

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA) and the Protection of
Persons from Restraint Act (PPRA)

**State-Level Complaint 2019:567
San Juan BOCES**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on October 9, 2019 by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

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 300.153², as well as the Protection of Persons from Restraint Act (PPRA), found at 1 C.C.R. 301-45³. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

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.

Pursuant to 1 C.C.R. 301-45, CDE has the authority to investigate alleged violations of the PPRA that occurred not more than one year from the date the original complaint was filed.

Accordingly, this investigation will be limited to the period of time from October 9, 2018, through October 9, 2019, for the purpose of determining if a violation of IDEA and/or PPRA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² Hereafter, 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).

³ Regulations for the Protection of Persons from Restraint Act are codified at 1 CCR 301-45, 2620-R-1.00, *et seq.*

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the BOCES violated the PPRA by improperly restraining Student on September 25, 2019, specifically by:

1. Physically restraining Student using more force than necessary, consistent with 2620-R-2.02(2)(c)(i);
2. Physically restraining Student in such a way that placed excessive pressure on Student's chest, consistent with 2620-R-2.02(1)(a)(ii);
3. Mechanically restraining Student with a physical device used to involuntarily restrict his movement or the normal function of his body, consistent with 2620-R-2.00(8)(b) and 2620-R-2.02(2)(b);
4. Failing to comply with the documentation and notice requirements, consistent with 2620-R-2.04;
5. Failing to comply with the review process requirements, consistent with 2620-R-2.05.

Whether the BOCES violated the IDEA and denied Student a free appropriate public education (FAPE) by:

1. Failing to educate Student in the Least Restrictive Environment (LRE) from January 2019 to the present by repeatedly removing him from the general education classroom due to behavioral concerns, consistent with 34 C.F.R. §§ 300.114, 300.320(a)(5).

FINDINGS OF FACT

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

Background

1. Student is a six-year-old child who is currently eligible for special education and related services under the disability category of Developmental Delay. *Ex. C*, p. 61. Student began the 2019-20 school year as a first grader at an elementary school ("School") within a BOCES member school district ("District"). The BOCES is responsible for delivery and oversight of all special education and related services to students within its member districts.

⁴ The appendix, attached and incorporated by reference, details the entire record.

2. Student is described as an intelligent, kind, and helpful child who enjoys being in the classroom and interacting with his classmates. *Ex. C*, pp. 63, 79; *Interviews with Parent, Paraprofessional, and Classroom Teacher*. Student excels academically, and performs at or above grade level in math and reading. *Ex. C*, p. 63.
3. However, Student also displays significant social emotional and behavioral challenges in the school setting. Particularly, Student struggles during transition times throughout the day, such as when the class switches from one subject to another, or moves from one activity to another. During these transitions or when Student otherwise becomes frustrated, he often quickly becomes dysregulated. *Interviews with Parent, Classroom Teacher, and Paraprofessional*.
4. Once Student becomes dysregulated, his behavior typically manifests in one of two ways. Sometimes, Student falls to the ground and begins screaming loudly. Other times, Student immediately turns and exhibits physical aggression towards whomever is closest to him, whether it is School staff or peers. These behavioral incidents consist of hitting, kicking, scratching, biting, and spitting. *Interviews with Paraprofessional, Classroom Teacher, Kindergarten Teacher, Dean, and Principal*.
5. In light of these social emotional and behavioral challenges, Student’s IEP team updated his Behavior Intervention Plan (BIP) and created a crisis intervention plan in February 2019, during his kindergarten year. Student’s revised BIP addressed his challenges with transitions and task completion, and included various strategies to prevent behavioral outbursts, such as timers and other signals to prepare him for transitions. *Ex. C*, p. 57.
6. The crisis intervention plan addressed steps to take if Student becomes overly dysregulated, such as Kindergarten Teacher or the paraprofessional summoning office staff for assistance and clearing the classroom if necessary. On such occasions, Student would then go to the office and complete two math problems with Former Principal, which helped to calm Student down. Former Principal and Student would then talk about the incident and make a plan for Student to return to class. *Ex. C*, p. 60.
7. Student’s IEP also contains a number of accommodations and supports to help Student transition between activities, as well as to provide Student with increased structure and consistency throughout his school day. As an example, one accommodation notes that Student “benefits from the use of auditory and visual cues while working on routines, such as music and signs to indicate transitions.” *Ex. C*, p. 72.
8. The IEP’s least restrictive environment section—as relevant to the IDEA allegation here—places Student in the general education classroom at least 80% of the time. *Ex. C.*, p. 74.
9. Parent contends that School staff repeatedly sent Student home during the 2018-19 school year, and then repeatedly removed him from class during the 2019-20 school

year, in violation of this LRE requirement. Parent also contends that School staff restrained Student with a weighted blanket during the 2019-20 school year, thereby using more force than necessary and placing pressure on his chest. Finally, Parent argues that School staff never informed her of these alleged restraints, thus violating the PPRA's documentation, notice, and review process requirements. *Complaint*, p. 4.

Behavior Challenges during Kindergarten (2018-19 academic year)

10. During the 2018-19 school year, Student attended kindergarten at School. At the beginning of the year, Student had multiple outbursts every day. During these outbursts, Student would hit and kick Kindergarten Teacher and her assistant, and he would be physically aggressive toward classmates. *Interview with Kindergarten Teacher*. Beginning in December 2018 and continuing into January 2019, School staff contacted Parent multiple times reporting behavioral issues that jeopardized safety, and requested that Student be sent home for the day. *Complaint*, p. 9; *Interview with Parent*.
11. In response, Parent requested an IEP team meeting to discuss ways to better support Student. *Complaint*, p. 9; *Interview with Parent*. Per Parent's request, Student's IEP team convened on February 4, 2019, and revised Student's BIP and created a crisis intervention plan as described above. *Ex. C*, pp. 57-60.
12. Student's BIP and crisis intervention plan helped to deescalate his behavior. Though Student continued to have behavioral outbursts, Kindergarten Teacher observed improvement in his ability to verbally identify emotions and frustrations rather than immediately act on them. *Interview with Kindergarten Teacher*. Additionally, Parent reported decreased calls requesting Student be sent home. *Interview with Parent*.
13. Though Student's behavior gradually improved throughout the 2018-19 school year with the help of the above mentioned plans, he exhibited markedly increased behavioral problems in first grade at the beginning of the 2019-20 school year.

Behavioral Challenges during First Grade (2019-20 academic year)

14. Student began first grade on August 13, 2019, and immediately displayed increased behavioral issues as he received disciplinary referrals on August 14, 15, and 16 for becoming physically violent with teachers, staff, and other students. *Ex. D*, pp. 1-3. Though these three incidents were documented, School staff did not document each time Student became dysregulated. Paraprofessional explained that Student was having approximately fifteen episodes a day, which included two to three significant escalations. *Interview with Paraprofessional*.
15. Early in the school year, Classroom Teacher cleared her classroom three to four times each week due to Student's behavioral issues. *Interview with Classroom Teacher*. This

involved Classroom Teacher calling the office for assistance and evacuating other students to a classroom across the hall. *Interview with Classroom Teacher.*

16. Dean also responded to Classroom Teacher's classroom daily—often multiple times and after the classroom was evacuated—due to Student's behavioral outbursts. *Interview with Dean.* Dean or Principal (or both) would try to deescalate Student in the classroom, consistent with the training they received in de-escalation techniques and physical management and restraint practices, by using non-confrontational language and giving affirmative commands for him to stop being violent and destructive. *Interview with Dean.* However, both administrators had to avoid and block Student's physical aggression as he would throw items around the room and knock over furniture. Both administrators characterized these episodes as Student "destroying the classroom" despite this de-escalation method. *Interviews with Principal and Dean.*
17. Based on Student's early struggles, and her knowledge of Student's behavioral issues from the previous year, Principal scheduled a meeting for August 27 to discuss a plan going forward to better address Student's needs. *Interview with Principal; Ex. C, p. 82.* The meeting was scheduled for 1:45 p.m., however, Student became dysregulated that afternoon and staff had attempted to deescalate him for 90 minutes. The meeting was delayed as Parent and staff picked up the classroom. During the ensuing meeting, Parent explained certain helpful strategies to help prevent Student's behavioral escalations, including a reward system and a picture schedule. *Interview with Principal; Ex. C, p. 82.* School staff also proposed taking Student to a Multipurpose Room to deescalate, rather than clearing the classroom. *Interview with Principal; Ex. C, p. 82.*
18. The Multipurpose Room in School is used as a place for students to deescalate, as a location where pull-out special education instruction can take place, or as a space to reward positive behaviors. The Multipurpose Room contains various sensory items, including a bean bag chair and a weighted blanket. All students have access to and may use the Multipurpose Room. Paraprofessional is the School staff member assigned to the Multipurpose Room. *Interviews with Paraprofessional and Principal.*
19. During the August 27 meeting, School staff specifically proposed using the Multipurpose Room for pre-emptive sensory breaks to help keep Student regulated, and for a location to bring him to deescalate. They reasoned that removing Student from class to help him deescalate would prevent having to clear the classroom and minimize disruption to classmates. *Interview with Principal.* At that time, Parent agreed that the Multipurpose Room would be good to use as a "safe space" for Student. *Interview with Parent.*
20. Following this meeting, Paraprofessional explained via email that Student was to be in the Multipurpose Room between 10:05 a.m. - 10:30 a.m. each day, for a flexible pull out time to be used for direct services pursuant to his IEP, or anything else Student needed on a particular day. Student could also earn a daily reward with Paraprofessional in the

Multipurpose Room from 10:30 a.m. – 10:40 a.m. He also had an optional break between 12:55 p.m. – 1:15 p.m., and a last reward of the day from 3:20 p.m. – 3:35 p.m. in the Multipurpose Room. *Ex. H*, p. 39.

21. School staff implemented these changes—which the SCO finds were made outside of a properly convened IEP meeting—by scheduling preemptive sensory breaks and removing Student to the Multipurpose Room when he became dysregulated. However, Student continued to become dysregulated and jeopardized the safety of others in the classroom by hitting, kicking, and throwing items at other students.

Student’s Initial Removals to the Multipurpose Room

22. Beginning in early September, Student began spending significant time in the Multipurpose Room. This increased time was due in part to School staff instituting a two strikes policy, wherein Student would spend the rest of the school day in the Multipurpose Room after two behavioral incidents. *Interviews with Paraprofessional and Dean; Ex. H*, p. 46.
23. According to Dean, Student went to the Multipurpose Room at least daily for typically between thirty minutes and two hours. Classroom Teacher reported that during September Student would be sent to the Multipurpose Room multiple times a day, or he would go in the morning and not return to class the rest of the day. Because of this, Classroom Teacher began making a double set of lesson plans: one for the class, and one for Student in case he was in the Multipurpose Room. *Interview with Classroom Teacher*. Paraprofessional kept a “bucket of materials” in the Multipurpose Room for Student. *Interview with Paraprofessional*.
24. As one example of a removal to the Multipurpose Room, on September 3, 2019, Student became dysregulated during a transition in small group reading. Student kicked his chair over and fell down, and then kicked a paraprofessional. Classroom Teacher evacuated the classroom, and while the class was leaving, Student kicked another student. School staff then escorted him to the Multipurpose Room. *Ex. D*, p. 9.
25. Then on September 10—discussed more fully below—Student again became dysregulated and was removed to the Multipurpose Room. On that date, Principal contacted Superintendent to explain the situation and ask for more resources and assistance in supporting Student. Superintendent then contacted the BOCES Director of Special Education (“Director”) the same day regarding “the level of behavioral needs [Student] has been exhibiting recently.” *Ex. H*, p. 1. Director emailed BOCES members of the IEP team and stated that, based on the known information regarding Student, the BOCES Assistant Director of Special Education (“Assistant Director”) planned to ask for a meeting. A pre-IEP meeting was subsequently scheduled for September 23. *Id.*

26. On September 10, Social Worker also spoke with Parent following the disciplinary incident earlier that day. During that conversation, Social Worker discussed a protocol with Parent regarding Student staying in the Multipurpose Room after repeated behavioral incidents: “I did express to her the team was going to make some parameters re: if/when he would be asked to spend the day in ISS versus going home. She also seemed supportive of that idea.” *Ex. H*, p. 46. The parameters referenced by Social Worker is the two strikes policy identified above at FF #22.
27. On September 16, BOCES and School staff members of the IEP team—including Assistant Director and Principal—met to discuss the pre-IEP team meeting scheduled for September 23. Based on the severe and frequent behaviors Student had been exhibiting, the group concluded that the IEP was inadequate to support his level of needs. To gain more data and information, they decided to propose to reevaluate Student in several areas, including social and emotional functioning. *Interview with Principal*. Because Parent had refused social-emotional testing in the past—notably during Student’s initial evaluation in 2017—the group also discussed the best way to approach Parent with its proposal. *Id.* Assistant Director also expressed the need to further revise Student’s BIP “as clearly his current one is not effective.” *Ex. H*, p. 5.
28. On September 23, Parent, BOCES staff, and School staff met to discuss the upcoming IEP meeting set for October 3. Assistant Director stated that the current level of support for Student was inadequate, and that the BOCES proposed to reevaluate Student in several different areas, including “social-emotional-behavioral.” *Ex. F*, p. 4; *Interview with Assistant Director*. Assistant Director provided Parent with a prior written notice and consent for reevaluation, and asked her to consider the IEP team’s proposal to reevaluate Student. *Interview with Assistant Director*.
29. The IEP team left the meeting expecting to reconvene the following week, on October 3, for the annual IEP review meeting. However, Parent cancelled the meeting after Student told her School staff had been restraining him with a weighted blanket. Additionally, Parent did not sign or return the consent to reevaluate Student. *Interview with Assistant Director*.

Restraints during First Grade (2019-20 academic year)

30. Although Student’s IEP contains a reference to a weighted blanket available to all students in the Multipurpose Room, it also notes that Student has not shown “much interest” in the weighted blanket. *Ex. C*, p. 64. Moreover, a weighted blanket was not recommended for Student by a physician, occupational therapist, or physical therapist, and it was not otherwise meant to be used in accordance with Student’s IEP as a protective, adaptive, or securing device.

31. Nevertheless, beginning September 10 and ending September 25, there are six documented instances of School staff—primarily Principal and Dean—restraining Student in the Multipurpose Room using a weighted blanket. *Ex. D*, pp. 51-52. During each of these restraints, School staff used a two-person hold to place Student on a bean bag chair. The two staff members then positioned themselves on either side of Student, and placed a weighted blanket over his torso and legs. The staff members next placed their body weight on the portion of the blanket resting on the floor, thereby securing Student in the bean bag chair. The staff members then each placed one hand on Student’s arm, and one hand on Student’s shoulder. If an additional staff member was present, that person held Student’s feet to prevent him from kicking. *Interviews with Paraprofessional and Dean*.
32. During these holds, staff members never placed their hands or any other pressure on Student’s chest. *Id.* Additionally, School staff would always periodically release Student from the hold by removing the blanket from his upper body. If Student could sit up, talk, and remain calm, staff would release the hold. If he continued to hit, kick, and scream, staff would again place the blanket over Student’s upper body and continue to try and deescalate him. *Id.* None of the staff members performing these restraints on Student were armed security officers, and Student never possessed or displayed a deadly weapon at any time.
33. Prior to turning to the specific documented instances of restraint on September 10, 12, 16, 18, 20, and 25, the SCO notes that only the alleged restraint of September 25 was initially accepted for investigation. However, the exhibits submitted by School and the BOCES contained evidence that staff had restrained Student five additional times using the weighted blanket. As described below, School staff had not notified Parent of any incidents of restraint, and thus she was not aware of these other dates at the time she filed the Complaint. Accordingly, the SCO expanded the scope of this investigation to include the six documented instances of School staff using the weighted blanket to restrain Student. *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46603 (Aug. 14, 2006) (discussing acceptance of additional related allegations during the investigation process).
34. On September 10, Student received multiple disciplinary referrals resulting in Classroom Teacher evacuating class three separate times. Beginning in the morning and lasting throughout the afternoon, Student became dysregulated during transition times and when told to complete certain work. At various times, Student threw items around the classroom, and hit, bit, kicked, and scratched Staff members and other students. Staff escorted Student to the Multipurpose Room three separate times. On each of these occasions, School staff restrained Student using the weighted blanket consistent with the description at FF #31-32. *Ex. D*, pp. 16-29.

35. On September 12, Student became dysregulated several times throughout the day. Beginning at 11:50 a.m., while working one-on-one with Paraprofessional in the Multipurpose Room, Student began to yell, hit, and kick Paraprofessional. Paraprofessional and another staff member then performed a hold using the weighted blanket, consistent with the description at FF #31-32. Paraprofessional periodically released the hold to see if Student could remain calm. *Interview with Paraprofessional*. Student became calm at 12:15 p.m. *Ex. D.* pp. 30, 51.
36. On September 16, at 9:40 a.m., Student became escalated after Classroom Teacher asked him to stop playing with a fidget toy and to return to his classwork. Student threw the toy, hitting a classmate in the head, and Paraprofessional attempted unsuccessfully to verbally deescalate him. *Interview with Paraprofessional*. Student walked to the Multipurpose Room on his own; however, once inside Student began hitting, kicking, scratching, and biting staff members. Principal and Dean then restrained Student with the weighted blanket for 15 minutes, consistent with the description at FF #31-32. *Ex. D.* pp. 31-33.
37. On September 18, at 2:40 p.m., Student kicked several staff members at the end of recess. A paraprofessional escorted Student to the Multipurpose Room. Once there, he immediately began hitting and kicking Paraprofessional. Paraprofessional attempted to calm Student by offering him a fidget; however, he continued to kick her. Dean and Paraprofessional then restrained Student with the weighted blanket for 10-15 minutes, consistent with the description at FF #31-32. *Interviews with Paraprofessional and Dean*. Eventually, Dean and Paraprofessional were able to calm Student. *Ex. D.* pp. 34-35.
38. On September 20, Student became dysregulated first thing in the morning during a spelling assignment and began screaming and hitting Paraprofessional. Classroom Teacher evacuated the classroom, and Paraprofessional and Dean took Student to the Multipurpose Room. After briefly calming, Student again became dysregulated and began hitting and scratching staff. Paraprofessional and another staff member restrained Student with the weighted blanket, consistent with the description at FF #31-32. Student briefly calmed, but quickly escalated, and Paraprofessional and Dean restrained Student with the blanket three more times. *Ex. D.* pp. 36-37.
39. Student briefly calmed, however quickly again became dysregulated. Paraprofessional then performed a one-person cross hold on Student for approximately 5-10 minutes. *Id.* Paraprofessional performed the cross hold on Student by standing behind him and crossing her arms over his arms and the front of his body to prevent him from flailing. Paraprofessional learned to perform this cross hold during the training she received in physical management and restraint techniques at the beginning of the school year. *Interview with Paraprofessional*. Student effectively spent the entire day in the Multipurpose Room.

40. On September 25, Student became dysregulated while the class transitioned into a reading assignment. Paraprofessional attempted to verbally deescalate Student; however, he threw a book and other items at her. Student then began kicking, hitting, and screaming. Staff briefly took Student to the Multipurpose Room and then returned with Student to the classroom, however his behavior again escalated and he began to throw items around the room and kick peers. Classroom Teacher evacuated the class, and Dean and Paraprofessional administered a hold to the Multipurpose Room. Once in the Multipurpose Room, staff attempted to verbally deescalate Student but he continued to hit and kick. Principal and Dean restrained Student with the weighted blanket three different times that morning, consistent with the description at FF #31-32. *Ex. D. pp. 38-41; Interviews with Paraprofessional and Dean.* Student ate lunch in the Multipurpose Room and then returned to class for the rest of the afternoon.
41. When asked why the weighted blanket was used on each of these dates, Principal, Dean, and Paraprofessional indicated that Student was too small to safely use the safety holds they were trained to employ, and they therefore concluded that the blanket was a safer alternative to deescalate Student. Because of Student's small stature, staff was concerned they could not securely place him in a hold without potentially causing injury. *Interviews with Paraprofessional, Dean, and Principal.* However, staff also acknowledged that the use of a weighted blanket to perform a hold was not addressed in training regarding physical restraint. *Interviews with Paraprofessional and Dean.*
42. In the course of this investigation, the SCO consulted a CDE Behavioral Specialist ("CDE Specialist") regarding the risks associated with mechanical restraints. CDE Specialist advised that mechanical restraints are prohibited for several reasons, chiefly because they increase the risk of death for the person restrained. Physical management techniques are designed to use a person's body mechanics to work against the individual so that he or she becomes exhausted and cannot continue to struggle. One danger with the use of a mechanical restraint is that it can allow a restrained person to relax, gain energy, and continue to struggle. An additional concern specific to using a weighted blanket here—according to CDE Specialist—is that staff would not have been able to see what Student was doing under the blanket, including harming himself or possibly losing circulation.
43. CDE Specialist also explained that training in physical management techniques includes a "child control position" specifically designed for restraining a person who is smaller in stature than the person applying the restraint. CDE Specialist termed this a "basket restraint" where the person performing the restraint stands behind and crosses their arms over the person being restrained, then tilts the person back slightly being sure to keep their feet on the ground. Tilting the person backward prevents them from kicking, and also helps the person performing the restraint to maintain physical control. This technique is similar to the cross hold performed by Paraprofessional on September 20 referenced above at FF #39.

44. When Parent arrived at School to pick up Student on September 25, Classroom Teacher told her that Student had had a rough morning, but otherwise not a bad day. However, on the walk home, Student appeared agitated and upset. Once home, Student told Parent that Principal and Dean had held him down using a blanket, and that he did not like it. Additionally, Student stated that it had happened several other times. This was the first time Parent heard that School staff had been restraining Student. *Interview with Parent.*
45. Later in the evening, Parent noticed a red mark on Student's chest, which she asserts was caused by School staff while they restrained Student. *Interview with Parent; Complaint*, p. 11. However, Student told Parent that he had been restrained "on his arm." *Complaint*, p. 11. The SCO finds Student's report to be consistent with the description of the blanket holds described by Paraprofessional and Dean at FF #31-32 in that they did not place their hands on Student's chest during the September 25 restraint.
46. In response to Parent's concern that she was not told of the restraints, Dean explained that School does not have a specific form to complete to document when a student has been restrained. School staff instead completes a disciplinary "referral form" and uses additional paper to write a narrative of events. *Interview with Dean.* The referral form has sections for problem behaviors, location of the incident, notes, possible motivation, follow up by staff, other persons involved, and administrative actions. *Ex. D*, p. 3. Though District has written policies for the use of physical intervention and restraint that comport with the PPRA, School has no systems in place to review individual restraints and no annual review process. *Interviews with Paraprofessional, Dean, and Principal; Ex. A.*
47. On September 30, 2019, Advocate emailed Principal asking if there had been an incident at School with Student on September 25, and requesting an incident report if so. *Ex. H*, p. 18. On October 1, Principal emailed Assistant Director stating that she had "lots of documentation" from September 25, and that Student had had a very difficult morning, but was able to return to class for the rest of the afternoon. *Ex. H*, p. 20. On October 2, Advocate emailed Assistant Director regarding an incident report from September 25, stating that Parent never received it and wanted a copy. Director, who was copied on the email, responded that Principal would send a copy of the report. *Ex. H*, p. 33.
48. After receiving the behavior referral form from September 25 and learning of the restraints, Parent removed Student from School and postponed the IEP meeting that was scheduled for October 3. *Ex. H*, p. 19.
49. On October 3, Director emailed Principal and stated that the BOCES was "ready to put more supports and services in place for [Student] and look at some options around his day with you and the team, if he attends. His incidents are significant as you know and

we do not want him or the staff and other children to continue to have that level of challenges and safety issues.” *Ex. H*, p. 28.

50. On October 8, Director emailed Superintendent, Principal, and Assistant Director suggesting next steps to support Student. She suggested that either she or Assistant Director facilitate an IEP meeting to talk about a potential change in placement to a modified day. Additionally, the BOCES wanted to bring in a school psychologist with experience in behavior and specialization in adolescent trauma. *Ex. H*, p. 35.
51. On October 10, Parent sent a letter to District stating that she would be homeschooling Student. *Letter provided by Superintendent*. Based on this information, the BOCES issued Parent a prior written notice that explained the IEP team would postpone completion of Student’s IEP: “The ESS team will wait until final decisions are made before proceeding with any course of action.” *Ex. F*, p. 5.

CONCLUSIONS OF LAW

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

Conclusion to Alleged Violations of the Protection of Persons from Restraint Act (PPRA): The use of a weighted blanket by School staff constituted a mechanical restraint, which is a violation of the PPRA. Additionally, School staff failed to notify Parent of all such restraints, or review the specific instances of restraint, resulting in additional violations of PPRA.

The PPRA defines restraint 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). School personnel may only use restraints “for the period of time necessary and using no more force than necessary.” PPRA Rule 2.01(3)(a). Also, restraints may not be “administered in such a way that places excess pressure on the student’s chest, back, or causes positional asphyxia.” PPRA Rule 2.02(1)(a)(ii).

The PPRA defines a mechanical restraint as “a physical device used to involuntarily restrict the movement of a student or the movement or normal function of his or her body.” PPRA Rule 2.00(8)(b). Mechanical restraints do not include: (1) devices recommended by a physician, occupational therapist, or physical therapist and agreed to by a student’s IEP team and used in accordance with the student’s IEP; (2) protective devices used to prevent self-injury in accordance with a Student’s IEP; (3) adaptive devices used to facilitate instruction or therapy and used as recommended by an occupational therapist or physical therapist consistent with a student’s IEP; and (4) positioning or securing devices used to allow treatment of a student’s medical needs. PPRA Rule 2.00(8)(b). Importantly, the PPRA expressly prohibits the use of mechanical restraints, with two exceptions: (1) if the student is openly displaying a deadly weapon, or (2) if used by an armed security officer who has received documented training in

defensive tactics utilizing handcuffing procedures and restraint tactics utilizing prone holds; and have made a referral to a law enforcement agency. PPRA Rule 2.02(2)(b).

In this case, School staff held Student using a weighted blanket in the Multipurpose Room on September 10, 12, 16, 18, 20, and 25. The weighted blanket is a physical device that was used to involuntarily restrict Student's movement, and thus it constituted a mechanical restraint. The weighted blanket was not recommended by a physician or related service provider, it was not a protective or adaptive device, and it was not a positioning or securing device to allow for treatment of any medical needs. Accordingly, none of the exceptions to mechanical restraint listed above apply. Further, the School staff employing the mechanical restraint were not armed security officers, and Student never displayed a deadly weapon. The safety risks inherent with the use of the weighted blanket in this case were described by CDE Specialist at FF #42-43. Because the PPRA prohibits the use of mechanical restraints under the circumstances they were used here, each occasion resulted in a violation of the PPRA.

The PPRA also specifies that restraints shall only be used in an emergency and with extreme caution, and after the failure of less restrictive alternatives (such as positive behavioral supports, constructive and non-physical de-escalation, and re-structuring the environment), or a determination that such alternatives would be inappropriate under the circumstances. PPRA Rule 2.01(1). Additionally, school personnel shall use restraints only for the period of time necessary and using no more force than is necessary, and prioritize the prevention of harm to the student. PPRA Rule 2.01(3).

Though the use of mechanical restraints was improper here, the SCO concludes that there is no evidence that School staff restrained Student with the blanket for longer than necessary or with more force than was needed. Dean and Paraprofessional both stated that although restraints sometimes lasted for up to 15 minutes, Student was never consecutively held for that amount of time. Rather, staff periodically released the restraint to see if Student was deescalated and calm. If he was, they would not continue to restrain him. The SCO also concludes that there is no evidence that School staff administered the restraints in such a way that placed excessive pressure on Student's chest. Dean and Paraprofessional credibly explained that they never placed their hands on Student's chest, but only on his arms to control him. Accordingly, the SCO does not find violations of the PPRA based on these two specific allegations.

Having determined each September incident constituted a restraint, the SCO next addresses the documentation and notification requirements at issue in this case. The PPRA contains specific documentation and notification requirements each time a restraint is used. First, parents are to be notified if there is a reasonable probability a restraint may be used on their child. PPRA Rule 2.04(1). Second, if a restraint is used, a written report must be submitted to school administration within one day. PPRA Rule 2.04(2). Third, the principal or a designee must notify parents of the restraint as soon as possible but no later than the end of the school day. PPRA Rule 2.04(3). Fourth, a written report must be provided to the parent within five

calendar days that details: the antecedent to the student's behaviors, a description of the event, efforts made at de-escalation, alternatives used to the restraint, the type and duration of the restraint used, injuries that occurred, and the staff present and staff involved in administering the restraint. PPRA Rule 2.04(4). Finally, a copy of the written report must be placed in the student's confidential file. PPRA Rule 2.04(5).

Here, School did not comply with any of these specific documentation and notification requirements following each of the six September restraints. Besides the lack of verbal or written notification to Parent, the SCO also concludes that the reports written by School staff do not comply with the PPRA's documentation requirements. PPRA does not require that any specific form be used, but rather sets out the requirements—detailed above—that the written report must contain. Specifically lacking from the behavioral referrals in the record here are the type of restraint used and any documentation of possible injuries. This results in a violation of PPRA notification requirements.

Having concluded that School violated the documentation and notification requirements, the SCO next addresses the review process requirements at issue here. The PPRA requires that each public agency ensure a review process is established and conducted for each incident of restraint. The purpose of this review is to ascertain that appropriate procedures were followed and to minimize future use of restraint. The review shall include, but is not limited to: staff review of the incident; follow up communication with the student and his/her family; review of the documentation to ensure use of alternative strategies; and recommendations for adjustment of procedures, if appropriate. PPRA Rule 2.05(1).

The PPRA also requires that a general review process be established, conducted and documented in writing at least annually. The purpose of the general review is to ascertain that the public education agency is properly administering restraint, identifying additional training needs, minimizing and preventing the use of restraint by increasing the use of positive behavioral interventions, and reducing the incidence of injury to students and staff. The review shall include but is not limited to: analysis of incident reports, including all reports prepared pursuant to 2.04(2) and 2.04(4); including but not limited to procedures used during the restraint, preventative or alternative techniques tried, documentation, and follow up; training needs of staff; staff to student ratio; and environmental considerations, including physical space, student seating arrangements, and noise levels. PPRA Rule 2.05(2).

In the present matter, though Dean explained that she and Principal would typically discuss restraints informally after the fact, there is no evidence that School has any systems or processes in place to review individual restraints in conformity with the above requirements. Furthermore, School has no general review process resulting in a violation of PPRA.

Conclusion to Alleged Violation of IDEA: The BOCES failure to educate Student in the LRE, as defined by his IEP during August and September 2019, resulted in a substantive violation of IDEA by impeding Student’s right to a FAPE.

The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and that they attend the school they would attend if not disabled. 34 C.F.R. §§ 300.114 and 300.116. Accordingly, an IEP must include “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. § 300.320(a)(5). This statement describes a student’s recommended placement in the LRE. *Id.* Students with disabilities must be educated consistent with the LRE described in the IEP. *Id.*

Here, the IEP’s least restrictive environment section placed Student in the general education classroom at least 80% of the time. Based on the evidence in the record, it is clear that during the start of the 2019-20 school year Student was not present in the general education classroom 80% of the time as required by his IEP. Dean explained that due to Student’s behavioral outbursts he went to the Multipurpose Room at least daily, typically between thirty minutes and two hours. The frequency of these removals is also evidenced by Classroom Teacher creating a separate lesson plan specifically for Student in anticipation of him being out of the classroom. Paraprofessional maintained academic materials in the Multipurpose Room specifically so Student could be taught when he was out of class. The disciplinary referrals in the record, as well as reports from School staff members, confirm that Student would often be sent to the Multipurpose Room and not return to class for the rest of the day. Based on this, the SCO concludes that Student was not educated consistent with the educational setting described in his IEP from August 14 to September 25.

Students should only be placed in separate classes, separate schools, or otherwise removed from the general education setting “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114 (a)(2)(ii); *Adams Cnty. Sch. Dist. 50, Westminster*, 115 LRP 33569 (SEA CO 5/26/15). For instance, placement in the regular education classroom may not be appropriate when the student engages in dangerous or disruptive behavior that threatens the safety of others or interferes with the education of peers. *See Clyde K. v. Puyallup Sch. Dist.*, 21 IDELR 664 (9th Cir. 1994); *see also C.L. v. Lucia Mar Unified Sch. Dist.*, 114 LRP 1813 (C.D. CA 1/9/14) (concluding violent and disruptive behavior that results in safety concerns for a student, classmates, or school staff may be a reason to reduce a student’s time in the general education environment). However, any significant change in placement must be made by the IEP team—including the parents of the child—and in consideration of a reevaluation. *See* ECEA Rule 4.03(8)(b)(ii)(B); 34 C.F.R. §§ 300.305, 300.327.

In this case, Student’s disruptive and dangerous behavior necessitated his removal from the general education classroom for the safety of others. Starting immediately at the beginning of

the 2019-20 school year, Student's behavioral outbursts significantly escalated. When Student became frustrated, he would become physically violent with School staff and classmates by hitting, kicking, scratching, biting, and throwing objects. Based on the frequency and severity of Student's behavior, School staff had to either remove Student from class or evacuate his classmates from the classroom. Given safety concerns for Student, his classmates, and School staff, keeping him in the general education classroom would have threatened the safety of others and interfered with the education of his peers. Nevertheless, the decision to remove Student from the general education setting based on disruptive behavior was not made by the IEP team and upon consideration of a reevaluation.

School districts must be alert to indications that a student needs to be reevaluated, even when a triennial evaluation is not due and even when the parent has not requested a reevaluation, to ensure the student's IEP continues to be reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. *Questions and Answers on Andrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 71 IDELR 68 (EDU 2017); 34 C.F.R. § 300.303(a). A significant escalation in a student's behavior is one such circumstance that may warrant a reevaluation. *See West-Linn Wilsonville Sch. Dist. v. Student*, 63 IDELR 251 (D. Ore. 2014).

Here, based on the frequency and severity of Student's behavior, School and the BOCES should have convened an IEP meeting by August 27 to consider revising Student's BIP, and to request consent to reevaluate Student in the area of social-emotional functioning. Though Principal held an informal meeting with Parent and other team members on this date to discuss ways to better serve Student, the frequency and duration of removals to the Multipurpose Room were evidence that Student's IEP and BIP were not sufficient to meet his needs. The failure to convene an IEP meeting by August 27 resulted in Student's continuous removal from the general education classroom, and School staff employing an illegal mechanical restraint to manage his behavioral outbursts. Accordingly, the SCO concludes that Student's repeated removals from the general education classroom resulted in a failure to educate Student consistent with the LRE defined in his IEP, which is a violation of IDEA. Furthermore, this failure constituted a significant change in Student's placement without consideration of a reevaluation and outside the IEP process, resulting in an additional IDEA violation.

The SCO must now determine if the violations resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it "(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a)(2).

In this case, the BOCES failure to timely convene an IEP meeting to request consent to reevaluate Student and consider revising his BIP directly contributed to the frequency, duration, and nature of the removals, to include the use of an illegal mechanical restraint. Had School staff and BOCES acted sooner to convene the IEP team, teachers, administrators, and

related services providers would have been able to develop more effective ways to assist Student and better manage his behavior. Though School and the BOCES discussed Student's situation and convened several meetings in anticipation of his annual IEP review, they recognized that neither the IEP nor the BIP were meeting Student's needs and thus they should have convened an IEP meeting earlier in the school year. Accordingly, the SCO concludes that Student's repeated removals impeded his right to a FAPE, resulting in substantive harm.

REMEDIES

The SCO concludes that the BOCES has violated the following PPRA requirements:

1. Using a mechanical restraint to restrain Student, in violation of PPRA Rule 2.02(2)(b);
2. Failing to comply with the documentation and notification requirements, in violation of PPRA Rule 2.04;
3. Failing to comply with the requirements regarding review of the use of restraint, in violation of PPRA Rule 2.05.

Pursuant to PPRA Rule 2.07(9), the SCO is limited to making recommendations to the public education agency of remedial actions to address findings of noncompliance. Consistent with this authority, CDE makes the following recommendations that should be taken in order to come into compliance with applicable laws and regulations. Additionally, the BOCES may contact Michael Ramirez at CDE to arrange for support and guidance regarding the PPRA's rules and requirements.

- a) The BOCES should provide additional training in nationally recognized physical management and restraint practices, that focuses on the dangers of employing mechanical restraints, as well as correct methods to utilize safety holds on small individuals;
- b) The BOCES should provide training on PPRA's documentation and notice requirements, as well as advice and procedures to monitor compliance;
- c) The BOCES should provide training on PPRA's requirements regarding the review of individual restraints and the establishment of a general review process, as well as advice and procedures to monitor compliance;

The SCO concludes that the BOCES has violated the following IDEA requirements:

1. Failing to educate Student consistent with the LRE identified in his IEP, consistent with 34 C.F.R. §§ 300.114, 300.320(a)(5);
2. Changing Student's placement outside the IEP process and without consideration of a reevaluation, consistent with 34 C.F.R. §§ 300.305, 300.327 and ECEA Rule 4.03(8)(b)(ii)(B).

To remedy these violations, the BOCES is ordered to take the following actions:

- 1) By **January 10, 2020**, the BOCES must submit to CDE a proposed corrective action plan (“CAP”) that effectively addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the BOCES is responsible. The CAP must, at a minimum, provide for the following:
 - a) BOCES staff, administrators at School, and anyone else deemed appropriate by the BOCES or School must review the contents of this decision. This review must occur no later than **January 31, 2020**. A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than **February 7, 2020**.
 - b) To improve communication, coordination, and collaboration amongst BOCES and School staff regarding substantial changes in students’ behavior, Principal and/or Dean must contact either Director or Assistant Director at least once per month to discuss any students exhibiting behavioral challenges that require classroom removal or restraint. The BOCES must submit documentation that these consultations have occurred by the third Monday of each month until **May 31, 2020**. If Principal and Dean are no longer employed at School, the BOCES may substitute individuals with similar roles.
- 2) By **December 20, 2019**, based on a review of existing evaluation data and parental input consistent with 34 C.F.R. § 300.305, the BOCES shall provide Parent with a consent for reevaluation consistent with 34 C.F.R. § 300.300. The reevaluation at a minimum must include an assessment of Student’s social-emotional functioning and behavior. The reevaluation must also include assessments in other areas involving educational, social-emotional, behavioral, or related service needs as identified by the IEP team, if any. If Parent does not provide informed consent to the reevaluation by **January 6, 2020**, the BOCES will be excused from conducting the reevaluation. If Parent conditions consent for reevaluation inconsistent with the scope of reevaluation identified above, this act may be construed as refusal to provide consent. A determination that Parent refused consent by adding conditions rests solely with CDE.
- 3) By **March 6, 2020**, the BOCES must convene an IEP meeting with Parent—at a mutually convenient time and setting—to review and revise Student’s IEP and BIP as necessary in consideration of the reevaluation ordered in this Decision. If Parent has not consented to reevaluation, the BOCES must convene the IEP team to develop the IEP based on existing data. If Parent does not respond to the BOCES’ efforts to convene an IEP meeting, the District must still conduct the IEP meeting, consistent with 34 C.F.R. § 300.322(d). Evidence that this IEP meeting occurred must be documented by providing a copy of the Notice of Meeting, IEP, BIP, and prior written notice to CDE no later than ten

(10) days following the IEP meeting. If Parent refused to attend the IEP meeting, the District must also submit documentation of its attempts to convince Parent to attend, to include detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence, and detailed records of visits to Parent's home, consistent with 34 C.F.R. § 300.322(d).

CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Michael Ramirez
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the BOCES to meet any of the timelines set forth above may adversely affect the BOCES' annual determination under the IDEA and subject the BOCES to enforcement action by CDE.

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. 46607 (August 14, 2006).

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

Dated this 6th day of December, 2019.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-13

- Exhibit 1: IEP dated 2/4/19
- Exhibit 2: Email correspondence; Referral form dated 9/25/19

Response, pages 1-10

- Exhibit A: District restraint policies
- Exhibit B: No responsive documents submitted
- Exhibit C: IEPs dated 2/27/18, 5/16/18, 10/3/18, 2/4/19
- Exhibit D: Disciplinary referral forms
- Exhibit E: SLP service logs
- Exhibit F: Various PWN
- Exhibit G: Progress report dated 10/3/18
- Exhibit H: Various email correspondence
- Exhibit I: List of BOCES staff
- Exhibit J: Eligibility determination, initial evaluation meeting notes, CPI certifications

Reply, pages 1-7

- Exhibit 3: Email correspondence

Interviews with:

Parent
Paraprofessional
Classroom Teacher
Kindergarten Teacher
Dean
Principal
Assistant Director
Director