

Colorado Department of Education  
Decision of the State Complaints Officer  
Under the Individuals with Disabilities Education Act (IDEA)

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**State-Level Complaint 2019:502**

**El Paso 8, Fountain-Fort Carson**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on January 16, 2019 by Parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> and the Administration of the Protection of Persons from Restraint Act (PPRA).<sup>2</sup>

Based on the written Complaint, the SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>3</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

Pursuant to the PPRA, the Colorado Department of Education has authority to investigate allegations concerning the misuse of restraint or seclusion that occurred not more than one year from the date the original complaint was filed.

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate alleged violations of IDEA that occurred not more than one year from the date the original complaint was filed.

Accordingly, this investigation will be limited to events that transpired no earlier than January 16, 2018 to determine whether or not a violation of the PPRA or IDEA occurred. Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

**SUMMARY OF COMPLAINT ALLEGATIONS**

Subject to my jurisdiction under 1 C.C.R. 301-45, the following allegation:

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.*

<sup>2</sup> The Rules for the Administration of the Protection of Persons from Restraint Act are codified at 1 C.C.R. 301-45, 2620-R-1.00 *et seq.* Hereinafter, the PPRA Rule will be cited as PPRA Rule 1.00 (1).

<sup>3</sup> Hereinafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

1. Whether School District improperly restrained (seclusion) Student on January 17, 2018, specifically by:
  - a. Administering the restraint outside of an emergency situation;
  - b. Failing to use less restrictive alternatives prior to the use of the restraint;
  - c. Failing to have Student reasonably monitored during the restraint;
  - d. Failing to use it only for the period of time necessary;
  - e. Failing to ensure that staff utilizing the restraint were properly trained;
  - f. Failing to comply with the documentation and notification requirements;
  - g. Failing to ensure a review process was established at the time of the restraint and that the School District conducted the proper review.

Additionally, I have determined that the Complaint raises the following allegations subject to my jurisdiction under 34 C.F.R. § 300.153(b) of the IDEA.

2. Whether Student has been denied a free appropriate public education (FAPE) because the District:
  - a. Failed to properly implement Student's IEP between January 16, 2018 and January 31, 2018, specifically as follows:
    - i. Failed to implement the positive behavioral interventions set out in Student's Behavioral Intervention Plan between January 16, 2018 and January 31, 2018 consistent with 34 C.F.R. § 300.323;
    - ii. Failed to implement Student's Health Plan January 17, 2018 consistent with 34 C.F.R. § 300.323.
  - b. Failed to review and revise Student's IEP, specifically as it pertains to Student's Behavioral Intervention Plan consistent with 34 C.F.R. §300.324(b);
  - c. Failed to provide Parents meaningful input in the development of Student's IEP, specifically the IEP meeting held February 22, 2018 consistent with 34 C.F.R. §§ 300.321, 300.322 and 300.324(a)(1)(ii).

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>4</sup> the SCO makes the following FINDINGS:

#### **Background**

1. At all times relevant to the Complaint, Student was a kindergartner and resided within District boundaries. Student has been identified as a student with developmental delay eligible for special education and related services. To address Student's needs, Student has an Individualized Education Program (IEP), a health care plan (HCP) and a behavioral intervention plan (BIP). *Exhibits 5, 6 & 9.*
2. The impetus for filing this complaint arose out of an incident that occurred on January 17, 2018. According to Mother, she went to Elementary School early in order to pick up Student for a private appointment. Upon her arrival in the office area, she heard Student screaming. Initially, she states she was not concerned as she was aware that he has difficulties with transitions. After about 15 minutes,

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<sup>4</sup> The appendix, attached and incorporated by reference, details the entire record.

Mother states that she was called to the back offices by the School Psychologist. She states when she arrived at the hallway where Student was located, she observed Paraprofessional sitting in the entryway outside one of the office rooms ("Calm Down Room"). According to Mother, the door was "nearly shut" and Student was alone in the room, behind the door sobbing and screaming. *Complaint p. 5, Exhibit 2 p.1; Interview Mother*. Mother's position is that this incident constitutes seclusion and should have been handled as such. District denies that the incident in question meets the definition of seclusion. Their position is that Student requested to go to the room and at no point requested or tried to leave the room.

3. According to Paraprofessional and Kindergarten Teacher, the situation that led to Student being in the Calm Down Room began during math class. Student was using math manipulatives (thin round counters) to add two numbers together in order to equal ten. Student began throwing his math manipulatives and putting them in his mouth. Kindergarten Teacher stated that he was yelling "I'm bad." Paraprofessional tried to redirect him by prompting him to take a break. Student swiped more math manipulatives onto the floor, threw them at other students, and attempted to kick another student and Kindergarten Teacher. At some point in time during this escalation, Student yelled "I know, it's my last chance, I want to go to the room." According to Kindergarten Teacher, she recalled Student running into the hall yelling "I want to go to the room." According to Paraprofessional, Student "tried to grab whatever he could. That's when I grabbed his hands and walked him to the room." Paraprofessional believed he wanted to go to the room and stated he willingly walked to Calm Down Room. Upon entering the room, Paraprofessional removed a desk and chair, the only two things in the room, while Student stood and watched. She then proceeded to sit in a chair outside the room in the entryway while Student walked around, yelled and ultimately sat down and took off his shoes and socks. *Exhibits O pp.2-4, V1, p. 14; Interviews with Kindergarten Teacher and Paraprofessional*.

4. During the IEP meeting held January 22, 2018, five days after the incident, Paraprofessional described the situation as follows:

"... on this date, is [sic], I put my foot inside the door and just pulled the door to. And he continually tries to either step on my foot or kick my shin or hit my hand. And when he starts that, I pull my foot just a hair out more and close the door a hair smaller than my foot, and I continue to reiterate the words mom wrote on this little picture card, his reward card and I said, "this is what we're waiting to see, so we can make it back to the classroom and start making good choices." And it's: quiet mouth, quiet hands, making good choices, and stay in the classroom, we just reiterate.... The room is clear. We have to clear it. Because we used to keep a chair and desk in there so he could show me how a kindergartener is [sic] sits with quiet mouth, quiet hands, but lately when he goes in there, he proceeds to take the desk and the chair and throw it. So we removed those." *Exhibit V1, p. 15*.

5. During an in-person interview with Paraprofessional, the SCO was shown the Calm Down Room.<sup>5</sup> Paraprofessional demonstrated her location in relation to the door and Student. Paraprofessional was sitting outside the room and in the middle of the entryway. She was positioned so her foot was in the doorway and she was looking into the room. Paraprofessional described that when Student tried to step on her foot and kick her, she would partially close the door. She stated that the time the door was partially closed was brief because as soon as Student stopped trying to step on her foot or kick her shin she pushed it open. Despite Student ceasing his attempts to kick or step on her

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<sup>5</sup> At the time of the interview, the Calm Down Room was converted to an office for a school officer.

foot, Paraprofessional remained seated in the doorway. Paraprofessional reported that when Student was sitting and removing his shoes and socks, he was inside the room about one and one-half feet from where she sat and in her line of sight. She stated she continued to communicate with him throughout his time in the Calm Down room prompting his behavior. *Interview Paraprofessional*.

6. According to School staff, including School Psychologist, Special Education Teacher, Paraprofessional and Kindergarten Teacher, it was sometimes necessary for Student to take breaks when he was displaying protest or avoidant behaviors. Those breaks included but were not limited to Student being allowed to remain in the classroom while the other students were removed, Student going into the hallway to walk, scooter or engage in some other activity, Student utilizing the sensory room and more recently utilizing the Calm Down Room. Paraprofessional noted that this location became one of the options utilized because Student chose it. The Behavior Intervention Plan, while ambiguous, does contemplate Student utilizing different environments to cool down, or complete work. In this situation, the SCO finds that District provided Student an opportunity to calm down according to his BIP. Based on these facts, the SCO finds that Student was not placed in the room as contemplated by the rules. Student chose where he wanted to calm down and went there of his own accord. He was not told to go there nor was he taken there. While there is no dispute that Paraprofessional was sitting in the doorway, Student was not placed alone in the room to prevent involuntary egress.

7. The SCO next considers Mother's allegation that District failed to implement the positive behavioral interventions set out in Student's BIP between January 16, 2018 and January 31, 2018. The SCO finds that, during this time period, District implemented the positive behavioral interventions as set out in the BIP for the reasons stated below.

8. According to Student's BIP, Student is likely to "display protest or avoidant behaviors when issued a directive for a non-preferred task, when redirected, or when asked to transition to a non-preferred activity or location." Some of those behaviors identified screaming, falling to the floor, yelling or saying "no," frequently, throwing objects, may include moving his arms in hitting motions. *Exhibit 5, p.1*.

9. The setting event strategies listed include Student having a consistent schedule, access to a visual schedule, access to 2 or 3 specific visual rules addressing behavioral needs, access to consistent routines, having familiar adults in proximity to prompt and give behavior specific praise, use of concrete "First, Then" language for non-preferred tasks, and scheduled structure movement breaks throughout the day." The antecedent strategies include prompting [Student] with a question to help him think about what he is supposed to be doing..., providing [Student] a specific job during transitions..., pairing of a preferred activity (e.g. a game) with a non-preferred activity (e.g. play game, then potty, game, pack up & game, home), providing peers with verbal and/or tangible praise to encourage Student to display same expected behaviors. Some of the Behavioral Teaching Strategies include having Student practice simple coping strategies, having Student identify and state his feelings, using consistent language to teach, praise, and prompt behavior, prompting Student to use "nice hands." *Exhibit 5, p.2*.

10. First, Kindergarten Teacher credibly described Student's needs and the supports he required. She not only attended an IEP meeting as he transitioned from Preschool to Kindergarten, but she also attended IEP meetings during the Fall of 2017. Kindergarten Teacher described the visual supports that were provided to Student, including a large classroom schedule and an individual schedule Student could carry around and change according to the day. Additionally, she utilized photos of Student to help

focus him on the expected behavior; e.g. photo on the desk of him working and photos on the wall with him doing a good job. To assist with transitions, Student was delegated jobs, including line leader and calendar. Kindergarten teacher described how the team regularly provided Student choices, used consistent language regarding expected behavior that was provided by Mother, used first then language as well as a visual board showing the tasks, provided Student with preferential seating and redirected him when escalated. As it pertains to movement /sensory breaks, with the exception of the day of the incident, the SCO finds that during this two week period, School provided Student with at least one sensory break as contemplated since the beginning of the school year. *Interview Kindergarten Teacher.*

11. Similarly, Paraprofessional was able to describe Student's needs and the supports he required. She attended an IEP meeting shortly before Student started school where the IEP team discussed his needs and how best to support him. Paraprofessional corroborated much of what Kindergarten Teacher reported. She discussed the use of the various visuals Student utilized, his access to manipulatives, the consistent language they used to support Student and prompt appropriate behavior, the use of first then language and providing choices. Additionally, Paraprofessional described that a variety of sensory breaks were provided including the use of taking a walk in the hallway, riding a scooter, jumping on a trampoline, and using the Calm Down Room. As it pertained to the Calm Down Room, Paraprofessional stated that the room was only utilized a few times as it was something Student newly "discovered" while on one of their walks. While Student's IEP provided that Student would receive intermittent adult support as needed, Paraprofessional was dedicated to supporting him a significant portion of each day. The level of adult support available to prompt, praise and give support is significant. *Interview Paraprofessional.*

12. School Psychologist and Special Education Teacher were also able to describe the interventions and strategies that they not only utilized but also observed being utilized by both by Kindergarten Teacher and Paraprofessional. Additionally, the SCO reviewed examples of the types of visuals utilized to support Student. *Interviews with School Psychologist and Special Education Teacher.*

13. The SCO next considers Mother's allegation regarding the implementation of Student's Health Plan. Mother's concern hinges on the requirement that Student's HCP requires line of sight supervision. She alleges that when she entered the Calm Down Room, Student was behind the door out of the Paraprofessional's view. District asserts that Paraprofessional was able to effectively monitor Student and that he was in line of sight at all times.

14. Student's HCP provides for both a G-Tube care plan and a seizure care plan. The plan as it pertains to Student's G-Tube requires that Student be monitored closely in the event Student pulls his G-Tube out. Regarding the seizures, Student has what is called absence seizures. These seizures produce a brief loss of awareness. The plan states that Student will immediately return to full awareness after one of these episodes. The HCP also has a plan for emergency treatment for seizures. The SCO finds that while the plan requires a provision that Student be monitored closely, there is no requirement that he be in constant line of sight. *Exhibit 9.*

15. As described in FF # 4 and FF #5, Paraprofessional was sitting right outside the room the entire time and in communication Student. There is no evidence to support that Student was left unmonitored during this incident. Accordingly, the SCO concludes that District implemented Student's Health Care Plan consistent with its requirement to closely monitor student.

16. The SCO next address Mother's allegations pertaining to her concern that District failed to review and revise Student's BIP and that District failed to provide meaningful parent participation. Right after the incident on January 17, 2018, Mother requested a meeting to address what she had observed. District quickly convened an IEP meeting on January 22, 2018 to discuss her concerns. *Interviews with Mother, Assistant Director and Assistant Principal.*

17. The IEP team reviewed what transpired on January 17, 2018, including receiving a verbal report from Paraprofessional, and discussed next steps. During the meeting, District acknowledged that their communication with Mother and their documentation on the Daily Communication Log was not adequate, especially as it pertained to Student needing to leave the classroom due to escalated behaviors and his access to sensory breaks. District proposed that "moving forward, time will be documented when [Student] leaves the classroom and time will be documented when he returns to the classroom..." Based on the transcript, it is apparent that the expectation was that the time period out of the classroom would be documented by two people. They further concluded that "the team will document details on future incidents of when [Student] leaves the classroom," *Exhibit 6, p. 68.* The IEP team discussed conducting a Functional Behavioral Assessment and inviting the District's Autism Team to observe and provide recommendations. District issued the applicable consent documents and Mother signed them that same day. The IEP team also planned to review and revise the Antecedent Behavior Consequence (ABC) tracker as part of the FBA's data collection.

18. On January 31, 2018 Mother removed Student from Elementary School. As a result, Student only attended school for six days between the January 22, 2018 IEP meeting and his withdrawal.

19. District convened an informal meeting on February 5, 2018 to discuss Mothers concerns in order to get Student back in school. In attendance were Special Education Director, Assistant Principal 2, Mother, Student's Case Manager, Individual Advocate and Student's Advocate. *Exhibit V; Interviews with Special Education Director, Mother and Student's Advocate.*

20. After a lengthy discussion, the meeting resulted in a number of recommendations and suggestions to be implemented to address Mother's concerns. Among these steps were 1) an agreement regarding where sensory breaks were to take place; 2) a detailed plan for visually presenting options for sensory breaks 3) steps to be taken if Student's behavior escalated; 4) steps to take if Student refused to leave the classroom; 5) a commitment that staff would not utilize seclusion; 6) that two adults would monitor Student anytime Student became escalated; 7) if feasible, the door to the Calm Down Room where the incident happened would be removed; 8) use of strategies to help de-escalate Student; 9) if the Calm Down Room was utilized, at least one staff member would remain in the room until Student met expectations or the staff member was at risk of harm; 10) identified other rooms where Student could calm down; 11) development of a communication plan for when Student's escalations require him to leave the classroom or in the alternative, the class needs to evacuate; and 12) reiteration of the importance of communicating and a suggestion to try mediation. *Exhibit E, p.1, Exhibit V2, pp. 1-46; Interview Special Education Director, Mother, Student's Advocate.*

21. Following that meeting, District attempted to convene an IEP meeting to "consider the suggestions and recommendations as well as adjust, as needed, the IEP based on team input." *Exhibit I, p. 75.* Student's advocate responded with a lengthy e-mail highlighting their displeasure regarding the manner in which District was responding to the January 17, 2018 incident. She concluded that "[t]he parents are considering next steps, but yet another meeting which will likely be followed up by more

vague written statements, with a school district refusing responsibility for what occurred, is not one of them.” *Exhibit 1, p.76.*

22. Ultimately, the District scheduled the IEP meeting for February 22, 2018 (February 2018 IEP) and provided proper notice to Mother. Despite the e-mail stating that Mother and Student’s Advocate would not attend another meeting, they did. Mother attended the meeting in person and Student’s advocate by phone. *Interviews Mother, Student’s Advocate, Special Education Director and Assistant Director.*

23. Mother alleges that District failed to provide her meaningful parent input at this meeting. Based on the following facts, the SCO disagrees.

24. As previously indicated, the focus of the February 22, 2018 IEP meeting was to review the recommendations and suggestions discussed during a lengthy informal meeting held February 5, 2018. Throughout the meeting, Special Education Director continuously sought input from Mother and Student’s advocate. For example, Special Education Director began the meeting by proposing to add the use of incompatible questions to the BIP when Student was escalated as was suggested by Mother. Special Education inquired of Mother “[d]oes that sound okay?” Mother responded “yes.” Special Education Director proceeded to review the list of proposals discussed at the informal meeting. Following up each recommendation with asking “[t]houghts on that,” “How is that for you? Is that sort of what you had pictured?,” “was that correct?” and other various ways of trying to get Mother’s opinion on the strategies to be implemented. *Exhibit V3, pp 1-27; Interviews Mother, Student’s Advocate, Special Education Director, Assistant Director and Assistant Principal 1.*

25. Despite these attempts to solicit feedback, Mother and Student Advocate chose to participate minimally. Student Advocate had, in fact, stated early in the meeting in response to Special Education Director’s request for input “[s]o, we’ll just wait ‘til the end. Do everything, [Special Education Director] and then we’ll ask questions and make and talk about it. Okay? But go ahead and go through everything first.” Special Education Director continued to solicit feedback from both Mother and Student’s Advocate. In fact, at the end of presenting all the recommendations, Special Education Director asked “I believe that that really does kind of, outline what we discussed in the informal meeting, so, I guess it’s time for your feedback so that we can get parent input and figure out what we may need to still change or adapt.” *Exhibit V3 p. 12.* Student Advocate requested District finalize the IEP and they would submit their input after reviewing the finalized IEP. Student Advocate even requested Special Education Director to use her administrative privileges to append Mother’s documentation once she received it. *Exhibit V3, p.13.* Although Mother ultimately e-mailed a statement to Special Education Director during the meeting, it was not directly responsive to the plan the IEP team was actively working on at the meeting.

### **CONCLUSIONS OF LAW**

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

**Conclusion to Allegation 1: The January 17, 2018 incident did not constitute seclusion when Student requested to go to the room to calm down, was not alone in the room, and was not physically prevented from leaving the room.**

Restraint is defined as any method or device used to involuntarily limit freedom of movement, including but not limited to bodily physical force, mechanical devices, chemicals, and seclusion. *PPRA Rule 2.00( 8)*. Seclusion is defined as the placement of a student alone in a room from which egress is involuntarily prevented. *Rule 2.00 (9)*. The rules allow for the use of a restraint only in emergency situations. *Rule 2.01(1)*. When a restraint is used, School staff and District have a duty to comply with notification and documentation requirements pursuant to *Rule 2.02*.

As a practical matter, the SCO notes that this Complaint was filed nearly a year following the incident, placing the allegation just within the one-year jurisdictional limit of the complaint process. Given the amount of time that has passed, witnesses understandably had difficulty recalling the circumstances and events surrounding this incident with sufficient detail. As a result, the evidence in this case is less substantial and reliable than it may have been had the Complaint been filed closer in time to the incident at issue.

In this case, the primary issue is whether the incident that occurred on January 17, 2017 meets the definition of seclusion. For the reasons explained below, the SCO concludes that the incident on January 17, 2018 does not meet the definition of seclusion. First, Student was not “placed” in the room but requested to go to the room to calm down. Student became escalated during a math class. During his escalation he was screaming, throwing math manipulatives, putting the manipulatives in his mouth, swiping at objects and attempting to kick a peer and attempting to kick a teacher. Paraprofessional tried to redirect Student without success. Student yelled “I know its my last chance, I want to go to the room.” Soon after, Student left the classroom with Paraprofessional and willingly went to the Calm Down room.

Second, Student was not alone in the room. Upon entering the calm down room, Paraprofessional removed a chair and desk while Student stood and watched. She then sat down on a chair just outside the room in the entryway and talked with him utilizing verbal prompts to help him calm down. Paraprofessional remained at the doorway where she was interacting with Student for the entire incident. Given Paraprofessional’s presence at the doorway, combined with her ongoing communication trying to help him calm down, Student was not alone in the room. Given the totality of the circumstances, the SCO finds and concludes that the incident on January 17 did not constitute seclusion as defined by the PPRA. Because this incident did not constitute seclusion, the District was not obligated to comply with the documentation and review requirements set forth in the PPRA.

**Conclusion to Allegation 2 (a)-(b) : District implemented the positive interventions set out in Student’s Behavioral Intervention Plan and Health Care Plan.**

Mother alleges that District failed to implement positive interventions set out in the Student’s Behavioral Plan.

Under IDEA, local education agencies are required to provide eligible students with disabilities a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student’s unique needs and provided in conformity with an individualized education program developed according to the Act’s requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. A public agency, here the District, must implement a student’s IEP in its entirety. 34 C.F.R. § 300.323(c). To satisfy this obligation, the District must ensure that each teacher and service



provider responsible for implementing a student's IEP is informed of "his or her specific responsibilities related to implementing the child's IEP" and "the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 C.F.R. § 300.323(d)(2).

In addition to informing teachers of their responsibilities regarding a student's IEP, the District must ensure that the IEP is being implemented. This obligation includes ensuring that all identified services are being consistently provided. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19.

Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007)(failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003)(failure to implement "essential" element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)(*de minimis* failure to implement IEP does not deny FAPE).

The SCO concludes that District utilized a number of the interventions listed in the BIP during the eight day period that this allegation covers. Moreover, District was in the process of identifying additional ways to support student. While it is clear that District needed to review and revise Student's BIP, District implemented many of the components of the BIP as written. District credibly described the supports and interventions they utilized. These supports included a visual schedule that was visible to all children and a visual schedule that Student could carry with him. Kindergarten Teacher reported that photos were posted to the wall showing Student doing a good job. Paraprofessional, a familiar adult, helped prompt him and give him behavior specific praise. Consistent language was used that was recommended by Mother. Student was provided choices and given jobs to help with transitions such as line leader. Given the short time period in question and that it occurred over a year ago, it is impossible for District staff to be able to recount each day. However, District credibly described the supports in place and how they were utilized. That, combined with what was discussed during the meeting, demonstrates that District was implementing Student's BIP.

As for the Health Plan, SCO concludes that the Health Plan does not require line of sight supervision. The HCP only requires close monitoring. During the seclusion, the SCO finds that Paraprofessional was nearby the entire time, was constantly communicating with Student back and forth, and had eyes on him much of the time. Consequently, the Paraprofessional provided close supervision on January 17, 2018, in accordance with Student's HCP.

**Conclusion to allegation 2(b): District did not fail to review and revise Student's Behavioral Intervention Plan.**

Mother's allegation arises from a concern that Student's BIP was not reviewed and revised during the Fall of 2017. Because this Complaint was not filed until January 16, 2019, this concern is beyond the one year jurisdiction of the state complaint process. Accordingly, the investigation into this

allegation is limited to the two-week period between January 16 and January 31, 2018, the date Mother withdrew Student from School.

The IDEA provides that school districts must review each child's IEP "periodically, but not less than annually." 34 C.F.R. § 300.324(b)(1)(i). Under the IDEA, each school district has an affirmative duty to ensure that a child's IEP team meets no less than annually to review and revise the IEP. 34 C.F.R. § 300.324(b). In developing an IEP, the IDEA requires the use of "positive behavior interventions and supports" in the case of a student with a disability whose "behavior" impedes his learning or that of others." 34 C.F.R. § 300.324 (a)(2)(i).

After the incident on January 17, 2018, District and Mother discussed the need to review and revise Student's BIP so that it more accurately reflected his behaviors and provided appropriate detailed interventions to support him. The SCO concludes that as of January 22, 2018, District took steps to initiate an FBA evaluation in order to review and revise Student's BIP, including receiving Mother's signed consent that same day. Not only was District in the process of discussing the components of the FBA, they were also in the process of scheduling an observation by the Autism Team to get additional recommendations for ways to support Student.

Unfortunately, Mother removed Student from Elementary School on January 31, 2018 and has not made him available to District since. Any failure to review and revise Student's BIP cannot reasonably be attributed to District when Parent has failed to make him available for the evaluation upon which such revisions would be based.

**Conclusion to allegation 2(c): District Provided Meaningful input in the development of Student's IEP, specifically the IEP meeting held February 22, 2018.**

The crux of Mother's allegation regarding parent participation is that District failed to provide Mother's position, both her verbal statements and written statements, in the IEP document under Parent Input.

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). Thus, the creation of an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" must involve a "fact-intensive exercise . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

To that end, the IDEA requires that parental participation be meaningful, to include carefully considering concerns for enhancing the education of the child. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). Meaningful consideration occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful consideration does not require that a school district

simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 4/22/18).

Based on the following facts, the SCO concludes that Parent was provided with a meaningful opportunity to participate in the development of Student's IEP. The February 22, 2018 IEP meeting provided Mother with significant opportunities for her to suggest, comment, and collaborate on the supports and interventions to be used by Elementary School pending the results of the FBA and observation by Autism Team. Many of Mother's recommendations were not just considered but were accepted and incorporated into the meeting notes as set out in FF #24. To illustrate: 1) District incorporated Mother's suggestion that two people document whenever Student leaves the classroom due to a behavior; 2) the BIP was modified to include the use of "incompatible questioning" to the February 28, 2018 BIP as recommended by Mother; 3) District removed the door to the Calm Down Room as requested by Mother; 4) District incorporated many of her suggestions regarding interventions and strategies to use when Student is escalated; 5) while District and Mother did not agree on the definition of seclusion, District agreed to define and document the practices that Mother objected to and agreed to not subject Student to those practices unless there was an emergency and 6) District modified the Daily Communication Log as requested by Mother. If there was any lack of parent participation, it can only be attributable to Parent's and Student's Advocate's unwillingness to participate fully. Accordingly, the SCO concludes that the February 22, 2018 meeting provided Mother with meaningful participation.

The SCO notes that Mother and Student's Advocate's reluctance to provide input during the IEP team meeting until after it was finalized, impeded rather than supported parent's participation. The IEP meeting is an opportunity for all team members to sit down and discuss ways to support student and develop a plan that meets his needs. It requires that all parties are able to hear what the needs are, discuss and provide feedback on proposals and try to finish with a plan that is reasonably calculated to enable a child to make progress. If Parent only responds after the document is finished, the IEP does not have the benefit of Mother's ideas, suggestions, and feedback.

#### **RECOMMENDATIONS UNDER PPRA/REMEDIES UNDER IDEA**

As the SCO found that the incident on January 17, 2018 does not constitute a seclusion, the District was not obligated to comply with any of the requirements pursuant to 1 C.C.R. 301-45.

As it relates to IDEA requirements, the SCO finds there are no violations. Accordingly, there are no remedies pursuant to IDEA.

#### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 19<sup>th</sup> day of March, 2019.

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Jacqueline Esquibel  
State Complaints Officer

## Appendix

### Complaint

Exhibit 1	Audio Files
Exhibit 2	Statements Regarding January 17, 2019 Incident
Exhibit 3	Communications
Exhibit 4	Student's Daily Logs
Exhibit 5	Student's Behavioral Intervention Plan
Exhibit 6	Student's May 24, 2017 Individual Educational Program
Exhibit 7	Transcripts of Meeting with School District
Exhibit 8	E-mail Communications
Exhibit 9	Student's Health Care Plan
Exhibit 10	Copy of the Rules for the Administration of the Protection of Persons from Restraint Act
Exhibit 11	Unsafe in the Schoolhouse: Abuse of Children with Disabilities, The Council of Parent Attorneys and Advocates, Inc.
Exhibit 12	District Logs

### Response

Exhibit A	Individualized Educational Programs in Effect for the 2017-2018 School Year, Including Any Amendments, Meeting Notes, and IEP Snapshots, if any.
Exhibit B	Evaluations, Assessments or Data used to Develop Student's IEPs for the 2017-2018 school Year.
Exhibit C	All Prior Notices Issued During the 2017-2018 School Year.
Exhibit D	All Notices of Meetings for any IEP Meetings held Between January and February 2018.
Exhibit E	All Prior Written Notices Issued during the 2017-2018 school year.
Exhibit F	Individualized Education Program Progress Reports for the 2017-2018 School Year, Including Progress Monitoring Conducted by the District During the 2017-2018 School Year.
Exhibit G	All Service Logs for the 2017-2018 School Year.
Exhibit H	Enrich Audit Log and Communication Log for the 2017-2018 School Year.
Exhibit I	Correspondence Among District Staff, School Staff, Parents Regarding Complaint Allegations
Exhibit J	Any District and/or School Policies Pertaining to the Complaint Allegations
Exhibit K	Name, Title and Contact Information of District and School Staff Members Who Have Knowledge of the Facts Underlying the Complaint Allegations.
Exhibit L	A Copy of the District's Annual Restraint Review for the 2017-2018

### Reply

Exhibit 13	Copy of Visual Schedule, Restraint and Seclusion Defined Terms, February 28, 2019 BIP
Exhibit 14	Statements from Mother, School Psychologist, Kindergarten Teacher and Paraprofessional
Exhibit 15	Progress Report Dated December 15, 2017
Exhibit 16	ABC Tracker Dated March 10, 2016 through April 7, 2016
Exhibit 17	Parent's Summary of Statements Regarding Incident on January 17, 2018

### Supplemental Exhibit – Visuals

**Interviews with:**

Mother  
Student's Advocate  
Special Education Director  
Special Education Teacher  
Paraprofessional  
Kindergarten Teacher  
Assistant Director  
Assistant Principal 1  
School Psychologist  
School Secretary  
Private BCBA