



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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VIA ELECTRONIC MAIL

Matt Best
Superintendent
Davis Joint Unified School District
526 B Street
Davis, CA 95616
Email address: mbest@djud.net

(In reply, please refer to case no. 09-19-5001)

Dear Superintendent Best:

The U.S. Department of Education (Department), San Francisco Office for Civil Rights (OCR), has completed its compliance review of the Davis Joint Unified School District (District) in the above-referenced matter. The compliance review, which was initiated on January 29, 2019, examined whether the District's use of restraint and seclusion in the 2017-2018 and 2018-2019 school years denied its students with disabilities a free appropriate public education (FAPE) in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, its implementing regulation at 34 C.F.R. Part 104, 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.

OCR is responsible for enforcing Section 504 and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance from the Department. OCR is also responsible for enforcing Title II and its implementing regulation, which prohibit discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

I. Summary of OCR's Compliance Review Findings

During the 2017-2018 and 2018-2019 school years, the District's policies prohibited the use of seclusion, allowed the use of restraint as an emergency intervention, and permitted students with disabilities to be placed in two nonpublic schools (NPS), NPS A and NPS B, both of which used restraints and the latter of which used seclusion. OCR found that in those two school years, two District students without disabilities were subjected to physical restraint in District elementary

schools, and four District students with disabilities were subject to physical restraint in such schools. OCR did not find any evidence in the voluminous records it reviewed or the 39 interviews it conducted that District schools used seclusion in the 2017-18 or 2018-19 school years.

OCR found that the District placed one student with disabilities (Student A) at NPS A where the student was subjected to multiple restraints and died after being subjected to a 90-minute prone restraint in [redacted content] 2018. OCR further found that two students with disabilities placed at NPS B (Students B and C) were subject to multiple restraints and seclusions. NPS B physically restrained Student B at least 17 times, as documented in 11 emergency reports, and placed him in the Time Away room 11 times, as documented in nine emergency reports, all of which reported this Time Away as “seclusion.” As a result of these “seclusions” and restraints, OCR determined that Student B spent at least 4.57 school days outside of the classroom. He likely missed more school days because the District’s and NPS B’s records failed to record all of the time spent in a restraint or Time Away, and interviews revealed other restraints and times in the Time Away room for which the District lacked records. OCR also found that NPS B physically restrained Student C 15 times, as documented in 11 emergency reports, and placed him in “Time Away” 12 times, as documented in 12 emergency reports. OCR determined that Student C spent at least 5.77 school days outside of the classroom and likely more because there were 11 reports that did not record the time.

With regard to the three students with disabilities whom the District placed at NPS A and NPS B (Students A, B, and C), OCR found that the District committed three procedural violations of the Section 504 regulations. First, the District failed to ensure that District staff making placement decisions for these students had access to and carefully considered information obtained about the use of physical restraint and/or seclusion with these students, as required by 34 C.F.R. §104.35(c)(2). Second, the District failed to ensure that the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options made the placement decisions regarding behavioral interventions for these students, as required by 34 C.F.R. §104.35(c)(3). Third, the District failed to reevaluate these students to determine whether NPS A’s and NPS B’s repeated use of restraint and seclusion for these students denied them a FAPE and if additional aids and services were appropriate to reduce the use of restraint and seclusion and to provide a FAPE, as required by 34 C.F.R. §104.35(b). OCR further found that these procedural violations resulted in denials of a FAPE to Students A, B, and C under 34 C.F.R. §104.33(b)(1)(ii), in violation of Section 504 and Title II.

OCR also identified a compliance concern that the District did not document all restraints of students with disabilities in its schools or all restraints and seclusions in NPS settings and therefore may have failed to identify all students subjected to restraints or seclusions or all incidents of restraint and seclusion for a given student, which may have resulted in students being denied a FAPE. Relatedly, the District’s inadequate documentation of restraints and seclusions and failures to ensure that District staff making placement decisions had access to complete information about restraints and seclusions raises a concern that the District did not consistently give parents sufficient information to have a meaningful opportunity to participate on IEP teams for their children.

II. Methodology

To conduct this compliance review, OCR gathered evidence by reviewing documents provided by the District and interviewing 39 individuals. The District documents included education records for students who were restrained or secluded, the incident reports describing the restraints and seclusions at District schools, NPS A, and NPS B, and the District's policies and procedures regarding restraint and seclusion in the 2017-2018 and 2018-2019 school years. OCR also reviewed additional documents relating to District students from NPS B and a [redacted content] where District students placed at NPS B resided. OCR did not review additional documents relating to students placed at NPS A because NPS A was closed and no longer operates,¹ and its counsel declined OCR's request to interview NPS A staff and conduct an onsite visit. OCR was able to conduct onsite visits to NPS B and District schools, including five schools where there were reported instances of restraint and seclusion. OCR interviewed 20 District staff members, including paraeducators, special education teachers, counselors, assistant principals, and principals involved in the instances of restraint and seclusion reported to OCR by the District. OCR also interviewed eight NPS B staff members, one student, seven parents, one Educational Rights Holder, one former employee, and one attorney for parents of District students.

III. Legal Standards

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

A. Definitions

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.²

OCR defines "physical restraint" as a personal restriction that immobilizes or reduces the ability of a student to move their 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.

¹ NPS A closed on [redacted content], 2019, after the California Department of Education revoked its state certification on [redacted content], 2019.

² 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.

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.

B. Section 504 and Title II

The Section 504 regulation at 34 C.F.R. § 104.33 requires school districts to provide a FAPE to all students with disabilities in their jurisdictions, regardless of the nature or severity of the disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met and are based on adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34-36. Implementation of an Individualized Education Program (IEP)³ developed in accordance with the IDEA is one means of meeting these requirements.

The Section 504 regulation at 34 C.F.R. § 104.35(a) provides that a district shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. The regulation at 34 C.F.R. § 104.35(b) provides that a district shall establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services.⁴

The Section 504 regulation at 34 C.F.R. § 104.35(c) provides that in interpreting evaluation data and in making placement decisions, a district shall (1) draw upon information from a variety of sources, including physical condition and adaptive behavior;⁵ (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with § 104.34, which requires placement in the regular education environment to the maximum extent appropriate.

³ This letter uses the term “IEP team” to refer to the group of persons who made placement and other educational decisions concerning students with, or suspected of having a disability, regardless of whether the decisions were made pursuant to Section 504 or the Individuals with Disabilities Education Act (IDEA).

⁴ 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).

⁵ The regulation at 34 C.F.R. § 104.35(c)(1) also lists the following possible sources: aptitude and achievement tests, teacher recommendations and social or cultural background.

When a student exhibits behavior that interferes with the student’s education or the education of other students in a manner that would reasonably cause a teacher or other 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 may require a reevaluation and additional aids or services.

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

IV. Facts

OCR found the following facts in its compliance review of the District’s restraint and seclusion practices. This section provides background about the District and summarizes its policies and procedures for restraint and seclusion, its use of restraint with students in District schools, and the use of restraint and seclusion with Students A, B, and C who were placed at NPS A and NPS B.

A. Background

The District serves the city of Davis, California and provides services to approximately 8,500 students in grades TK through 12.⁶ During the 2017-18 school year, 16.7% of these students were students with disabilities and in the 2018-19 school year 18.2% of the students were students with disabilities, as shown below. In those years, the District had nine elementary schools, four junior high schools, and three high schools.⁷ The chart below reports the numbers and percentages of students with and without disabilities at each school.

School	2017-2018 School Year			2018-2019 School Year		
	Students without disabilities	Students with disabilities	Percentage of Students with disabilities	Students without disabilities	Students with disabilities	Percentage of Students with disabilities
School = S Elementary = ES Junior High = JHS High = HS						
Birch Lane ES	480	101	17.4 %	495	96	16.2 %
Chavez ES	568	54	8.7 %	546	53	8.8 %
Fairfield ES	38	4	9.5 %	42	6	12.5 %
Korematsu ES	429	75	14.9 %	510	75	12.8 %
Montgomery ES	414	85	17.0 %	385	69	15.2 %
North Davis ES	500	82	14.1 %	479	87	15.3 %
Patwin ES	354	81	18.6 %	308	78	19.2 %
Pioneer ES	459	64	12.2 %	484	65	11.8 %
Willett ES	389	65	14.3 %	448	70	13.5 %

⁶ See <https://www.djUSD.net/about/overview>.

⁷ See <https://www.djUSD.net/schools>.

School	2017-2018 School Year			2018-2019 School Year		
Da Vinci Charter Academy JHS	219	72	24.7 %	209	79	27.4 %
Emerson JHS	371	113	23.3 %	375	81	17.8 %
Harper JHS	519	107	17.1 %	523	115	18.0 %
Holmes JHS	558	162	22.5 %	562	136	19.4 %
Da Vinci Charter Academy HS	196	25	11.3 %	187	91	32.7 %
Davis Senior HS	1,422	294	17.1 %	1,015	347	25.5 %
King HS	37	83	69.2 %	41	24	36.9 %
District totals:	6,953	1,393	16.7%	6,609	1,472	18.2%

As noted above, in the 2017-2018 and 2018-2019 school years, the District placed Student A at NPS A and Students B and C at NPS B. The District did not know the total number of students at NPS A or NPS B in these school years. Both schools served only students with disabilities. NPS A is no longer in operation.

B. The District’s Policies and Procedures Related to Restraint and Seclusion

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

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

The District’s Board Policy 6164.4 (*Identification and Evaluation of Individuals for Special Education*) (Policy 6164.4) requires the District to establish a comprehensive system that includes procedures for the identification, screening, referral, and regular and triennial assessment of students eligible for special education services. Policy 6164.4 states that the District’s identification procedures must include methods for using referrals from parents/guardians, teachers, appropriate professionals, and others, and should be coordinated with school site procedures for referral of students whose needs cannot be met with modifications to the regular instructional program. Policy 6164.4 further states that the District must notify parents/guardians in writing of their rights related to the identification, referral, assessment, instructional planning, implementation, and review of special education services for a student, including the right to consent to any assessment concerning the student.

The District’s accompanying regulation, Administrative Regulation 6164.4 (*Identification and Evaluation of Individuals for Special Education*) (Regulation 6164.4) describes the procedures the District must follow when identifying, evaluating, and reevaluating students for special

education services. Regulation 6164.4 states that after receiving a referral for special education services for a student, the District must develop a proposed evaluation plan within 15 days, unless the parent/guardian agrees in writing to an extension. Upon receiving the proposed evaluation plan, the parent/guardian has at least 15 days to decide whether to consent to the initial evaluation.

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

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

The District's policies also address behavior interventions for student with disabilities. The District's Administrative Regulation 6159.4 (Behavioral Interventions for Special Education Students) (Regulation 6159.4) states that when the behavior of a student with a disability impedes their learning or the learning of others, the student's IEP team will consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. Regulation 6159.4 requires that if a student has a Behavior Intervention Plan (BIP) already in place, the IEP team will review and modify the BIP to address the student's behavior.

The District's policies refer to restraint as an emergency behavioral intervention. Regulation 6159.4 addresses and limits when emergency interventions may be used. Specifically, it provides that emergency interventions may be used only to control unpredictable, spontaneous behavior that poses a clear and present danger of serious physical harm to the student or others that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. Regulation 6159.4 also states that emergency interventions will not be used as a substitute for a systematic BIP, no emergency intervention will be used for longer than is necessary to contain the behavior, and they should not involve the use of force exceeding what is reasonable and necessary under the circumstances.

Whenever an emergency intervention is used, Regulation 6159.4 requires the District to notify the student's parents/guardians and, if appropriate, residential care providers, within one school day. Regulation 6159.4 also requires that a behavior emergency report (emergency report) be immediately completed, kept in the student's file, and forwarded to the Superintendent or designee for review.

Regulation 6159.4 further states that if the emergency report is for a student who does not have a BIP, the Superintendent or designee will schedule an IEP team meeting within two days to review the emergency report and determine the necessity for a Functional Behavioral Assessment (FBA) and an interim BIP. The regulation requires the IEP team to document the reasons for not conducting the FBA and/or not developing an interim BIP. Regulation 6159.4 also states that if the emergency report is for a student who has a BIP, any incident involving a previously unseen serious behavior problem or where a previously designed intervention is not effective will be referred to the IEP team. The regulation requires the IEP team to review the incident and determine whether the student's plan needs to be modified. The District's implementation of the regulation allows IEP teams to reconvene to reevaluate if the student's IEP or BIP needs to be modified.

In addition to Regulation 6159.4, the District has a similar policy, Administrative Regulation 5131.41 (Use of Restraint and Seclusion) (Regulation 5131.41), that prohibits District staff from using behavioral restraint and seclusion to control student behavior except to the limited extent authorized by law.⁸ Regulation 5131.41 states that a behavioral restraint includes mechanical restraint or physical restraint used as an intervention when a student presents an immediate danger to self or to others and does not include postural restraints or devices used to improve a student's mobility and independent functioning rather than to restrict movement. The regulation defines a mechanical restraint to be the use of a device or equipment to restrict a student's freedom of movement which does not include the use of devices as prescribed by an appropriate medical or related services professional. Regulation 5131.41 defines physical restraint to be a personal restriction that immobilizes or reduces the ability of a student to move freely and does not include a physical escort in which a staff member temporarily touches or holds the student's hand, wrist, arm, shoulder, or back for the purpose of inducing a student to walk to a safe location. Regulation 5131.41 defines seclusion as the involuntary confinement of a student alone in a room or an area from which the student is physically prevented from leaving and explains that seclusion does not include a timeout involving the monitored separation of the student in an unlocked setting, which is implemented for the purpose of calming the student.

According to Regulation 5131.41, District staff must not: use a physical or behavioral restraint technique that obstructs a student's respiratory airway or impairs/restricts breathing, including a technique in which a staff member places pressure on the student's back or places their body weight against the student's torso or back; place a student in a facedown position with the student's hands held or restrained behind the student's back; or use a behavioral restraint for longer than is necessary to contain the behavior that poses a clear and present danger of serious physical harm to the student or others. Regulation 5131.41 further states that staff should avoid

⁸ Regulation 5131.41 was approved by the District on May 2, 2019, near the end of the 2018-2019 school year and after Student A died on or around [redacted content], 2018. Further details about Student A can be found below.

the use of behavioral restraint and seclusion of students whenever possible and that these interventions may be used only to control student behavior that poses a clear and present danger of serious physical harm to the student or others that cannot be prevented by a less restrictive response. In addition, Regulation 5131.41 states that behavioral restraints and seclusion of students must not be used in any form as a means of coercion, discipline, convenience, or retaliation and that staff must not use locked seclusion unless it is in a facility otherwise licensed or permitted by state law to use as a locked room.

According to the District, it uses a third party's nonviolent crisis intervention strategies to educate staff regarding how and when to use emergency intervention strategies on students. The third-party training includes strategies for prevention and de-escalation, managing behavioral risk using disengagement and/or holding skills, and post-intervention response.

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

District Board Policy 6159.2 (Nonpublic, Nonsectarian School and Agency Services for Special Education) (Policy 6159.2) provides that when a student's IEP team determines that an appropriate public education alternative does not exist within the District's schools and that the nonpublic, nonsectarian school or agency placement is appropriate for that student, the IEP team may decide to place the student in one of these settings. Policy 6159.2 also states that during the period when any student with a disability is placed in a nonpublic, nonsectarian school or agency, the student's IEP team shall retain responsibility for monitoring the student's progress towards meeting goals identified in their IEP.

Regulation 6159.2 requires the District to have a master contract with nonpublic, nonsectarian schools or agencies, which shall include a description of the District's process to oversee and evaluate these placements and whether the student is making appropriate educational progress. For example, the master contract in effect for the 2017-18 school year required the NPS to provide at least four written progress reports, which contain progress over time toward IEP goals and objectives, to the District and the parents of the student with disabilities placed at the NPS. In the 2017-18 school year, the master contract also allowed District representatives access to NPS A and NPS B facilities for periodic monitoring of each student's instructional program, including unannounced monitoring visits. The contract also allowed the District to do a formal review of each student's progress, including access to observe each student at work and the instructional setting, interview NPS employees, and review each student's records and progress.

The District's master contracts with NPS A and NPS B provide procedures regarding the use of "emergency interventions," such as restraint and seclusion. The contract does not require that NPS A or NPS B comply with the District's special education policies or the District's policies on the use of restraint or seclusion. According to the contract, emergency interventions may be used only to control behavior that is unpredictable and spontaneous and may not be employed longer than necessary to contain the behavior. 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 master contract also requires that NPS staff members complete an emergency report and submit it to the District within 24 hours of an emergency intervention. Additionally, the contract requires the NPS to notify parents via telephone within 24 hours of the use of an emergency intervention, such as a restraint or seclusion of their child by NPS staff.

If NPS staff complete an emergency report, the master contract requires the District to schedule an IEP meeting within two days to review the emergency report and determine whether an FBA should be conducted and an interim plan implemented for any student who does not have a BIP or Positive Behavior Intervention Plan. For students who already have a BIP, the IEP team is required to convene within two days to review and modify the BIP if a “new serious behavior has been exhibited or existing behavioral interventions have proven to be ineffective.”

In addition, the contract requires that NPS A and NPS B maintain a written policy regarding emergency interventions and emergency reports and submit evidence of annual crisis intervention and emergency procedures training to the District at the beginning of the school year and within six days of any new hire at NPS A or NPS B. The District did not request or receive copies of emergency intervention policies or evidence of crisis intervention and emergency procedures trainings from NPS A or NPS B for the 2017-2018 or 2018-2019 school years. The District was unable to provide OCR with information about the emergency intervention procedures at NPS A and NPS B. NPS A declined to provide OCR with information about its emergency intervention procedure.

NPS B provided OCR with its one-page Policy and Procedures for Reporting Behavior Emergencies, which describes how an emergency report is written for an incident involving a restraint or seclusion. This policy also requires NPS B to email the emergency report to the District within 24 hours and notify the parent, guardian, or residential care provider about the incident by the end of the day on which the incident occurred. The policy does not mention anything else about restraints or seclusions.

NPS B’s behavior interventions system policy permits a physical restraint only when a student’s behavior may seriously cause or threaten injury. NPS B’s restraints only permit holding limbs and expressly prohibit one-person restraints. In interviews with NPS B staff who were identified in the emergency and incident reports involving District students in the 2017-2018 and 2018-2019 school years, OCR found that some NPS B staff did not know that NPS B’s behavior intervention system procedures prohibit the use of one-person restraints.

According to NPS B’s Director and Associate Directors 1 and 2, NPS B uses a strategy called Time Away. Time Away rooms were described as spaces for students to calm down when they are escalated or in crisis and where staff often direct students after an incident of physical restraint. In the 2018-2019 school year, some of the Time Away rooms at NPS B had doors, and NPS staff members had a practice of leaving a student alone in the room with the door closed but

not locked.⁹ However, in the 2017-2018 and 2018-2019 school years, when NPS B staff sent a student to a Time Away room, NPS B commonly documented the incident as “seclusion” in the emergency report. OCR reviewed these emergency reports that denoted Time Away as “seclusion,” but neither the emergency reports nor the incident reports state whether the student was in a Time Away room with a door or involuntarily confined alone in the room.

Student B, who was placed in the Time Away room at least 11 times, told OCR that a staff member stood outside the door, holding the door shut and observing the student through a window on the door. Student B told OCR that a student is not permitted to leave the Time Away room until the student completes a “quiet 5,” in which the student must sit quietly against the back wall for five minutes. According to Student B, if the student did not complete a “quiet 5,” the student may stay in the Time Away room all day, which Student B said he has experienced. According to NPS B and the District, the Time Away room and “quiet 5” are techniques to help a student fully de-escalate. When OCR asked NPS B staff if Students B and C were placed in Time Away rooms with doors or were ever involuntarily confined alone and prevented from leaving, NPS staff said they did not recall.

C. The Use of Seclusion and Restraint With District Students

OCR did not find any evidence in the records the District provided for the 2017-18 and 2018-19 school years or the 39 interviews it conducted that District schools used seclusion during the 2017-18 or 2018-19 school years. According to the District’s Director of Special Education, no students with disabilities placed at District schools were subjected to any incidents of seclusion in the 2017-2018 and 2018-2019 school years. The Director of Special Education told OCR that for the past ten years, there have been no seclusion rooms in any of the District schools. OCR’s interviews with parents in the District did not raise any concerns about seclusion of students at District schools. In addition, the District staff members interviewed by OCR stated that it is their understanding that seclusion is not permitted at District schools because the nonviolent crisis intervention training they received does not allow it.

During the 2017-2018 and 2018-2019 school years, nine District students were subjected to physical restraint by school staff at three District elementary schools and two NPS sites (NPS A and NPS B). Of the nine students, seven were designated students with disabilities at the time of the restraint. Of these seven, four were placed in District elementary schools, one (Student A) was placed at NPS A, and two (Students B and C) were placed at NPS B. Below we discuss the restraints of students in the District elementary schools first. Then, we discuss the restraints of Student A at NPS A, followed by the restraints and seclusions of Students B and C at NPS B.

1. The District’s Use of Physical Restraints in Elementary Schools

During the 2017-2018 and 2018-2019 school years, a total of six District students who attended one of three elementary schools were subjected to physical restraint by school staff. In the span of these two school years, the six students experienced a total of 12 incidents of restraint. Four of these six

⁹ NPS B moved campuses [redacted content] 2019. According to Student B, the new NPS B campus for the 2019-2020 school year has Time Away rooms in which the adult sits inside the room with the student and the door is closed.

students had an IEP in place and were receiving special education services from the District when restrained; the remaining two students did not have an IEP in place when restrained. One of these six students experienced three instances of restraint in the 2017-2018 school year and no restraints in the 2018-2019 school year. Another student experienced one instance of restraint in the 2017-2018 school year and four instances of restraint in the 2018-2019 school year. The remaining four students were each restrained one time total across the 2017-2018 and 2018-2019 school years.

Based on OCR's interviews of District staff and review of the documents regarding the 12 incidents of restraint, each involved emergency situations where the student was exhibiting crisis behavior, such as hitting, kicking, or punching staff/others, throwing objects, or attempting to run away and off into the street. According to emergency report documentation and staff interviews, when the six students exhibited crisis behavior, school staff responded by placing the students in a restraint as a last resort after attempting to first use de-escalation techniques, in accordance with the students' IEPs and the District's policies and procedures. For example, de-escalation techniques included blocking hits and kicks, walking and/or moving away, giving wait time until compliance, and removing audiences. Two of the students' IEPs stated that if the student attempted to hit, kick, or punch staff or run away from class, staff could use nonviolent crisis emergency intervention strategies to keep the student and staff safe. Regarding the other two students with disabilities, while their IEPs did not specify that staff could use nonviolent crisis intervention strategies if the student attempted to hit, kick, or punch staff or elope from class, both students had a BIP in place describing de-escalation techniques that staff could use in response to these behaviors.

The two remaining students did not have IEPs when they were restrained. The District evaluated both of these students for special education services after they each experienced one instance of restraint and determined that both did not qualify for such services. One student was restrained only once when a teacher held his hands behind his back for 1 to 2 minutes after he tried to hit students and staff. He already had an individualized health care plan in place, and the District determined that he did not need an IEP. The other student experienced additional restraints and a [redacted content]. The District immediately reassessed this student in [redacted content] 2019, determined that the student qualified for special education services, and developed an IEP.

In accordance with the District's policies and procedures, the parents of the District students were notified about each of the 12 restraint incidents within one school day each time. For the four students with disabilities, the District also scheduled IEP meetings within two days of the incidents to determine if the students' BIPs needed to be revised. In addition, for three of the four students with IEPs, the IEP teams made some revisions to the students' BIPs and IEPs after the restraint incidents as they deemed appropriate. According to the parents of the three students with disabilities that OCR interviewed,¹⁰ there were no concerns regarding the District's use of restraint on their children.

OCR's review of the emergency reports indicated that the length of the restraints did not exceed what was necessary to contain the emergency behavior, generally ranging from a few seconds to five minutes. According to a District staff member, one of the restraints lasted 20 minutes because

¹⁰ OCR attempted to contact the parents of the six students for interviews. The parents of three of these students responded to OCR's inquiries, and OCR interviewed these parents.

the student took longer to de-escalate and staff had difficulty calming the student down to the point where the student could be safe.

The District's Director of Special Education reported to OCR that the students described above were the only students subjected to physical restraint at District schools in the 2017-2018 and 2018-2019 school years, and there were no other instances of restraint or seclusion. OCR's interviews with staff at four of the five visited elementary schools also did not reveal other instances of restraint or any seclusions. However, a staff member at one elementary school told OCR that sometime during or around 2018 a police officer restrained a student after the student destroyed the classroom. OCR requested a copy of any relevant emergency reports for this student, and the District responded that it has no record of this restraint. In addition, one parent in the District reported to OCR that her child with disabilities experienced multiple physical restraints by a paraprofessional and resource specialist at a different District elementary school during the 2018-2019 school year. According to the parent, school staff held the student's hands behind his back and walked him down the hall that way. Other times, the staff picked him up and carried him out of the classroom. OCR asked the District for emergency reports regarding this student, and the District replied that there were none.

2. Restraints and Seclusions of District Students at Nonpublic Schools

During the 2017-2018 and 2018-2019 school years, the provision of IEP services for one District student (Student A) included placement at NPS A. The 2017-2018 contract between NPS A and the District was in effect from July 1, 2017, to June 30, 2018. Although the District continued Student A's placement at NPS A during the 2018-2019 school year, the District did not have a contract with NPS A for the 2018-2019 school year. According to the District's Director of Special Education, the District was in the process of developing its 2018-2019 contract with NPS A when Student A, the only District student placed there, was seriously injured at the school on [redacted content], 2018, and subsequently died on [redacted content], 2018, as discussed below.

During the 2017-2018 and 2018-2019 school years, the provision of services for Students B and C included placement at NPS B and the District had a contract in place with NPS B during the 2017-2018 and 2018-2019 school years. The District did not visit NPS A or NPS B during the 2017-18 or 2018-19 school years even though its contracts permitted unannounced monitoring of each student's instructional program, interviews of NPS employees, and a formal review of each student's progress, including access to observe each student at work and the instructional setting.

a. Student A

Student A was the only District student placed at NPS A during the time period reviewed by OCR. Student A was [redacted content] years old and was transitioning into [redacted content] grade when the District placed him at NPS A during an IEP meeting on [redacted content], 2018. The District's offer of FAPE in Student A's IEP from this meeting included special education services provided by an NPS under contract with the SELPA or District, and NPS A was identified in the comments section of the IEP. Additionally, the IEP included Extended School Year (ESY) at NPS A from [redacted content], 2018 to [redacted content], 2018. The IEP attached a BIP dated [redacted content], 2017. The BIP was created when Student A was a [redacted content] grade student at

another NPS, and the BIP focused on Student A's off-task behavior and replacement behaviors when he is off task.

Neither the [redacted content] 2018 IEP nor the [redacted content] 2017 BIP provided for the use of restraint or seclusion as an intervention for Student A. NPS A's behavior emergency response protocol was not listed as an intervention either. In [redacted content] 2018, prior to the IEP meeting that month, Student A, his parent, and his grandparent toured NPS A with the District's Program Specialist 1. According to Program Specialist 1 and Student A's family, there was no discussion of the emergency behavior procedures during the tour of NPS A and IEP meeting.

On [redacted content], 2018, while Student A was at NPS A for ESY, NPS A emailed an emergency report to Program Specialist 1, who worked for the District. According to Program Specialist 1 and the District, Program Specialist 1 did not open the email or read the emergency report because the District's email system quarantined the email and the emergency report was not accessible. Though the District told OCR that it could not open or provide OCR with the emergency report, OCR's review of email correspondence between NPS A and the District shows that NPS A submitted emergency reports to the District on [redacted content], 2018, and after each physical restraint of Student A by NPS A staff. Thus, the inaccessible report may pertain to a restraint on [redacted content], 2018.

On [redacted content], 2018, the District convened Student A's annual IEP meeting. The IEP stated that he did not meet his two behavior-related goals to remain on task and to show respect for personal and shared property. The IEP included two new behavior-related goals to increase appropriate peer engagement and accept the consequences for inappropriate behavior, such as [redacted content], without physical aggression or arguing with staff. As in Student A's [redacted content] 2018 IEP, the District's offer of FAPE in his [redacted content] 2018 IEP included special education services provided by an NPS under contract with the SELPA or District, specifically NPS A – although there was no executed contract between NPS A and the District for the 2018-2019 school year.

The [redacted content] 2018 IEP also included a BIP that was based on data collection, not an FBA. Student A's problem behaviors listed in the BIP included [redacted content]. Per the BIP, staff response to the problem behaviors was to disengage him from activity, maintain proximity, and hold hands for safety. According to the District's Program Specialist 2, who participated in this IEP meeting, holding hands for safety meant that a staff member gently placed her hand on Student A's hands or arm to let him know she was present. The IEP notes state that Student A's teacher at NPS A (Teacher) reported that Student A's behavior, including [redacted content], occurred five to ten times a day and was impacting his ability to access the curriculum. Neither the [redacted content] 2018 IEP nor the BIP provided for the use of restraint or seclusion as an intervention for Student A. NPS A's behavior emergency response protocol was not listed as an intervention either. Though the teacher at NPS A informed the IEP team of Student A's serious and frequent behaviors and their adverse effect on his ability to access the curriculum, the IEP team notes do not reflect that the team discussed an FBA or other further evaluation or assessment of Student A, nor did they discuss whether additional supports or services were needed to ensure FAPE.

After Student A's annual IEP meeting on [redacted content], 2018, NPS A staff physically restrained Student A five times on [redacted content], for a total of 145 minutes, as documented in five emergency reports. The first physical restraint was for five minutes, which occurred because Student A did not respond to staff's physical prompts to continue [redacted content] and pushed into staff. The emergency report does not define what a physical prompt is and why it was used. The subsequent physical restraints were prone restraints on [redacted content], 2018, in which staff held Student A on the ground, lying face down. The duration of the prone restraints were 20 minutes, 20 minutes, and 10 minutes, respectively. According to the emergency reports for the three prone restraints, staff used prone restraints in response to Student A spitting on and hitting peers. One of the emergency reports included other attempted interventions, but other reports did not.

NPS A notified Student A's parent about the physical restraints on [redacted content], 2018. Student A's parent told OCR that she did not understand what physical restraints were occurring at NPS A, and she felt the District should have known the Student's placement at NPS A was not effective given the volume and frequency of emergency reports the District was receiving during [redacted content] 2018.

OCR reviewed evidence that NPS A emailed the District with the emergency reports for the physical restraints on [redacted content], 2018. When OCR interviewed the District staff who had received these emails, Program Specialist 1 and Program Specialist 2 revealed that neither had read the [redacted content], 2018 emergency report because each person thought the other person had read it. Program Specialist 2 read the emergency reports for the physical restraints on [redacted content], 2018. According to Program Specialist 2, he did not know what type of restraint was being used because they were described in the emergency reports as "Handle With Care-Neutral," and he did not contact NPS A to ask.

Program Specialist 2 did not believe that the emergency reports necessitated an IEP meeting when the IEP team had recently convened on [redacted content], 2018. Program Specialist 2 told OCR that he believed Student A's behavioral regression was natural given the change of placement to NPS A and the corresponding new setting, staff, peers, and interactions. Program Specialist 2 also explained that the emergency reports did not raise red flags because he did not think NPS A staff were physically restraining Student A for the total time listed on the emergency reports and he thought "Handle With Care-Neutral" sounded "innocuous." After reading the emergency report of [redacted content], 2018, Program Specialist 2 told OCR that he intended to call an IEP meeting because this was the third restraint he had read about. In fact, it was the fourth restraint of Student A by that point in [redacted content] 2018. However, Program Specialist 2 stated that before he was able to convene an IEP meeting, the final restraint took place on [redacted content], 2018.

During this last physical restraint, three staff members held Student A in a prone restraint for 90 minutes until he was taken to the hospital. According to the [redacted content], 2018 emergency report, NPS A staff put Student A in a prone position at [redacted content] PM for spitting at another student. The Teacher held Student A's upper body, another staff member held his legs, then a third staff member came to assist with the prone restraint because Student A was continuing to escalate. While in the prone restraint, Student A was [redacted content]. The Teacher reported that she tried to count down to release several times, but Student A kept escalating so she continued the

restraint. At [redacted content] PM, Student A stated he was going to throw up, then he became unconscious. The Teacher released Student A from the prone restraint after he became verbally unresponsive to staff. The School Nurse rolled Student A onto his back then conducted CPR for seven to ten minutes until paramedics came. NPS A staff notified Student A's parent at [redacted content] PM. Student A was taken to the hospital, where he died on [redacted content], 2018.

OCR reviewed several emails between NPS A and the District on [redacted content], 2018, starting with a [redacted content] PM email to Program Specialist 2 asking for a call back immediately. The following day, [redacted content], 2018 at [redacted content] PM, NPS A emailed the Director of Special Education and both Program Specialists with the emergency report for the [redacted content], 2018 incident. Upon reading the emergency report, Program Specialist 2 told OCR he had questions about the prone restraint of Student A, including where the restraint took place, whether other students were evacuated, what exactly happened between [redacted content] PM, and how NPS A staff attempted release. Program Specialist 2 told OCR that the emergency report lacked information about Student A's antecedent behavior and staff responses, including what, if any, interventions were attempted, but he did not contact NPS A to ask these questions.

OCR requested interviews with the NPS A staff involved in the restraint on [redacted content], 2018. The District informed OCR it has no ability to identify their whereabouts or connect OCR with NPS A staff. Counsel for NPS A declined OCR's request to interview NPS A staff.¹¹

b. Student B

Student B entered the District on [redacted content], 2018, and during the 2017-2018 school year, Student B was [redacted content] years old and in [redacted content] grade at NPS B. During his time in the District, Student B resided in the [redacted content] and was assigned to Program Specialist 1 who served as the District liaison for NPS B as well as for Student B's Educational Rights Holder and [redacted content].

On [redacted content], 2018, the IEP team convened for a 30-day review of the NPS B placement, and Student B's IEP team determined that NPS B was the appropriate placement for him. This IEP also included a BIP that was based on recorded behavior and staff observation, not an FBA. As listed in Student B's IEP, Student B's problem behaviors included [redacted content]. Staff response to the problem behaviors was to monitor Student B for safety and stay silent while he calms down. The IEP notes state that the team recommended continuing with the BIP at this time. The [redacted content] 2018 IEP and BIP, as well as Student B's subsequent IEPs and BIPs during the 2018-2019 school year, did not provide for the use of restraint or Time Away as an intervention for Student B. None of Student B's IEPs or BIPs listed NPS B's behavior emergency response protocol as an intervention either.

In the 2018-2019 school year, Student B was [redacted content] years old and in [redacted content] grade at NPS B. OCR reviewed a total of 13 emergency reports, dating from [redacted content], 2018 to [redacted content], 2019, describing physical restraints and/or Time Away involving Student B. Specifically, NPS B physically restrained Student B 17 times as documented in 11

¹¹ [Redacted content]

emergency reports and placed him in Time Away 11 times as documented in nine emergency reports. All the physical restraints of Student B were of unknown duration, except the restraint on [redacted content], 2019, which lasted for three minutes. The emergency reports and incident reports describing Student B in Time Away do not consistently indicate the length of time spent in a Time Away room. However, based on the six incident reports that contained the duration of time in Time Away,¹² Student B spent at least 123 minutes in Time Away during the 2018-2019 school year. In addition, Student B reported that on at least one occasion he had to stay in the Time Away room all day because he did not complete a “quiet 5.” NPS B staff witnesses did not recall whether Student B was placed in Time Away rooms with doors and whether he was ever involuntarily confined alone and prevented from leaving, but they reported referrals to Time Away as “seclusion” in the emergency reports and incident reports submitted to the District.

On [redacted content], 2018, NPS B prepared two emergency reports involving Student B. The first emergency report and incident report described NPS B staff placing Student B in Time Away for an unspecified amount of time because he reportedly [redacted content]. The second described NPS B staff holding the Student in a physical restraint for an unspecified amount of time and placing him in Time Away for five minutes because he was reportedly hitting, punching, and kicking staff.

On [redacted content], 2018, Student B’s annual IEP took place. The District’s offer of FAPE was a continued placement at NPS B. This IEP also included a BIP based on recorded behavior and staff observation, not an FBA. Student B’s problem behaviors were documented as [redacted content]. The [redacted content] 2018 BIP did not change from the [redacted content] 2018 BIP with regard to Student B’s early escalation behaviors, problem behaviors, and de-escalation behaviors or the staff responses to each of these categories of behaviors. Staff response to Student B’s problem behaviors also remained the same. Furthermore, the notes section of Student B’s [redacted content] 2018 IEP described the IEP team’s discussion about Student B’s behavior. The meeting notes reflect that NPS B reported that Student B can be physically aggressive towards staff when he is denied something or a limit is imposed on him, but there is no history of behavioral incidents resulting in restraints. The meeting notes do not reflect any reference to the incidents on [redacted content], 2018, resulting in the use of Time Away and physical restraint of Student B.

Between [redacted content], 2018 and [redacted content], 2019, NPS B prepared nine emergency reports describing physical restraints and/or Time Away involving Student B.¹³ Specifically, during this time period, NPS B staff physically restrained Student B 13 times and placed him in Time Away seven times. The emergency reports do not contain information about how long the restraints lasted in each instance, with the exception of the restraint on [redacted content], 2019, which lasted three minutes. The emergency reports documented the amount of time in Time Away inconsistently, but the reports documented at least 93 minutes in Time Away during this period.

According to the emergency reports and incident reports between [redacted content], 2018 and [redacted content], 2019, NPS B staff physically restrained Student B and/or placed him in Time Away because he was reportedly physically attacking or threatening staff and students. On some of

¹² These six incident reports describe a range of time spent in Time Away from five minutes to 25 minutes.

¹³ These incidents occurred on [redacted content].

these occasions, Student B reportedly used objects, such as [redacted content], to threaten others. His reported eloping behavior also resulted in the use of physical restraints and/or Time Away.

On or around [redacted content], 2019, the [redacted content] emailed Program Specialist 1 to request a meeting about Student B's and Student C's safety at NPS B. Program Specialist 1 suggested an IEP meeting for both students.¹⁴ At an IEP meeting for Student B on [redacted content], 2019, his IEP team discussed a potential change in placement, and Program Specialist 1 talked about a possible FBA to address his behavior needs. By the [redacted content], 2019 IEP meeting, the District had received at least seven emergency reports describing incidents involving NPS B staff physically restraining Student B and/or placing him in Time Away.¹⁵ Program Specialist 1 told OCR that she suggested an FBA at this IEP meeting because of the pattern of incidents. She stated there is no specific number of emergency reports or incident reports to trigger an FBA, but she noted that Student B exhibited continued behavior resulting in emergency interventions. The meeting notes do not reflect any reference to the physical restraint and Time Away incidents involving Student B preceding the IEP meeting, though the notes show the team discussed one undated incident when NPS B staff physically restrained and allegedly verbally threatened harm to Student B. The meeting notes do not indicate that the IEP team considered how much time Student B spent away from educational services and whether this impacted his receipt of a FAPE. Program Specialist 1 told OCR that the purpose of the meeting was to discuss a string of behavioral incidents about which the team was concerned. Ultimately, the IEP team discussed the timing of an FBA and strategies to improve behavior.

After the IEP meeting on [redacted content], 2019, NPS B submitted two more emergency reports describing physical restraints and/or Time Away involving Student B. Specifically, on [redacted content], 2019, NPS B staff held Student B in a physical restraint for an unspecified amount of time, and he spent 25 minutes in Time Away for reportedly throwing items and his body at staff. Then, on [redacted content], 2019, NPS B staff twice held Student B in physical restraints after he reportedly hit staff in the face and threw rocks at staff. Staff also sent Student B to a Time Away room for an unspecified duration.

Student B's Education Rights Holder told OCR that NPS B did not contact him about the emergency interventions it used on Student B during the 2018-2019 school year. He learned about the restraints and Time Away incidents only at Student B's IEP meetings. He also stated that he did not know what kinds of restraints were used on Student B and was unfamiliar with Time Away.

During the 2018-2019 school year, the District did not convene an IEP team meeting within two days of each emergency intervention used on Student B. The District's Program Specialist 1 told OCR that no IEP meeting was convened after the incidents of physical restraint and Time Away because Student B's antecedent behavior was already documented in his BIP.

¹⁴ Student C (described below) was [redacted content] and assigned to Program Specialist 1.

¹⁵ From [redacted content], 2018 to [redacted content], 2019, NPS B prepared 11 emergency reports describing incidents where NPS B staff physically restrained Student B and/or placed him in Time Away. However, documents from the District and NPS B only show email correspondence between NPS B and Program Specialist 1 regarding seven of these 11 emergency reports. Therefore, the documentary evidence confirmed that the District had received at least seven of the 11 emergency reports prepared by NPS B by the IEP meeting on [redacted content], 2019.

OCR received information from the [redacted content] that indicates Student B may have experienced more instances of restraint and Time Away during the 2018-2019 school year beyond the incidents of physical restraint and Time Away described in the 13 emergency reports and incident reports from the District and NPS B. The [redacted content] kept track of injuries Student B sustained while at NPS B, and their injuries list stated that Student B had a forehead injury from headbanging in Time Away on [redacted content], 2018. When OCR requested any emergency report or incident report regarding a referral of Student B to Time Away on [redacted content], 2018, the District responded that it had no records regarding the incident.

OCR also reviewed Student B's level sheets for the 2018-2019 school year. NPS B maintains daily level sheets that describe student behavior, including whether the student has been sent out of the classroom due to misconduct. NPS B provided OCR with Student B's level sheets from [redacted content], 2018 to [redacted content], 2019, though not every school day's level sheet was provided. Student B spent at least 1,715 minutes, or 4.57 school days, outside of the classroom as documented in the level sheets, which included the length of time he was outside of the classroom. There were at least five instances when level sheets indicated Student B was outside of the classroom but did not specify the length of time. For instance, the [redacted content], 2018 level sheet stated Student B was in Time Away from [redacted content], and the [redacted content], 2019 level sheet stated Student B "stayed out of class most of day."

Across both school years analyzed in OCR's compliance review (SY 2017-18 and SY 2018-19), NPS B physically restrained Student B at least 17 times, as documented in 11 emergency reports, and placed him in Time Away 11 times, as documented in nine emergency reports, all of which reported these times as "seclusion." Student B's level sheets and other evidence indicated that Student B spent at least 4.57 school days outside of the classroom. The amount of missed instruction was likely more because District and NPS B records failed to record the amount of time spent in a restraint or the Time Away Room, and interviews with Student B and [redacted content] staff revealed other restraints and times in the Time Away room for which the District lacked records. Student B was not receiving educational services for at least 4.57 school days, yet the notes from his IEP meetings do not show that the IEP team discussed his time away from educational services or how they impacted his receipt of FAPE.

c. Student C

In the 2017-2018 school year, Student C was [redacted content] years old and in [redacted content] grade at NPS B. Like Student B, Student C [redacted content]. Student C entered the District on [redacted content], 2018, and was assigned to Program Specialist 1, who served as the District liaison for NPS B as well as for Student C's Educational Rights Holder and [redacted content].

Student C's first IEP with the District, dated [redacted content], 2018, derived from a 30-day review meeting, in which his IEP team determined that NPS B was the appropriate placement for him. This IEP also included a BIP, dated [redacted content], 2018, that was based on observations and data collection, not an FBA. Student C's documented problem behaviors included: [redacted content]. Per the [redacted content], 2018 IEP and [redacted content], 2018 BIP, the staff response

to Student C's problem behaviors should include: evacuating other students from the class; having two staff monitor Student C for safety with one staff in close proximity to him and the other staff at the door; using a neutral tone and short one-step directions; ignoring Student C's topics of conversation and his behavior as long as he is safe; following Student C to any location; calling Educationally-Related Mental Health Services provider, Behavior Analyst, or School Psychologist; and calling a School Resource Officer if behavior is a safety issue.

The [redacted content] 2018 IEP included the team's discussion that Student C "does spend a lot of time in the Time Away Room," and NPS B staff reported, "He's done better the last few days but previously he had been going to Time Away Room every day." Despite these statements in the [redacted content] 2018 IEP, that IEP and BIP, as well as Student C's subsequent IEPs and BIPs in the 2018-2019 school year, did not provide for the use of Time Away or restraint as an intervention for Student C. NPS B's behavior emergency response protocol also was not listed as an intervention in any of Student C's IEPs or BIPs.

In the 2018-2019 school year, Student C was in [redacted content] grade at NPS B. On [redacted content], 2018, Student C's IEP team met for his annual IEP. This meeting discussed similar present levels and noted that Student C causes physical injury to himself and others, including [redacted content] when extremely frustrated. The discussion also reflected that Student C met only one of his three behavior-related goals. The District's offer of FAPE was continued placement at NPS B with three new behavior-related goals, which were reflected in the IEP signed on [redacted content], 2018.¹⁶ On [redacted content], 2018, NPS B staff held Student C in a physical restraint for an unspecified amount of time and placed him in Time Away for about five minutes because he reportedly threw himself into staff and refused to comply with staff commands. Despite this incident, Student C's [redacted content], 2018 BIP was nearly identical to his [redacted content] 2018 BIP, keeping the same early escalation behaviors and problem behaviors, and did not update the staff responses to such behaviors listed in his [redacted content] 2018 BIP.

On [redacted content], 2018, Student C's IEP team held a meeting. Student C's Educational Rights Holder and [redacted content] called the meeting to discuss a school safety plan. According to the IEP notes, the team discussed how to keep Student C safe when he elopes and strategies for proximity, prevention, and taking breaks. The meeting notes do not reflect any reference to the [redacted content], 2018 incident preceding the IEP meeting, which involved a physical restraint and Time Away.

OCR reviewed a total of 15 emergency reports, dating from [redacted content], 2018 to [redacted content], 2019, describing physical restraints and/or Time Away involving Student C. Specifically, NPS B physically restrained Student C 15 times as documented in 11 emergency reports and placed him in Time Away 12 times as documented in 12 emergency reports. The emergency reports and incident reports describing physical restraints of Student C do not indicate the length of the restraints, except for the restraint on [redacted content], 2019, which lasted for four minutes, and the restraint on [redacted content], 2019, which lasted for six minutes. Student C spent a total of 240 minutes in Time Away as documented in the 12 incident reports, but the incident reports also

¹⁶ The [redacted content], 2018 IEP meeting was reconvened on [redacted content], 2018.

described processing time that was not recorded on any incident report.¹⁷ NPS B staff witnesses told OCR that they did not recall whether Student C was placed in Time Away rooms with doors, involuntarily confined, or prevented from leaving, but they reported their referrals to Time Away as “seclusion” in the emergency reports and incident reports submitted to the District.

Between [redacted content], 2018 and [redacted content], 2019, NPS B submitted seven emergency reports describing physical restraints and/or Time Away involving Student C to Program Specialist 1. Specifically, during this time period, NPS B physically restrained Student C nine times and placed him in Time Away six times. According to the emergency reports and incident reports during this time, NPS B staff physically restrained Student C and/or placed him in Time Away because he reportedly eloped, put himself in imminent harm, or was physically attacking or threatening staff and students.

On [redacted content], 2019, Student C’s triennial IEP took place and included the same present levels and offer of FAPE as his [redacted content] 2018 IEP and BIP. The triennial IEP included the [redacted content], 2018 BIP, which was only updated to add transportation as an antecedent for Student C’s physical aggression. According to the IEP notes, the IEP team reviewed the BIP and discussed strategies to address Student C’s attention-seeking behavior that results in eloping from campus. The meeting notes do not reflect any reference to the restraint and Time Away incidents involving Student C preceding the IEP meeting, which had been documented in at least seven emergency reports since his last IEP meeting on [redacted content], 2018. The IEP team determined that Student C’s placement would continue to be NPS B.

Between [redacted content], 2019 and [redacted content], 2019, NPS B submitted five emergency reports to the District describing physical restraints and/or Time Away involving Student C. During this time period, NPS B physically restrained Student C three times and placed him in Time Away three times. According to the emergency reports and incident reports between [redacted content], 2019 and [redacted content], 2019, NPS B staff physically restrained Student C for reportedly kicking staff repeatedly and placed him in Time Away for reportedly eloping off campus and hitting another student.

On [redacted content], 2019, Student C’s IEP team held a meeting. As described above, the [redacted content] emailed Program Specialist 1 requesting to meet about student safety concerns at NPS B, and Program Specialist 1 suggested an IEP meeting for both Students B and C. During the [redacted content], 2019 IEP meeting, the IEP team discussed the [redacted content] concerns about Student C’s ability to elope, why staff’s close proximity to Student C had not prevented eloping behavior, and how Student C’s BIP did not specify a level of physical proximity. The team agreed that Student C would receive paraeducator support within arm’s length proximity to address behavioral needs. The meeting notes do not reflect any reference to the restraint and Time Away incidents involving Student C preceding the IEP meeting, even though thirteen emergency reports documented them since [redacted content], 2018.

After the [redacted content], 2019 IEP meeting, NPS B submitted two more emergency reports to the District describing physical restraints and/or Time Away involving Student C. On [redacted

¹⁷ The incident reports describe a range of time spent in Time Away from five minutes to 60 minutes.

content], 2019, NPS B staff held Student C in a physical restraint for an unspecified amount of time and placed him in Time Away for 15 minutes because he reportedly verbally and physically threatened students and staff with large tree branches. On [redacted content], 2019, NPS B staff held Student C in a physical restraint for an unspecified amount of time and placed him in Time Away for 60 minutes because he reportedly hit staff.

The contract between NPS B and the District requires emergency reports be sent to the District within 24 hours, yet some of the emergency reports regarding Student C were not submitted until three to five days later. Though Program Specialist 1 did not remind NPS B of the 24-hour requirement in replies to these late reports, the District told OCR that District staff reminded NPS B of this requirement in a meeting on [redacted content], 2019.

Program Specialist 1 generally did not respond to NPS B's emails with emergency reports and incident reports for Student C. Of the 15 emergency reports emailed to Program Specialist 1, she replied with follow-up questions twice. First, upon receiving the emergency report and incident report of [redacted content], 2019, which was the eighth emergency intervention incident of the 2018-2019 school year, Program Specialist 1 replied to ask if NPS B also sent these reports to Student C's Educational Rights Holder. NPS B responded that it emails the reports to the [redacted content], not his Educational Rights Holder. Program Specialist 1 told OCR that she was in contact with Student C's Educational Rights Holder throughout the school year though not necessarily after every emergency report was received. Second, after receiving the [redacted content], 2019, 9:15 AM emergency report and incident report about a 30-minute referral to Time Away, which was Student C's ninth referral to Time Away during the 2018-2019 school year, Program Specialist 1 replied to ask NPS B to clarify what the Time Away intervention looks like.

During the 2018-2019 school year, the District did not convene an IEP team meeting within two days of each emergency intervention used on Student C. The District's Program Specialist 1 told OCR that no IEP meeting was convened after the incidents of physical restraint and Time Away because Student C's antecedent behavior was already documented in his BIP. Program Specialist 1 told OCR she did not have concerns that NPS B was not implementing Student C's IEP and BIP, and she stated that the IEP team was frequently discussing Student C's BIP and strategies at the IEP meetings that were convened for Student C during the 2018-2019 school year.

OCR received information from the [redacted content] indicating that Student C may have experienced more instances of restraint and Time Away during the 2018-2019 school year beyond the incidents of physical restraints and Time Away described in the 15 emergency reports and incident reports from the District and NPS B. According to the [redacted content], Student C described how a teacher's nail scratched him down his back during a restraint on [redacted content], 2018. The [redacted content] also cited an emergency report and incident report signed by NPS B Associate Director 1 on [redacted content], 2018, regarding two NPS B van drivers physically restraining and escorting Student C to Time Away after he was physically aggressive during and after the van ride. When OCR requested any emergency report or incident report regarding these two [redacted content] 2018 incidents, the District responded that it had no records regarding the incidents.

NPS B provided OCR with Student C's level sheets from [redacted content], 2018 to [redacted content], 2019, though not every school day's level sheet was provided. Student C spent at least 2,163 minutes, or 5.77 school days, outside of the classroom as documented in the level sheets, which included the length of time he was outside of the classroom. There were 11 instances when level sheets indicated Student C was outside of the classroom but did not specify the length of time. For instance, the [redacted content], 2019 level sheet stated Student C [redacted content] and was in Time Away starting at [redacted content] AM with no end time listed.

Student C left the District at the end of the 2018-2019 school year because [redacted content].

V. Analysis

Based on the evidence OCR obtained in this compliance review, OCR found that the District committed the following three procedural violations of the Section 504 regulations with respect to the three students it placed at NPS A and NPS B (Students A, B, and C): (1) the District failed to ensure that District staff making placement decisions for these students had access to and carefully considered information obtained about the use of physical restraint and/or seclusion rooms with these students; (2) the District failed to ensure that the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options made the placement decisions regarding behavioral interventions for Students A, B, and C; and (3) the District failed to reevaluate Students A, B, and C to determine whether the repeated use of restraint and seclusion affected their receipt of a FAPE and if additional aids and services were appropriate to reduce the use of restraints and seclusions and to provide a FAPE. OCR further found that these procedural violations resulted in denials of a FAPE to Students A, B, and C under 34 C.F.R. §104.33(b)(1)(ii), in violation of Section 504 and Title II. The District staff members participating on the IEP teams for Students B and C also failed to consider how many instructional days each missed due to NPS B's repeated use of restraints and seclusions in the Time Away room or to offer compensatory services to address this missed instructional time.

Additionally, OCR identified a compliance concern that the District did not document all restraints of its students with disabilities in District schools or all restraints and seclusions in NPS settings, and therefore may have failed to identify all students subjected to restraint or seclusion or all incidents of restraint and/or seclusion of a given student, and that such failures may have resulted in students being denied a FAPE. Relatedly, the District's inadequate documentation of restraints and seclusions and its failures to ensure that IEP teams had access to complete information about restraints and/or seclusions of students raises a concern that the District did not consistently provide parents with sufficient information to have a meaningful opportunity to participate on the IEP teams for their children.

A. Violations

Below we explain OCR's conclusions that the District committed three procedural violations of the Section 504 regulations and why these three resulted in denials of a FAPE to Students A, B, and C.

1. The District failed to ensure that District staff members making placement decisions had access to and carefully considered information about restraint and/or seclusion

First, the District failed to ensure that the District staff members participating on the IEP teams for Students A, B, and C had access to and were able to consider carefully the information regarding NPS A's and NPS B's reported use of physical restraint and/or Time Away rooms with these students, as required by the Section 504 regulation at 34 C.F.R. §104.35(c). This regulation requires that placement decisions be made by persons knowledgeable about the student, the evaluation data, and the placement options. 34 C.F.R. §104.35(c)(3). 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. 34 C.F.R. §104.35(c)(2). Placement decisions include decisions regarding what types of emergency and other interventions to use with students.

OCR found that Student A's parent and his District liasons, Program Specialists 1 and 2, did not know about NPS A's emergency response procedure or that NPS A repeatedly used emergency responses to address Student A's known problem behaviors. According to Student A's family and Program Specialist 1, there was no discussion about NPS A's emergency response procedures during their tour of NPS A in the late spring of 2018, nor did Student A's [redacted content], 2018 IEP refer to NPS A's emergency response procedures. The District told OCR that it does not have a copy of NPS A's written policy for emergency interventions and emergency reports, nor is there evidence that the District ever requested the policy after receiving multiple emergency reports of restraints being used on Student A. Even as Program Specialist 2 received emergency reports from NPS A in the [redacted content] of 2018 that explicitly referred to the use of restraints, Program Specialist 2 claimed to have no understanding of the emergency interventions used on Student A. NPS A used restraints on Student A at least five times lasting at least 145 minutes between [redacted content], 2018 and [redacted content], 2018, when NPS A subjected Student A to a 90-minute prone restraint. Additionally, there was an emergency report from NPS A to the District previously on [redacted content], 2018, which may be another restraint but the District told OCR that it could not open the emergency report.

Without knowledge of NPS A's system for emergency responses, OCR finds that the District staff members on Student A's IEP team did not carefully consider all relevant information regarding Student A's placement at NPS A. Given Student A's problem behaviors, including physical aggression, NPS A's emergency response procedure was relevant to placement discussions. Restraints used to address Student A's behavior became significant aspects of Student A's placement, even though Student A's IEPs and BIPs did not provide for the use of restraint. Because the District liasons were not timely reviewing or forwarding the emergency reports of repeated and lengthy restraints of Student A to his IEP team, the team did not have crucial information about NPS A's use of emergency behavior interventions to address his behavior.

Similarly, the District staff members on the IEP teams for Student B and Student C did not carefully consider all relevant information regarding their placements. Student B's and Student C's IEPs and BIPs did not provide for the use of restraint or Time Away as agreed upon behavior interventions.

Nonetheless, Student B was subjected to at least 17 physical restraints and 11 referrals to Time Away during the placement at NPS B in the 2018-2019 school year. Student C was physically restrained at least 15 times and referred to Time Away 12 times during the placement at NPS B in the 2018-2019 school year. Student B's Educational Rights Holder told OCR that he did not know what kinds of restraints were used on Student B and was unfamiliar with Time Away; thus, he was missing critical information when participating in discussions about Student B's placement. The District staff members on the IEP teams for Students B and C also did not understand what NPS B meant by the use of Time Away rooms, though NPS B staff repeatedly reported the time spent in Time Away rooms as "seclusion."

Student B's and Student C's IEP teams identified their respective problem behaviors, including physical aggression, and staff response to such problem behaviors, but at no point did the response include restraint, Time Away, or NPS B's behavior emergency response protocol. Even though NPS B described the use of Time Away as "seclusion" in at least 21 emergency reports to the District, the District did not take steps to ensure that NPS B complied with the District's policy prohibiting the use of seclusion. Such steps could have included, for example, conducting an unannounced monitoring visit to view the Time Away room, interview NPS B employees about use of the room, and observe Students B and C in the instructional setting, as permitted by the District's contract with NPS B.

Because NPS B did not record the duration of at least 16 of 17 reported restraints of Student B and did not consistently record the amount of time Student B or Student C spent in a Time Away room, the District's IEP teams for Students B and C also lacked critical information about how much time Students B and C spent without instruction and/or services required by their IEPs.

Based on the evidence discussed above, OCR found that the District's failure to ensure that the IEP teams for Students A, B, and C had access to and carefully considered information regarding the use of physical restraint and/or seclusion rooms when making the placement decisions for the students violated the Section 504 regulations at 34 C.F.R. §§ 104.35(c)(2) and 104.35(c)(3).

2. The District failed to ensure that placement decisions regarding behavioral interventions for Students A, B, and C were made by the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options

OCR found that the District failed to ensure that the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, such as the members of the IEP teams for Students A, B, and C, were involved in the placement decisions regarding the use of restraints and/or Time Away for these students, in violation of the Section 504 requirement at 34 C.F.R. §104.35(c)(3). As a result, OCR found that NPS A and NPS B staff unilaterally made placement decisions regarding behavioral interventions for these students outside of the IEP process and without the IEP teams' involvement.

As described above, NPS A repeatedly used restraints on Student A even though Student A's IEP team did not have full information about NPS A's use of emergency behavior interventions to

address his behavior. The District should have addressed this problem because NPS A provided the District with enough information in the emergency reports to know that NPS A was making decisions to use restraints on Student A outside of the IEP process. The information highlighted why the staff members on the IEP teams should be making these decisions because it indicated that NPS A's use of restraints contravened Regulation 6159.4. It permits emergency interventions like restraints only to control unpredictable, spontaneous behavior that poses a clear and present danger of serious physical harm to the student or others that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. The regulation also states that emergency intervention will not be used for longer than is necessary to contain the behavior. Yet the information NPS A reported to the District revealed that the first physical restraint of Student A was for not responding to staff's physical prompts to continue [redacted content] and pushing into staff, and the three subsequent prone restraints were in response to Student A spitting on and hitting peers. Two of the prone restraints lasted 20 minutes and one lasted 10. The last reported restraint, which preceded his death, was also for spitting and lasted 90 minutes. Only one of the reports for the restraints included other attempted interventions.

Based on Student B's and Student C's emergency reports and incident reports, the District also had enough information to know that when the Students exhibited the problem behaviors, NPS B was using its behavior emergency response protocol, including physical restraints, outside of the IEP process. For example, 11 emergency reports revealed that NPS B physically restrained Student B at least 17 times in the 2017-18 and 2018-19 school years, and nine emergency reports revealed that NPS B placed him in the Time Away room 11 times, all of which were reported as "seclusion." Despite these repeated reports of "seclusion," which District policy prohibited, District staff did not ask NPS B to clarify what Time Away entailed until [redacted content], 2019, when the District received a report about Student C's ninth referral to Time Away during the 2018-2019 school year. For all three students whom the District placed in NPS settings, the District effectively allowed NPS A and NPS B to decide to use the emergency response protocols to address the students' behaviors outside of the required IEP process for making such placement decisions.

3. The District failed to reevaluate Students A, B, and C to determine if the repeated use of restraint and seclusion affected their receipt of a FAPE and if any additional aids and services were appropriate to reduce the use of restraints and seclusions and to provide FAPE

The Section 504 regulations at 34 C.F.R. §104.35(a), (b), and (c) require that the District evaluate students suspected of having disabilities and to reevaluate students with identified disabilities periodically and when making placement decisions to assess their specific areas of educational need. For students whose behavior impedes their learning or that of others in a manner that would lead the District to suspect that the behavior is caused by or related to a disability, the District must evaluate the student to determine if the student has a disability and needs special education or related services because of that disability. Similarly, if a student's behavior worsens and results in the use of restraint, this may indicate that the student's current placement is not addressing the student's needs. This may suggest, for example, the need for a reevaluation or modification to their IEP, including any BIP.

The District's 2017-2018 master contract with NPS A and 2017-2018 and 2018-2019 master contracts with NPS B recognize these obligations to evaluate and reevaluate students, and to convene IEPs to address challenging student behavior.¹⁸ Specifically, the master contracts require IEP teams to convene within two days following an emergency report for students who already have a BIP so that the team can review and modify the BIP if a new serious behavior has been exhibited or existing behavioral interventions have proven to be ineffective. Additionally, the District's Regulation 6159.4 requires scheduling an IEP meeting within two days of the use of an emergency intervention on a student with a BIP when the previously designed intervention for their behaviors is not effective. Regulation 6159.4 requires the IEP team to review the incident culminating in the emergency intervention and determine whether the student's plan needs to be modified.

According to the District's policies and contracts with NPS A and NPS B, after receiving an emergency report, the District should have reconvened the student's IEP team within two days to review the reported emergency interventions and determined if the Student's BIP and/or IEP required modification. But the District repeatedly failed to do so. The District did not convene any IEP meetings for Students A, B, or C immediately following a reported instance of the use of emergency interventions, including physical restraint. The District did not convene an IEP meeting despite evidence that the students' problem behaviors were increasing in frequency and that staff at NPS A and NPS B were repeatedly using restraint an/or seclusion to respond to these behaviors. These reports put the District on notice of a potential failure to implement the Students' IEPs and/or BIPs or a potential problem with their placement at NPS A and NPS B. Yet, the District failed to call an IEP meeting after receiving five emergency reports for Student A (before the final restraint incident that preceded his death), 13 for Student B, and 15 for Student C, in contravention of its obligations under Section 504, District Regulation 6159.4, and its contracts with NPS A and NPS B.

Before [redacted content], 2018, the date Student A experienced a 90-minute prone restraint, the District had received five total behavior emergency reports from NPS A describing four physical restraints, including three prone restraints, that Student A experienced between [redacted content], 2018 and [redacted content], 2018. The District did not convene an IEP meeting upon receiving any of these reports to reevaluate Student A to determine if the repeated restraints were denying him a FAPE and/or indicated a need for additional or alternative services or interventions even though the District had five opportunities to convene an IEP meeting before the final restraint that preceded Student A's death. Program Specialist 2 told OCR that he did not read the first emergency report and was not concerned about what he thought were the first and second emergency reports because the IEP team had recently met, he believed behavioral regression was normal, and "Handle With Care-Neutral" sounded "innocuous." Although he reviewed the second and third emergency reports regarding physical restraints of Student A, including two prone restraints that lasted 20 minutes

¹⁸ OCR notes that Student A's [redacted content], 2018 IEP and [redacted content], 2018 IEP stated that an NPS under contract with the SELPA or District provides Student A's special education services. As of [redacted content], 2018, NPS A was not an NPS under contract with the SELPA or District, yet the District continued to place Student A at NPS A. Throughout the [redacted content] of 2018 when Student A experienced at least five physical restraints and died following injuries from the last physical restraint, the District had no executed contract with NPS A to provide special education services to Student A.

each, he did not convene an IEP meeting or follow up with NPS A with any questions or concerns. After receiving what was, in fact, the fourth emergency report of a physical restraint of Student A in a 16-day span, Program Specialist 2 told OCR he intended to call an IEP meeting, but he did not do so before the fifth and final physical restraint of Student A, 20 days later, on [redacted content], 2018.

Regarding Student B, the District received at least 13 emergency reports and incident reports describing physical restraint and/or placement in Time Away and did not convene an IEP meeting to reevaluate Student B to determine if these repeated restraints and seclusions were denying a FAPE and/or indicated a need for additional or alternative services or interventions upon receiving any of the 13 reports. For example, the District received emergency reports and incident reports regarding two incidents on [redacted content], 2018, which described how Student B was physically restrained once and placed in Time Away twice, and did not call an IEP meeting. The IEP team met one month later for Student B's annual IEP on [redacted content], 2018, and there was no discussion of the use of emergency interventions on [redacted content], 2018. Instead, NPS B stated in the notes section of the IEP that there is not a history of behavioral incidents resulting in restraints. But NPS B staff had used emergency interventions on Student B prior to his annual IEP meeting, which suggested that Student B's BIP and/or IEP may require modifications. Despite this information, Student B's [redacted content] 2018 BIP did not change from his [redacted content] 2018 BIP.

After the [redacted content], 2018 annual IEP meeting, NPS B emailed Program Specialist 1 with nine emergency reports and incident reports describing physical restraints and/or Time Away involving Student B from [redacted content], 2018 to [redacted content], 2019. Despite these numerous reports, the District did not convene any IEP meetings to discuss these emergency interventions, determine whether an FBA or modifications to Student B's BIP and/or IEP were necessary, or assess whether the students required additional aids and services to reduce the use of restraints and seclusions and to provide a FAPE. It was not until the [redacted content] initiated an IEP meeting for Student B on [redacted content], 2019, that the District's Program Specialist 1 finally suggested an FBA because of Student B's continued behavior resulting in emergency reports and incident reports for emergency interventions.

Due to the restraints and time in Time Away, Student B did not receive educational services for at least 4.57 school days, yet the notes from his IEP meetings do not show that the IEP team discussed his time away from educational services, how this impacted his receipt of FAPE, and whether he may need compensatory services. Even without the complete amount of time missed for Student B and Student C, the reports revealed at least 4.57 school days missed for Student B and 5.77 school days missed for Student C. This information regarding missed school days combined with the fact that the students were experiencing multiple instances of the use of restraints, should have prompted the District to reevaluate if their placements were appropriate.

Regarding Student C, the District received 15 emergency reports and incident reports describing physical restraint and/or placement in Time Away and did not convene an IEP meeting upon receiving any of the 15 reports to reevaluate the student and whether he was being denied a FAPE. After Student C's [redacted content], 2018 annual IEP meeting, the District received one emergency report and incident report describing how NPS B physically restrained and placed Student C in

Time Away on [redacted content], 2018. The District did not convene an IEP meeting after receiving the [redacted content], 2018 emergency report and incident report; the IEP team did not meet until a month later on [redacted content], 2018, at the request of Student C's Educational Rights Holder and [redacted content]. The IEP team notes reflect that the IEP team discussed strategies for proximity, prevention, and taking breaks on [redacted content], 2018.

Between the [redacted content], 2018 IEP meeting and the triennial IEP for Student C on [redacted content], 2019, the District received seven additional emergency reports and incident reports describing physical restraints and/or the use of Time Away with Student C. Despite the number of emergency interventions to which NPS B subjected Student C by the time the IEP team met for the triennial, the IEP team did not discuss restraints or Time Away of Student C during the triennial IEP meeting on [redacted content], 2019. The [redacted content], 2019 IEP kept the Student C's [redacted content], 2018 BIP, which was nearly identical to the [redacted content], 2018 BIP, except for the addition of transportation as an antecedent for Student C's physical aggression. In other words, Student C's BIP, including staff response to his early escalation behaviors and problem behaviors, remained the same between [redacted content] 2018 and [redacted content] 2019, even though there had been at least eight emergency reports describing physical restraints and/or Time Away of Student C by [redacted content] 2019. This information should have led the District to reconvene the IEP team, reevaluate Student C, and determine if Student C's BIP or placement at NPS B required modification. It was not until the [redacted content] requested a meeting with the District regarding safety concerns at NPS B that the District adjusted behavioral interventions for Student C during an IEP meeting on [redacted content], 2019. Finally, after the District had received 13 emergency reports and incident reports describing physical restraint and/or Time Away, the IEP team agreed to add a 1:1 paraeducator who would remain at arm's length proximity to Student C.

The District told OCR that an IEP meeting was not required after each instance of NPS B staff using an emergency intervention with Student B or Student C because their respective BIPs already identified the problem behavior that resulted in the emergency intervention by NPS B staff. While Students B and C may not have been engaging in new behavior that resulted in emergency interventions, their repeated behaviors and related physical restraints and seclusions reported by NPS B to the District raised serious concerns about whether the existing behavioral interventions in their respective BIPs were effective. Behavior interventions for both Students B and C were finally updated during their respective [redacted content], 2018 IEP meetings, but not until each student had experienced numerous instances of physical restraint and significant time in the Time Away room.

OCR finds the District violated Section 504 because it had reason to believe that Student A's worsening behavior and the increasing use of restraint was an indication that the placement was not addressing his needs and the District failed to reevaluate him. Similarly, the District had reason to believe that both Student B's and Student C's worsening behavior and NPS B's increasing use of restraint and Time Away in response to this behavior were indications that their placements were not addressing their needs and yet the District failed to reevaluate them in a timely manner.

4. The District's Three Procedural Violations of Section 504 Resulted in Denials of a FAPE in Violation of Section 504 and Title II

The Section 504 regulation defines a FAPE to include providing a free appropriate education of special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met, and (ii) are "based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36." 34 C.F.R. § 104.33(b)(1)(i)-(ii). Based on the District's three violations of the procedural requirements for making placement decisions under Section 504 described above, OCR found that the District denied Students A, B, and C a FAPE in violation of 34 C.F.R. § 104.33(b)(1)(ii).

The District denied Students A, B, and C a FAPE because its collective procedural violations resulted in NPS staff making placement decisions for these students instead of District staff as part of a group of persons knowledgeable about the students, the meaning of the evaluation data, and the placement options. As a result, District staff failed to carefully consider critical information about NPS A's and NPS B's use of physical restraints and/or seclusion rooms with these students when making placement decisions, and failed to reevaluate these students when repeated reports from NPS A and B necessitated a timely reevaluation of their needs and whether their BIPs, IEPs, and/or placements at NPS A and B remained appropriate.

Furthermore, during their placements at NPS A and NPS B, Students A, B, and C were not receiving educational services during repeated periods of restraint and/or seclusion, and the evidence shows that the members of their IEP teams were not assessing how the time away from educational services impacted the student's receipt of a FAPE, or if other aids, services, or placement changes were needed to ensure a FAPE. For example, the members did not consider that as a result of restraints and seclusions at NPS B, Student B spent at least 4.57 school days outside the classroom, Student C spent at least 5.77 school days outside the classroom, and both likely missed much more instructional time due to incomplete recordkeeping. Nor is there evidence that the District staff members considered if compensatory services were needed to address the missed instructional time or rectify denials of a FAPE. In all of these ways, the evidence showed that the District placed three of its students in NPS settings and then repeatedly failed to ensure the provision of a FAPE.

B. Compliance Concerns

In addition to the Section 504 violations described above, OCR identified a compliance concern that the District did not document all restraints and seclusions for students with disabilities and therefore may have failed to identify all students subjected to restraint or seclusion or all incidents of restraint and seclusion, which may have resulted in students being denied a FAPE. OCR also identified a related concern that the District's inadequate documentation of restraints and seclusions and failures to ensure that the District had access to complete information about restraints and seclusions may mean that the District did not consistently give parents sufficient information to have a meaningful opportunity to participate on IEP teams for their children.

The Section 504 regulation at 34 C.F.R. § 104.35(c)(1) provides that in interpreting evaluation data and in making placement decisions, the District shall draw upon information from a variety of sources, which includes accurate emergency reports and incident reports of restraint and seclusion of its students, whether they are placed in District schools or other settings. The Section 504 regulation at 34 C.F.R. § 104.35(c)(2) further requires that the District have “procedures to ensure that information obtained from all such sources is documented and carefully considered.” Missing information from the District’s records raises concerns that the District lacks such procedures and cannot identify all restraints at District public schools, all restraints and seclusions in NPS settings, or all students subjected to restraint or seclusion.

While there was insufficient evidence to indicate that the six students subjected to restraint in District public schools were denied a FAPE, there was evidence that the documented restraints for those six students were not the only instances in which students were subjected to restraint at District public schools. For instance, OCR received information from a parent in the District that her child with disabilities was repeatedly physically restrained at a District elementary school. When OCR requested documentation related to this student, the District replied that it has no documentation regarding any physical restraints of this student. In addition, a staff member at another District elementary school reported to OCR that a police officer restrained a student at that school, and the District informed OCR that it has no record of this restraint incident.

OCR also found evidence that the District failed to identify all instances in which students placed in NPS settings were subjected to restraint or seclusion. For example, the behavior emergency reports, incident reports, and level sheets provided to OCR by the District and NPS B for Students B and C did not provide thorough records that would allow the District to identify all incidents of restraint or Time Away and determine whether Students B and C were being denied FAPE. For only one of the 17 reported physical restraints of Student B during the 2018-2019 school year did the District have information describing the duration of the physical restraint: the three-minute restraint on [redacted content], 2019. Similarly, only six of the 11 total incident reports describing Student B in Time Away were recorded, totaling 123 minutes. Based on the 2018-2019 level sheets that contain start and end times, Student B spent at least 1,715 minutes, or 4.57 school days, outside of the classroom. This number of missed school days is likely higher because there were five instances when level sheets indicated that Student B was outside of the classroom but did not specify the length of time, and the District did not provide all level sheets to OCR.

The documentation for Student C was similarly incomplete. The District has information describing the duration of only two of the 15 reported physical restraints of Student C during the 2018-2019 school year: the four-minute restraint on [redacted content], 2019, and the six-minute restraint on [redacted content], 2019. Student C spent 240 minutes in Time Away as documented in the 12 incident reports, but the incident reports also described processing time that was not recorded on any incident report. Based on the 2018-2019 level sheets that contain start and end times, Student C spent at least 2,163 minutes, or 5.77 school days, outside of the classroom. The number of missed school days is likely higher because there were 11 instances when level sheets indicated Student C was outside of the classroom but did not specify the length of time, and the District did not provide all level sheets to OCR.

OCR also received information from the [redacted content], indicating that Students B and C may have experienced more instances of restraint and Time Away during the 2018-2019 school year than those listed on the emergency reports and incident reports that the District provided to OCR.

Because of the extensive missing information from the District's records, OCR identified a compliance concern that the District may not know all the students who were restrained or secluded or every instance of restraint or seclusion during the 2017-2018 and 2018-2019 school years and whether additional students were denied FAPE beyond Students A, B, and C. In addition, the District's inadequate documentation of restraints and seclusions and failures to ensure that IEP teams had access to complete information about restraints and/or seclusions of students raises a concern that the District did not consistently give parents enough information to have a meaningful opportunity to participate on the IEP teams for their children.

C. There is insufficient evidence that the six students restrained in District public schools were denied a FAPE in the 2017-18 and SY 2018-19 school years

Regarding the six students that the District did identify as having been subjected to restraint in District public schools, OCR found insufficient evidence that those six students were denied a FAPE. OCR found that the six students were restrained a total of 12 times during the 2017-2018 and 2018-2019 school years and four of these six students were identified by the District as having a disability when the restraints occurred. The restraints were used for a brief and reasonable amount of time in response to emergency situations involving a student hitting, kicking, or punching staff/others, throwing objects, or trying to run into the street. School staff were following the provisions in the students' IEPs and District policies and procedures by first attempting to use de-escalation strategies and using restraint only as a last resort. Furthermore, the six students in District school placements experienced a small number of restraints; four of the six students experienced only one instance of restraint across the two school years OCR reviewed.

For the four restrained students identified as having a disability, the District scheduled IEP meetings within two days of the restraints to determine if the students' BIPs needed to be revised. For three of these four students, the IEP teams reconvened after the restraint incidents and revised the student's BIPs and IEPs as they deemed appropriate. As for the two restrained students who were not identified as having a disability, the District evaluated these students for special education services after they were restrained one time and they were not found eligible for services. One of these two students experienced additional restraints and thereafter, the District reassessed this student for special education services, determined the student qualified for services, and implemented an IEP for the student. OCR's investigation did not reveal any concerns from the parents of the six students in District school placements about the restraints they experienced.

VI. Resolution Agreement

The enclosed Resolution Agreement under Sections 303(b) of OCR's *Case Processing Manual (CPM)* will address the following violations. The preponderance of the evidence demonstrates District violations of Section 504 and Title II that denied a FAPE to Students A, B, and C by: (1)

failing to ensure that the District staff members making placement decisions for these students had access to and carefully considered information obtained about the use of physical restraint and/or Time Away rooms in violation of 34 C.F.R. §104.35(c)(2); (2) failing to ensure that the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options made decisions regarding their placements and behavior interventions, as required by 34 C.F.R. §104.35(c)(3); and (3) failing to reevaluate Students A, B, and C to determine whether the repeated use of restraint and seclusion had affected their receipt of a FAPE and what additional aids and services, if any, were appropriate to reduce the use of restraints and seclusions and to provide a FAPE as required by 34 C.F.R. §104.35(b).

Additionally, pursuant to Section 302 of the *CPM*, the enclosed Resolution Agreement will resolve OCR's compliance concern that the District did not document all restraints and seclusions, and therefore may have failed to identify all of its students who were restrained or secluded or all incidents of restraint and seclusion for a given student, and that such failures may have resulted in students being denied a FAPE. The Resolution Agreement also will address OCR's concern that the District's recordkeeping deficiencies, coupled with District staff not having access to complete information about restraint and seclusion, may have left parents with insufficient information about the use of restraint or seclusion with their children to have a meaningful opportunity to participate on their IEP teams. To resolve these compliance concerns, the District will develop, implement, and monitor a process for creating, maintaining, and sharing with IEP teams, including parents, complete and accurate records about the use of restraint and seclusion of District students, including those placed at settings outside the District.

To resolve the violations and concerns identified in this letter, the Resolution Agreement requires the District to:

- create and revise policies for restraint and seclusion, including that the use of such interventions on students with disabilities is subject to Section 504, Title II, and their implementing regulations;
- distribute the revised policies to parents/guardians, faculty, administrators, staff, and any NPS employees providing special education services to District students;
- develop and implement a process and form to create and maintain records about the use of restraint and seclusion of District students, including District students placed at any NPS;
- provide training on the policies for restraint and seclusion and the FAPE-related requirements of the Section 504 regulation to all teachers and administrators and other District staff who are members of IEP and Section 504 teams for students with disabilities;
- ensure that staff at NPS sites where District students are placed have received training that addresses the FAPE-related requirements of the Section 504 regulations;
- after providing proper written notice to Student B's Educational Rights Holder, convene a properly constituted team to determine what remedial and compensatory services are appropriate as a result of the past use of restraint or seclusion and develop a plan for timely implementation;
- conduct a review to identify any District students, not previously reported to OCR, who were restrained or secluded by staff at nonpublic schools from 2019 to the present,

develop responsive remedies based on this review, and ensure that the responsive remedies are implemented for these students; and

- implement a program to monitor the use of restraint and seclusion for District students in District schools and any NPS settings to ensure compliance with Section 504 and Title II and report to OCR regarding the effectiveness of that program.

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing this compliance review as of the date of this letter. When fully implemented, the Resolution Agreement is intended to address the violations and compliance concerns identified by OCR in this letter. OCR will monitor the District's implementation of the Resolution Agreement until OCR determines that the District is in compliance with its terms and the Section 504 and Title II obligations at issue in this compliance review.

VII. Conclusion

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

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because the individual has filed a complaint with the District or with OCR, or participated in any complaint resolution process. If this happens, the individual subjected to such retaliatory treatment may file a complaint alleging retaliation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive 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.

If you have any questions regarding this letter, please contact Sewali Patel, Civil Rights Attorney, at (415) 486-5380 or sewali.patel@ed.gov.

Sincerely,

/s/

Zachary Pelchat
Regional Director

Enclosure: Resolution Agreement

cc: Jan Tomsy, Counsel for District (email only)
Laura Juanitas, Associate Superintendent, Student Support Services for the District (email only)