEP provided one behavioral goal for Student B to make safe choices using coping skills.

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<sup>11</sup> A "basket" restraint is a type of restraint in which the child sits on the floor with legs stretched out while the adult sits or kneels on the floor behind the child, leans forward against the back of the child while holding the child's arms at the side.

For the 2013-2014 school year, Student B was restrained at least 77 times as documented in 28 emergency reports. On January XX, 2014, an IEP was convened for Student B. Prior to the IEP being convened, Student B had already been restrained by staff at least 43 times. Regarding behavior, the IEP states that Student B continues to exhibit aggressive behaviors and his escalation cycle is very fast not allowing for him to problem solve or communicate his needs. The IEP includes an attached BIP. The BIP provides for a range of interventions, including daily check-ins, preferential seating, consistent expectation setting, modeling, and positive reinforcement. The BIP also provides that in circumstances when Student B does not respond to directions to stop physical aggression, staff will implement an "emergency intervention plan". The BIP states that the Behavior Analyst will review data on a weekly basis to determine whether changes to the plan are warranted.

For the 2014-2015 school year, after a May 2014 IEP meeting, Student B was removed from the Seneca program and was placed at a different NPS called Spectrum. In that school year, Student B was eight years old and in the third grade. According to the District, Student B was not restrained or subjected to seclusion during the 2014-2015 school year and no emergency reports exist for Student B for the 2014-2015 school year. According to a Behaviors Strategies Report prepared by Spectrum for Student B's October XX, 2014 IEP, there were only two instances of Student B engaging in his previous behaviors of aggression, elopement, and disruptive behavior. The October XX, 2014 IEP largely mirrors the previous year's IEP, except that the individual counseling services in the amount of 1 hour weekly and 150 minutes of weekly group counseling were eliminated without an evaluation or report from a qualified professional that would explain why Student B no longer required counseling services to receive FAPE. The IEP contained no behavioral goals.

During the time that Student B was placed by the District in a Seneca program, Seneca also created EIPs for Student B. The EIPs dated September XX, 2012 and January XX, 2013 provide direction to staff regarding interventions to implement at early and escalated phases of behavior and also identifies interventions that staff should not implement. The September XX, 2012 EIP is consistent in the instructions it provides with Student B's March 2012 BSP. Both provide various interventions such as redirection and proximity for Student B. Both provide for the use of physical interventions in the event that there is a risk of other students or staff being hurt. The March 2012 BSP specifies that physical interventions are only appropriate if Student B is an imminent danger to himself or others. The EIPs provide that if Student B escalates to a crisis phase demonstrated by throwing sharp or heavy objects at others or putting others at risk of getting hurt, staff will use physical escort and/or restraint. It states that staff will escort Student B to the library area of the classroom and then attempt to release. If he continues to be unsafe, staff will use restraint until his body is calm. Though worded differently, the EIPs are consistent with the instructions provided in the March 2012 BSP.

### 3. Student C

Student C was 5 years old and in kindergarten when he entered Seneca in the 2012-2013 school year. He received special education services pursuant to an IEP based on a qualifying disability under Emotional Disturbance and a secondary disability of Speech and Language Impairment.

During the 2012-2013 school year, Seneca staff restrained Student C 197 times for a total of 555 minutes as documented in 72 emergency reports. Student C was subjected to seclusion by Seneca staff 7 times during that school year for 29.5 minutes. Additionally, the emergency reports show 85 instances of a removal from class described in the reports as "Interim time out of

both Sec and Rest.” for a total of 1,118 minutes. The District provided no documentation that an IEP was convened for Student C during the 2012-2013 school year.

In the 2013-2014 school year, Student C was restrained by Seneca staff 122 times as documented in 52 emergency reports. During the 2013-2014 school year, an IEP was convened for Student C on November XX, 2013. By that time, according to the emergency reports prepared by Seneca, Student C had been subjected to 23 instances of restraint. His IEP contained four behavioral goals. The IEP meeting notes reflect that the therapist reviewed the results of the Functional Analysis Assessment (FAA) and the corresponding Positive Behavior Intervention Plan. (The FAA and BIP were not provided to OCR.) There was no discussion reflected in the meeting notes regarding the use of restraint and seclusion with Student C.

Student C’s Triennial IEP took place on May XX, 2014. There were no changes to Student C’s goals and no discussion of the emergency reports or use of restraint and seclusion to address his behavior. The purpose of the May 2014 IEP meeting, according to the District records, was to discuss Student C’s transition to a different Seneca program for the upcoming year.

For the 2014-2015 school year from July 2014 through January 2015, Seneca staff restrained Student C 26 times as documented in seven emergency reports. For this same school year, Student C was attending a different Seneca program than the one he had attended in the prior years. On November XX, 2014, an IEP team was convened for Student C, one social-emotional goal was developed, and a BIP was developed. The BIP did not describe or provide for the use of restraint or seclusion. On January XX, 2015, an IEP team was convened as a continuation of the prior November XX, 2014 IEP meeting. According to the January XX, 2015 meeting notes, team members expressed a belief that the BIP created at the November XX, 2014 IEP meeting had been effective in addressing Student C’s behavioral needs in school. According to the IEP meeting notes, there had been zero occurrences of behavior emergencies since August XX, 2014.

During his enrollment in Seneca programs, EIPs were created for Student C on August XX, 2012, September XX, 2012, November XX, 2012, and January XX, 2013. The August 2012 EIP provided that if Student C escalates to a crisis phase demonstrated by physical behaviors such as throwing objects at others, hitting, kicking, biting, or lunging staff, among other strategies, staff can use restraint or seclusion. The subsequent EIPs provided similar instruction. The emergency reports cite to the EIP as the guide for the use of interventions used with Student C. For example, an emergency report on November X, 2012 stated, “Per his EIP, I did not discuss the triggers for the event with [Student].” The EIPs were not referenced in any of Student C’s IEPs reviewed by OCR nor in his November 2014 BIP. There is no evidence in the meeting notes of Student C’s IEPs reviewed by OCR that the EIPs were ever discussed by his IEP team.

#### 4. Student D

Student D was five years old and in kindergarten attending a program at Seneca during the 2012-2013 school year. (He had been at a Seneca program since he was three years old.)

During the 2012-2013 school year (July 2012 to June 2013), Seneca staff restrained Student D 73 times as documented in 32 emergency reports. The District did not provide OCR a copy of the IEP that was in effect for the majority of Student D’s 2012-2013 school year.

In May of 2013, an FAA was conducted for Student D. The FAA listed as recommendations that a BIP be developed to address Student D’s behavior. The FAA described that Student D has difficulty accepting staff limits and sometimes reponds by knocking over chairs, running away from

staff, yelling, refusing to follow directions, and tantrumming. It states that he becomes easily frustrated and may exhibit aggressive behaviors such as kicking, screaming, hitting, speaking in an aggressive tone, and flailing his body. When escalated, he will engage in self harming behaviors of hitting his head against the wall and scratching himself. He also has shown aggressive behaviors with peers such as pushing or yelling. He has difficulty maintaining focus and is often distracted by stimuli.

A BIP was developed for Student D in June 2013. Student D's BIP provided proactive and reactive interventions to address Student D's behavior. The BIP provided the following reactive interventions: prompt Student D to switch to the replacement behavior; maintain close proximity; model deep breathing; provide clear directions; reflect and validate his emotions and encourage him to verbalize them; remind him that he is not in trouble. The BIP also states that "if absolutely necessary (justification required), staff should escort [Student D] away from the situation or use the safest method of physical restraint." The BIP contains one required goal and two optional goals for Student D.

During the 2013-2014 school year, Seneca staff restrained Student D 85 times for a total of 154.8 minutes as documented in 48 emergency reports. The emergency reports include 32 instances of "time out" for Student D for a total of 208.5 minutes. The emergency reports prepared for Student D for the 2013-2014 school year document that with regard to the use of restraint Seneca staff adhered to the interventions identified for Student D in his BIP. Emergency reports, for example, document that Seneca staff first would clarify expectations for Student D and prompt him to engage in replacement behavior, maintain close proximity, and model deep breathing. When his behaviors escalated demonstrated by physical aggression or self-harm, the emergency reports document that Seneca staff would escort him to an area away from other students, and when his behavior continued Seneca staff would then usually implement a basket or cradle restraint.<sup>12</sup> These actions are consistent with the BIP.

During the 2013-2014 school year, Student D had a triennial assessment. An IEP was held on October XX, 2013. The IEP includes four behavioral goals for Student D. At a May X, 2014 IEP team meeting, which was held to address the transition of Student D from Seneca's Building Blocks program, the IEP team concluded that Student D would step down from a non-public school site to a school based counseling enriched SDC program effective fall 2014.

For Student D's second grade year in 2014-2015, he was enrolled at an elementary school in the District. He was also still receiving services from Seneca. In the 2014-2015 school year, Seneca staff restrained Student D 137 times as documented in 32 emergency reports. On September XX, 2014, an IEP team meeting was convened to discuss Student D's escalation behaviors and address his placement. The IEP team meeting notes reflect that the Seneca program would continue to provide support to Student D and that an understanding exists that Student D could be transferred to the Seneca offices in XXX XXXXXXXX if his behaviors escalated such that they could not be supported at the school. The notes do not reflect that the IEP team discussed or approved a reassessment of Student D or that any changes/revisions be made to his existing BIP. On October XX, 2014, the IEP team convened for Student D's annual review. The team notes state that the team reviewed the BIP. A BIP, dated October XX, 2014, is attached to the IEP and provides the same interventions identified in the June 2013 BIP.

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<sup>12</sup> With this restraint, the child is held face-up; their arm nearest the adult is brought across the child's chest and over their shoulder with the wrist held by the adult. The other arm is also held by the wrist.

On December X, 2014, an IEP team meeting was convened to again discuss Student D's escalating behaviors. Student D's mother requested the meeting and the notes indicate that she expressed her concern with Student D's increased behavioral issues and staff's response to the behavior. She also expressed that she wanted the school to stop suspending him for his behavior. The only response to the escalated behaviors stated in the notes is to set up a contract for Student D to earn a tablet at home as positive reinforcement, and to look into getting him wrestling books. The IEP team also discussed improvements with regard to Student D. The team identified an increase in the use of physical escorts but fewer instances of other types of restraints. The notes do not reflect that the team considered performing an assessment of Student D or review and revision of Student D's BIP.

During Student D's enrollment in Seneca programs, EIPs were created for him. An EIP was created for Student D dated August X, 2012 and provided a range of interventions to use with Student D. The EIP provided that for crisis behavior staff are allowed the use of seclusion and hands-on interventions. The seclusion and hands-on interventions described in the August 2012 EIP stated that if less restrictive interventions were not effective, staff may escort Student D to a modified quiet room and close the door, place him in a restraint, or gently guide his body part away from the injurious behavior. It also notes that staff should avoid using restraint if possible. Subsequent EIPs created that school year dated September XX, 2012 and March XX, 2013 provide for similar intervention strategies to be used. The EIPs are not referenced in the IEP or BIP.

#### 5. Student E

Student E was six years old and in the first grade during the 2012-2013 school year. He was assessed in September 2012 and found to meet the criteria for an educational diagnosis of Emotional Disturbance. According to the assessment report, he had an existing eligibility of Speech and Language Impairment. The District did not provide an IEP for Student E for the 2012-2013 school year. For the 2012-2013 school year (October 2012 to June 2013), Student E was restrained 21 times as documented in 11 emergency reports.

For the 2013-2014 school year, Seneca staff restrained Student E 74 times as documented in 28 emergency reports. On December XX, 2013, an IEP was convened for Student E. The IEP references an FAA that was completed for Student E and a BSP. The IEP contains 4 behavioral goals for Student E. Copies of the BSP and FAA were not provided to OCR.

For the 2014-2015 school year, Seneca staff restrained Student E 11 times as documented in five emergency reports. At a June X, 2014 IEP team meeting, the team reviewed and agreed to a behavior support plan for Student E and, at a January XX, 2015 IEP meeting, the IEP team meeting convened to review Student E's behavior and the interventions in place to address it. The team noted that the behavior support plan has been effective and it converted it to a BIP and made it an attachment to Student E's IEP. However, the January XX, 2015 IEP notes show that the IEP team was only aware of two of the three emergency reports that had been issued during the first semester of the year. The IEP team did not review the emergency report dated October XX, 2014. This emergency reported included incidents that led Seneca staff to impose two basket restraints, one for four minutes and the other for two minutes. The October XX incident was one in which Student E attempted to hurt his teacher, e.g., by grabbing the teacher's wrist and twisting it.

During Student E's enrollment at Seneca programs, EIPs were created for him. An EIP was created for Student E dated November XX, 2012 and provided a range of interventions to use with Student E. The EIP provided that for crisis behavior staff are allowed the use of seclusion and

hands-on interventions. Specifically, if less restrictive interventions are not effective, staff may escort Student E into a contained space away from the classroom. If he continues to be a danger to himself or others, staff may use “standard hands-on interventions.” An EPIP was also created on March XX, 2013 for Student E that provided the same provisions regarding crisis interventions. Because OCR did not have a copy of Student E’s IEP in place during the 2012-2013 school year and the BSPs created for Student E at that time, OCR cannot determine whether the use of restraint and seclusion identified in Student E’s EIPs were consistent with the decisions made by the IEP team.

## 6. Student F

During the 2012–2013 school year, Student F was 13 years old and in the 9<sup>th</sup> grade at a Seneca Program. He was found eligible for special education services in 2011 based on a primary disability of Emotional Disturbance and a secondary disability of Other Health Impairment. A May X, 2013 IEP for Student F notes that his behavior impedes his learning or the learning of others. The IEP references a BSP and also notes that Student F is motivated through token systems, positive reinforcement of appropriate behavior, and redirection. The IEP meeting notes state that a Seneca therapist presented a behavior support plan for Student F and some of the planned strategies in the plan include monitoring his comments and conversations, having him check with staff before making comments, journaling his feelings, drawing, and taking a break from the classroom. According to the District, Student F was not subjected to any incidents of restraint or seclusion in the 2012-2013 school year.

During the 2013-2014 school year, Student F was restrained 17 times for approximately 69 minutes as documented in 8 emergency reports. The restraints included five wall restraints of two, four, six, three, and 20 minutes in duration.<sup>13</sup> Each of the emergency reports reference Student F’s “antecedent behavior per BIP” and four of the emergency reports state that staff “utilized BIP (Behavioral Intervention Plan)” as a less restrictive intervention. While the emergency reports reference a “BIP”, no BIP was referenced or attached to the IEP effective in the 2013-2014 school year. The BSP from the 2012-2013 school year did not allow for the use of restraint.

Five of the emergency reports indicate Student F was “escorted . . . to seclusion area,” one indicates he was “escorted . . . to non-Seclusion Area,” and two do not indicate an escort to either a seclusion or non-seclusion area. It is not possible to determine the total length of Student F’s seclusion because some of the emergency reports do not provide specific start and end times for any instances of seclusion, contrary to policy. Three of the emergency reports state that the student was escorted to a seclusion area that is specifically designated as “No Door” for 60, 21, and 15 minutes.

A June XX, 2014 IEP for Student F again notes that his behavior impedes his learning or the learning of others. The positive behavior interventions, strategies, and supports in place for him are the same as those stated in his May X, 2013 IEP. A BIP created in 2011 is attached to the IEP, but includes dates in 2011 and 2012. Additionally, the IEP is not signed. The District told OCR that no incidents of restraint or seclusion occurred for Student F between June 2014 and January 2015 for the 2014-2015 school year.

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<sup>13</sup> The justification for the 20-minute wall restraint in the emergency report is that the student was unable to commit to safety.

During the time that Student F was placed by the District in a Seneca program, Seneca also created EIPs for Student F. The EIP dated June XX, 2012 provides direction to staff regarding interventions to implement at early and escalated phases of behavior and also identifies interventions that staff should not implement. The EIP provided that if Student F escalates to a crisis phase demonstrated by throwing objects with the intent to harm, flipping a desk over, grabbing others, and aggressively cursing, staff will provide verbal reassurance and validation, allow him to check in with staff, and offer him the opportunity to continue to have time away from the group. The EIP also states that Student F “prefers the basket restraint”. A December 2012, March 2013, and September 2013 EIPs state “n/a” after the heading “Seclusion and Hands-On Interventions”. The November 2013 and August 2014 EIPs state that staff will escort Student F if he does not comply. None of the EIPs are referenced in Student F’s IEPs or BSP.

## 7. Student G

In the 2012-2013 school year, Student G was 4 years old when he was enrolled in a Seneca Program. He was initially determined eligible for special education in 2011 based on a primary disability of Emotional Disturbance and a secondary disability of Speech and Language Impairment. OCR was not provided with any copies of IEPs for Student G that were in effect prior to March 2014. In the 2012-2013 school year, Seneca staff restrained Student G 14 times as documented in seven emergency reports. The emergency reports for Student G do not identify for each restraint the duration of the restraint, even though it is required by policy. As such, it is not possible to determine from the records the amount of time that Student G was restrained. The number of times and the cumulative duration of time that Student G was removed from the classroom and placed in other locations is not documented. In addition, the location to which Student G was removed is not always stated in the emergency report. However, some reports identify the following locations: the “Ladybug” classroom; the hallway; and, the “break room (nearby classroom used as a calming space for the children).”

In the 2013-2014 school year, from September 2013 through March 2014, a period of six months, Student G was restrained 63 times for a total of 71.95 minutes as documented in 49 emergency reports. The emergency reports for Student G document that during the 2013-2014 school year, he had been subjected to 1 “cradle hold” on February X, 2014, and 9 “basket holds” from October 2013 through February 2014. Student G was subjected to “time out” 12 times for a total of 90 minutes. (No emergency reports were provided to OCR for Student G for the remainder of the school year from April to June.) The 2013-2014 emergency reports reflect not only a significant number, but also a significant clustering of behaviors alleged to provide the basis for the use of restraint or seclusion. This clustering included preparation of two or more emergency reports on the same day (see, e.g., emergency reports of September XX; September XX; October X; October XX; October XX; October XX; December X; December XX; December XX; January XX; February X) and preparation of emergency reports on two or more consecutive days (see, e.g., emergency reports of September XX – XX; October X – X; October XX – XX; October XX – XX; November XX – XX; November XX – XX; December X – X; February X – X; March XX – XX; and, March XX – XX).

For the 2013-2014 school year, the emergency reports do not state that Student G was subjected to seclusion. The narrative descriptions in 47 of 49 of the emergency reports describe that Student G was removed from the classroom. These instances of removal do not identify the length of time Student G was removed from the classroom. The areas to which he was removed included: the “break room (room adjacent to the class);” the “courtyard (neutral outdoor calming area);” a playroom; the basketball court; the hallway; and, the “chill room” (described as a room adjoining the classroom or a small room in the classroom with no door).

No IEP was provided to OCR for the period of time covering September 2013 through March 2014 when the reported restraints took place.

A March XX, 2014 IEP reflects that Student G's behavior impedes his learning or the learning of others because the student's "poor attention skills and impulsive behavior will affect [sic] his performance in the classroom and therapy sessions." At the March XX, 2014 IEP team meeting, the IEP team agreed to change the primary disability to autism and the secondary disability to intellectual disability. The IEP team notes reflect that they discussed the results of the FAA and the corresponding BIP. The BIP includes antecedent management strategies such as modifying the curriculum, using high preferred activities to encourage compliance, spreading out high demand/low demand activities, consistent schedules, transition warnings, and consistent use of visual supports. The BIP includes strategies for physical resistance and aggression which includes direct communication, removing attention and physical escort. The BIP does not include other forms of restraint such as basket or cradle holds. The IEP team agreed to change Student G's placement to a District provided Autism Special Day Class.

According to the District, zero incidents occurred from June 2014 through January 2015 that resulted in an emergency report being prepared regarding Student G. An IEP was held for Student G on November X, 2014. As in the previous March 2014 IEP, the November X IEP reflects that Student G's behavior impedes his learning or the learning of others because of his poor attention skills, his impulsive behavior, and his performance in class and in therapy sessions. The notes to the November X IEP reflect the parent's frustration and dissatisfaction because, in part: the District allegedly was to develop a transition IEP for the student in June but did not, resulting in the student's current placement relying on services and goals that were outdated and created for the prior placement.

EIPs were prepared for Student G in July 2012 and December 2012. The July 2012 EIP describes the interventions to use to address Student G's behaviors and includes less restrictive interventions, such as providing proximity, coaching him to take deep breaths, and holding his hand. They also include interventions to use if Student G engages in unsafe behaviors, such as hitting peers. In that circumstance, the EIP provides that staff may pick up Student G in a comforting manner and take him to a quiet space or hallway to slow down and self-sooth. The December 2012 EIP also provides that staff can engage in a cradle restraint for crisis behaviors. Because OCR did not have a copy of Student G's IEP in place during the beginning of the 2012-2013 school year, OCR cannot determine whether the use of restraint identified in Student G's EIPs were consistent with the decisions made by the IEP team. Subsequent IEPs and the BIP do not make reference to the EIPs.

#### 8. Student H

Student H was 10 years old when he was placed in a Seneca program in the 2013-2014 school year. During that school year, Seneca staff restrained Student H 24 times totaling 48 minutes in duration as documented in 14 emergency reports. None of the emergency reports reflect that Student H was removed from the classroom as a result of his behavior. However, at least nine of the emergency reports reflect that Student H was already outside of the classroom as a result of previous behavior. (see emergency report of September XX and XX, January XX, March XX, April X, X, XX, and XX, and May XX). For example, the emergency report for September XX states that Student H was in the "CORE crisis class room" to complete a "programmatic consequence" when the incident leading to the restraint occurred. The documentation created by Seneca does not include the amount of time that Student H spent outside of the classroom as a result of his behavior during the school year.

Most of the emergency reports stated that the alleged behavior leading to restraint was Student H's negative or threatening interaction with a peer, including attempted or completed battery of the peer. Three of them cite "major disruption," "persistent non-compliance," "other behaviors – wandering," or "other behaviors – contributing to crisis" as the behavior that compelled use of restraint (see emergency reports of September XX, November XX, and April X).

For the 2014-2015 school year, OCR was provided with four emergency reports for Student H all within a few days of each other: once on September X and three times on September X, 2014. The September X emergency report reflects that Student H was restrained when he was escorted "in order to maintain a calm and safe milieu." It does not state the length of time that the restraint lasted. The three emergency reports from September X document incidents that occurred at 11:28 a.m., 12:43 p.m., and 4:15 p.m. The first emergency report states that Student H was restrained for three minutes when he made threats to one of his peers who was walking by in a nearby hallway and restrained again for two minutes when he did the same thing when the peer walked down the hallway again. After the second incident, Student H was removed to a "neutral area." The report does not provide any details about the neutral area.

The second September X emergency report does not reflect the use of either restraint or seclusion and states that Student H shouted and then ran from the area and had to be brought back. The final September X emergency report states that, after school concluded for the day, staff found a note from Student H that stated "I will be running away." The student's mother was contacted and advised of the note.

OCR was not provided with any IEPs or behavior plans for Student H.

#### 9. Student I

In the 2012-2013 school year, Student I was 10 years old and placed by the District in a Seneca program. He qualified for special education services based on a primary disability of Emotional Disturbance and a secondary disability of Other Health Impairment. During the 2012-2013 school year, Seneca staff restrained Student I 74 times for a total of 253 minutes as documented in 29 emergency reports. The restraints included two prone restraints totaling 23 minutes including one for 20 minutes; two supine restraint for 11 minutes total; 24 basket restraints for 71 minutes total including one of 13 minutes; six cradle restraints for 19 minutes total; and, two wall restraints for three minutes total. The District did not provide a copy of Student I's IEP that was in effect for the 2012-2013 school year.

In the 2013-2014 school year, an IEP meeting was held for Student I on November XX, 2013. The November XX, 2013 IEP states that Student I's behavior impedes his learning or the learning of others primarily when he responds to direction by creating a classroom disruption "targeting peers, throwing items, yelling, and hitting or kicking staff." The IEP contains two Social Emotional goals for Student I to practice coping skills, and showing attention and engagement in learning. Included as an old goal from a prior IEP is a behavior goal that Student I will comply with staff's verbal requests indicating that at the annual review in October 2013, the goal had not been met. Under strategies related to Organization/Behavior Support, four boxes are checked: short breaks between assignments; cues/prompts/reminders of rules; offer choices; and supervision during unstructured time. The IEP indicates that a BSP was attached. The IEP does not provide for physical restraint as an intervention. OCR was unable to determine if the BSP provided for physical restraint as an intervention because a copy of the BSP was not provided to OCR.

During the 2013-2014 school year, Seneca staff restrained Student I 46 times for a total of 161 minutes as documented in 23 emergency reports. The 23 emergency reports include ones prepared on four consecutive days<sup>14</sup> and three prepared on a single day.<sup>15</sup> The emergency reports do not identify that seclusion was used. However, 22 of the 23 emergency reports show that the incident occurred while Student I was not in the regular classroom, or that he was removed from the regular classroom during the incident. However, contrary to policy, the emergency reports do not identify the length of time he spent outside of the classroom. The emergency reports note removal to such areas as “outdoor area behind classroom,” crisis classroom, “milieu supervisor’s office,” and “alternative classroom”. The noted behaviors leading to the use of restraint were commonly classified as threat toward others, assault toward others, major disruption, and persistent noncompliance.

For the period of the 2014-2015 school year, from July 2014 through January 2015, Student I was restrained 72 times for a total of 249 minutes as documented in 28 emergency reports. Three of the emergency reports state that Student I was “escorted to seclusion area” but do not identify a start time or end time for the seclusion. Twenty-five of the 28 emergency reports show that the incident occurred while Student I was not in the regular classroom, or that he was removed from the regular classroom during the incident. However, the emergency reports do not identify the length of time he spent outside of the classroom.

An IEP was convened on September XX, 2014. The IEP identifies the same two social emotional goals from the previous November XX IEP, and added a behavior goal that Student I would actively participate in groups and activities throughout the day. The same four boxes were checked for strategies related to Organization/Behavior Support. IEP team meeting notes state that “it was determined that [Student I] needs to spend more time in the classroom, and reduce his instances requiring physical management.” The IEP provides no information regarding whether any BSP or BIP is in place to address Student I’s behavior. The IEP is signed by District representatives. The IEP is not signed by the student’s parent and there is nothing to indicate that the parent ever agreed to its content.

On January XX, 2015, the IEP team met to discuss five emergency reports from late December 2014 and early January 2015. The team determined that a functional behavior assessment was necessary in order to address the student’s behavior and it implemented an interim BIP. The interim BIP provided the following interventions: use of tokens and behavioral contracts, crisis communication such as distraction interventions, proximity, and if Student I continues to engage in unsafe behaviors, staff will use “emergency interventions”.

The District provided OCR with two EIPs for Student I dated June XX, 2012 and December XX, 2012. Both state that Student I has required “hand-on interventions” and that he can be subjected to a basket or cradle restraint. The December 2012 EIP also states that staff should calmly talk to Student I during “hands on seclusion”. None of the EIPs are referenced in Student I’s IEPs or interim BIP.

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<sup>14</sup> February XX (Thursday) through February 25 (Tuesday).

<sup>15</sup> March XX at 12:15 p.m., 2:02 p.m., and 2:52 p.m.

**Issue 1: Whether the District's use of restraint and seclusion has denied students with disabilities an opportunity to receive a FAPE.**

**Legal Standards**

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

The regulations implementing Section 504 require public school districts to provide a FAPE to all students with disabilities in their jurisdictions.<sup>16</sup> 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 non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. 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. OCR interprets the Title II regulations to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.<sup>17</sup>

The Section 504 regulations at 34 C.F.R. § 104.33(b)(3) state that school districts may place or refer students with disabilities for aid, benefits, or services other than those that it operates or provides, such as NPS placements, as a means of carrying out its responsibilities to provide these students with a FAPE. In such circumstances, the school district remains responsible for ensuring that its obligations pursuant to Section 504 are met with regard to the student so placed or referred.

***Significant Change in Placement***

The Section 504 regulations, at 34 C.F.R. § 104.35(a), require school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement. Subsection (c) requires that placement decisions be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources that is carefully considered and documented. Sections 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation or placement of the student. Taken together, the regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to act consistent with the Section 504 regulations in disciplining disabled students.

The exclusion of a disabled student from his or her program for more than 10 consecutive days, or for a total of more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was

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<sup>16</sup> 34 C.F.R. § 104.33.

<sup>17</sup> 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii).

caused by, or was a manifestation of the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

### **Analysis**

OCR identified deficiencies that may have resulted in the denial of FAPE for students with disabilities placed by the District in Seneca programs. As described further below, based on the documentary evidence gathered to date, OCR identified deficiencies related to the District placing students without considering all the relevant information; implementing behavior interventions, in the form of restraint and seclusion, that were not agreed to as part of students' IEPs; failing to reconvene the IEP team meeting and reevaluate students who were exhibiting significant increases in behavior problems and who were being subjected to significant incidents of restraint and seclusion; and subjecting students to a significant change in placement due to a series of removals from instruction without an evaluation or due process protections. In addition, the documentary evidence raises concerns that the District changed and reduced Student B's IEP services without identifying why Student B's unique needs had changed.

*Placement decisions made without carefully considering relevant information about students' behavior and restraints/seclusion used*

Section 504 requires that placement decisions be made by persons knowledgeable about the student, the evaluation data, and the placement options. In making placement decisions, the District must establish procedures to ensure that information obtained from all sources is documented and carefully considered by the group of persons knowledgeable about the student. OCR found, for example, that the IEPs provided by the District for the students described above, often demonstrated no acknowledgment of the significant number of instances where students were restrained or removed from class. In some circumstances, where there was a recognition that the student's behavior was escalating, for some students, the IEPs do not reflect any steps taken in response, such as reassessment and re-evaluation of the student, reconsideration of the terms of any behavioral plans that may exist, or consideration of developing a behavioral plan if one does not exist.

For example, Student B was six years old when he was restrained 74 times by an adult in the 2012-2013 school year. It was not until the second half of the school year in April 2013 that an IEP meeting was convened for Student B. During his April 2013 IEP meeting, there is no evidence that any discussion took place regarding reassessing Student B due to the significant use of restraint. Student C was six years old when he was restrained by an adult in the 2013-2014 school year 122 times. At his Triennial IEP in May 2014, there is no documentation that there was any discussion of the numerous emergency reports or instances of restraint that Student C experienced during the school year. Student E was restrained 11 times during the 2014-2015 school year. The meeting notes for Student E's January 2015 IEP state that Student E had been subjected to two instances of restraint, indicating that the IEP team was not aware of an October XX emergency report documenting two basket restraints for three instances of aggressive behavior towards a teacher. Based on Student E having only two emergency reports, and without considering his behavior in October 2014, the IEP team determined that a behavior support plan for Student E had been effective. Student F was restrained 17 times during the 2013-2014 school year. During his June 2014 IEP meeting, there is no evidence that the use of restraints was discussed or addressed. His IEP provided the same supports as the IEP from the previous year. Student I was restrained 161 times during the 2013-2014 school year. After an IEP meeting convened early in the school year in

November 2013, there is no evidence that any other IEPs were convened to address the significant use of restraint with Student I as the school year progressed. Accordingly, OCR identified a deficiency based on the records reviewed because the records suggest that IEP teams either did not review or were not provided with relevant information about the students' behaviors necessary to make appropriate placement decisions as set forth in 34 C.F.R. § 104.35(c).

*Failure to implement IEPs*

OCR found evidence that the District implemented behavior interventions for students that were not agreed to through an IEP process consistent with the procedural requirements of Section 504. For example, Student A's BSP and IEPs did not provide for the use of restraint and seclusion. However, Student A's March 2014 manifestation determination meeting stated that he had been physically restrained. Once the District placed Student A at Seneca, according to the emergency reports sent by Seneca to the District, Student A was subjected to 90 instances of restraint and 413 minutes of seclusion from July 2014 through January 2015. This was not a form of behavior intervention agreed to in Student A's IEPs. Similarly Student C's November 2013 and November 2014 BIPs did not provide for the use of restraint as an agreed upon behavior intervention. Nonetheless, Student C was subjected to 122 instances of restraint in the 2013-2014 school year, and 26 instances from July 2014 through January 2015. Student F was restrained 17 times in the 2013-2014 school year including wall restraints – one lasting 20 minutes in duration. Student F did not have a BIP and his IEP did not provide for the use of restraint.

The emergency reports prepared by Seneca and sent to the District, stated that the interventions taken were consistent with the students' EIPs. Seneca's policy describes that the purpose of EIPs is to provide Seneca staff with information about the student such as potential crisis behaviors and interventions to use. The District provided OCR with copies of EIPs for seven of the students described above. The District's contract with Seneca clearly states that emergency interventions – restraints and seclusions – are not to be used as a substitute for a Behavior Intervention Plan. However, the EIPs were not always consistent with the students' BIPs or IEPs. The EIPs for Students C, for example, provides for the use of restraint which directly contradicts Student C's BIP which did not provide for restraint. Similarly, the EIPs for Student F providing for restraint contradicts Student F's IEP, which did not provide for the use of restraint as an intervention. Section 504 requires that the services a student receives as part of their FAPE, including behavioral interventions such as restraint or seclusion, be determined by a group of persons knowledgeable about the student, the evaluation data, and placement options. All of the EIPs reviewed by OCR were created by a single individual, were specifically stamped "Confidential Not Part of Educational Record," and are not referenced in any of the IEPs, BIPs, or BSPs reviewed by OCR. EIPs created by a single individual that are not discussed in the IEP process, do not constitute part of the student's IEP.

*Failure to assess/re-assess students' unique needs with regard to behavior*

Students with disabilities or suspected of having disabilities must be evaluated in all areas related to the suspected disability. For students whose behavior impedes their learning or that of others, they may need an evaluation to examine their behaviors and develop interventions and strategies to address the behavior. Similarly, if a student's behavior worsens, this may indicate the need for a reevaluation or modification to their IEP. The District's contract with Seneca recognizes these obligations to evaluate and reevaluate students, and to convene IEPs to address escalating and challenging student behavior. Specifically, it requires that following an emergency report, an IEP team meeting "shall be convened" within two days. The contract provides that when the Student does not have a BIP, the IEP team will determine if there is a necessity for a functional

behavioral assessment. If the student already has a BIP, the IEP team will review and modify the BIP if new serious behavior has been exhibited or if existing behavioral interventions are not effective in addressing the student's behavior. The District's contract with Seneca clearly states that emergency interventions – such as restraints and seclusions – are not to be used as a substitute for a Behavior Intervention Plan.

The District was included on the distribution list for every emergency report reviewed by OCR, and yet OCR found that several of the students described above, demonstrate examples of students' behavior worsening and emergency interventions being used, sometimes without a BIP or reconvening of an IEP. These students were subjected to significant instances of the use of restraint before the District convened an IEP team meeting or conducted an assessment to consider whether the student's educational needs should be re-evaluated to ensure FAPE or whether modifications were needed to the Student's BIP. For example, for Student A, out of the 28 emergency reports completed for Student A during the first half of the 2014-2015 school year, each report stated that no follow-up was necessary. There is no evidence that an IEP team meeting was convened after any of those emergency reports to discuss or address Student A's behavior during that first half of the 2014-2015 school year. For Student C, there is no evidence that an IEP or assessment was scheduled in the 2012-2013 school year to address his behavior that resulted in 197 instances of restraint. Student D was restrained 73 times in the 2012-2013 school year and an FAA and IEP was not conducted until nearly the school year's end in May 2013. Similarly, for Student F, he was restrained 17 times in the 2013-2014 school year and an IEP was not convened to address or discuss his behavior until June 2014.

Section 504 requires that school districts conduct an evaluation prior to taking any action with respect to any significant change in placement. A reduction in the agreed-upon services in an IEP may constitute a significant change in placement. OCR noted one example in which the District reduced services for a student without conducting an evaluation. Specifically, Student B had been restrained by Seneca staff 151 times over the course of 2 school years (2012 through 2014). Among other things, Student B's IEPs prior to the 2014-2015 school year provided for individual and group counseling. Early in the 2014-2015 school year, after the IEP team agreed to place Student B at a different NPS placement, the October XX, 2014 IEP team determined to remove counseling services for Student B. No explanation or rationale is provided for why Student B would no longer require counseling to access a FAPE given his emotional and behavioral needs. OCR also identified a deficiency because there is no documentary evidence that an evaluation was conducted prior to the determination that, although Student B was still placed in a restrictive setting, he would no longer receive the previously agreed-upon counseling services.

*Failure to evaluate the student prior to a significant change in placement*

The exclusion of a disabled student from his or her program for a total of more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was caused by, or was a manifestation of the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate.

The emergency reports provided to OCR by the District for the students described herein did not provide thorough records that would allow OCR to determine the number of minutes of lost instructional time that students experienced due to being removed from the classroom, being restrained outside of the classroom, and being placed in seclusion settings. For the nine students reviewed, the records showed that they were restrained for a cumulative total of 1,301

times during the three school years reviewed by OCR. Despite Seneca's policy requiring that emergency reports identify the length of time of each restraint, OCR found that the emergency reports did not always do so. Because the emergency reports were inconsistent for each student with regard to reporting the length of time of each restraint, OCR could not determine the total amount of lost instructional time resulting from these restraints based on the records alone. In addition, OCR questioned the reliability of some of the documented lengths of time showing that a student was restrained for one minute, even though the report states that the student was escorted from one location to another and/or was resisting or struggling during the escort.

For example, for Student A, with the very few exceptions, the use of hands-on escort were recorded by staff as lasting exactly one minute. However, the reports indicated that staff physically escorted Student A from one part of the school to another, and in some incidents, the emergency report states that Student A was struggling, resisting, or flopping. Student C was subjected to a total of 345 restraints over a two and a half year period from the 2012-2013 school year through January 2015. The emergency reports for 2012-2013 for Student C show that he was restrained 197 times for a total of 55 minutes. It also shows that he was subjected to seven instances of seclusion for a total of 29.5 minutes and an additional 85 instances of "time out" for a total of 1,118 minutes (or the equivalent of approximately 4.6 instructional days). Student D was restrained a total of 295 times over the two and a half year period reviewed by OCR. However, the emergency reports were inconsistent in documenting the length of time that Student D was subjected to each restraint. The emergency reports for Student D also showed that in the 2013-2014 school year, he was removed from the classroom at least 32 times for a total of 208.5 minutes. Student H was subjected to 28 restraints from the 2013-2014 school year to January 2015. His emergency reports also document at least nine removals from the classroom in the 2013-2014 school year, but do not identify for how long he was out of the classroom.

OCR noted a deficiency in that the emergency reports for the students maintained inconsistent documentation about the length of removals, and thus the District could not, as required, identify whether a student was subjected to a cumulative removal of 10 days for disability-related behaviors and therefore could have violated 34 C.F.R. § 104.35(a) by having failed to evaluate the student prior to such a change in placement.

For the foregoing reasons, OCR identified deficiencies but did not reach a compliance finding with respect to the District's provision of a FAPE for the students whose records were reviewed. In order to complete its investigation and make a compliance finding, OCR would need to conduct interviews of staff, review additional documents, and conduct onsite visits.

**Issue 2: Whether the District discriminates against students on the basis of disability by using restraint and seclusion more frequently and excessively for students with disabilities than students without disabilities.**

### **Legal Standards**

Under the Section 504 regulations, no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives federal financial assistance.<sup>18</sup> The Title II regulations create the same prohibition against disability-based discrimination by public entities.<sup>19</sup> Under 34 C.F.R. § 104.4(b)(1) and 28 C.F.R. § 35.130(b)(1), a school district may not,

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<sup>18</sup> 34 C.F.R. §§ 104.4(a) and (b).

directly or through contractual, licensing, or other arrangements, on the basis of disability, afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; or limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. The use of restraint given the physical nature of the intervention, could result in a denial or limitation because it can be dangerous to the student in certain circumstances, can result in removal from class and loss of instructional time, and/or may have a traumatizing effect on a student. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

### **Analysis**

A school district discriminates on the basis of disability in its use of restraint or seclusion by unnecessarily treating students with disabilities differently from students without disabilities who are similarly situated.<sup>20</sup> The District's reported number of instances of the use of restraint and seclusion with its students showed that it used the practices extensively with its students with disabilities while never using the practices with its students who did not have a disability. Specifically, the District reported to the Department that all of the instances of use of restraint and seclusion in the 2010-2011 school year and in the 2013-2014 school year were with students with disabilities. OCR found that nine students with disabilities were restrained and secluded for behavior described as ranging from disrupting the milieu, to threats of harm, to physical assault. The same behaviors amongst the District's non-disabled student population, according to the District, would not result in a restraint or seclusion. For the 2013-2014 school year, for example, the District reported to the state of California that 797 students engaged in threats of physical injury or use of force or violence.<sup>21</sup>

OCR did not complete its investigation to determine whether the students without disabilities who engaged in similar behaviors as the nine students described herein were similarly situated and whether the District had a legitimate, nondiscriminatory reason for the use of restraints in lieu of other less restrictive interventions and sanctions. However, OCR notes that the District's contract with Seneca provides that restraint and seclusion may only be used when behavior poses a clear and present danger of serious physical harm. The records reviewed provided evidence that the

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<sup>19</sup> 28 C.F.R. §§ 35.130(a) and (b).

<sup>20</sup> OCR notes that the District is also accountable for any potential discrimination through 34 C.F.R. § 104.4(b)(1)(v) and 28 C.F.R. § 35.130(b)(i)(v) because it has contracted directly with the Seneca program to provide services to its students with disabilities.

<sup>21</sup> <http://dq.cde.ca.gov/dataquest/SuspExp/umirsedcode.aspx?cYear=2013-14&cType=ALL&cCDS=0161192000000&cName=Hayward+Unified&cLevel=District&cChoice=dUMIRS&ReportCode=dUMIRS> (last visited June 12, 2017).

use of restraints and seclusion were not always consistent with students' IEPs or BIPs, and that the District did not always ensure that Seneca followed their own procedures to minimize the need for the use of restraint, to properly document each use, and to revisit whether further evaluation was needed for the student.

Although OCR identified deficiencies with respect to different treatment in the use of restraint and seclusion for students with disabilities, to make a compliance determination, OCR would need to conduct interviews of staff and students, review additional documents, and conduct onsite visits.

## **CONCLUSION**

To address the deficiencies identified herein, the District without admitting to any violation of law, entered into the enclosed Agreement which is aligned with the issues investigated and the information obtained by OCR during this compliance review.

Pursuant to the terms of the Agreement, the District will take the following actions:

- Draft, adopt, and implement its own policy governing the use of restraint or seclusion after it has been approved by OCR.
- Disseminate the policy to its administrators, staff, faculty, and parents/guardians and to NPS providing special education to students with disabilities in the District along with a written description of the main points and requirements of the policy to ensure that these individuals understand when, why, and how restraint and seclusion may be lawfully used.
- Provide training on the policies regarding the appropriate use of positive behavior interventions to all faculty, staff, and administrators involved with providing instruction or services to students with disabilities.
- Designate an administrator to oversee the District's use of restraint and seclusion by, among other things: monitoring behavioral emergency reports for students to ensure compliant reporting of uses and proper follow-up action; periodically reviewing the District policies governing the uses; providing training to appropriate staff; performing semi-annual audits of the uses including at NPS settings; and, ensuring appropriate actions are taken to address any noncompliant uses.
- Review the educational records for Students A-I to determine whether the past use of restraint or seclusion warrants the provision of remedial services and if so, the District will convene a properly constituted team to determine the amount of services for them and, thereafter, offer them to the student along with a timetable for delivery.

Based on the commitments made in the enclosed agreement, OCR is closing the investigation of this compliance review as of the date of this letter. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with the Section 504, Title II, and their implementing regulations that were at issue in this matter.

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

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

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the compliance review process. If this happens, the individual may file a complaint alleging such treatment.

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

If you have any questions regarding this letter, please contact Alan Konig, Civil Rights Attorney, at (415) 486-5527 or [Alan.Konig@ed.gov](mailto:Alan.Konig@ed.gov).

Sincerely,

/s/

Laura Faer  
Regional Director

encl.