



Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities

Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

致英口能力有限人士: 如果您不懂英口, 或者使用英口有困口, 您可以要求口得向公众提供的免口口言口助服口, 帮助您了解教育部口口。如您需要有关口口或笔口的口口口口, 口致口1-800-USA-LEARN (1-800-872-5327) (听口障碍人士口口: 1-800-877-8339) 或致口口: Ed.Language.Assistance@ed.gov。

給英語能力有限人士的通知: 如果您不懂英語, 或者使用英口有困口, 您可以要求獲得向大眾提供的語言協助服務, 幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊, 請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線: 1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100
www.ed.gov

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

Notice of Significant Guidance. The U.S. Department of Education (Department) has determined that this letter is significant guidance under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). See www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf. Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this guide and the accompanying letter to provide State and local educational agencies, including charter schools, with information to assist them in meeting their obligations under Federal civil rights laws, including Section 504 of the Rehabilitation Act of 1973, and implementing regulations that it enforces. 29 U.S.C. § 794; 34 C.F.R. Part 104. This document also provides members of the public with information about their rights under the law and regulations.

If you are interested in commenting on this letter or have questions, please send them to OCR by email at OCR@ed.gov, by phone at 800-421-3481 (TDD 800-877-8339), or by mail to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, DC 20202. For further information about the Department’s guidance processes, please visit www.ed.gov/policy/gen/guid/significant-guidance.html.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

December 28, 2016

Dear Colleagues:

I write to explain the limits that Federal civil rights laws enforced by the U.S. Department of Education’s Office for Civil Rights (OCR) impose on the use of restraint and seclusion by public elementary and secondary school districts.¹ In particular, this guidance informs school districts how the use of restraint and seclusion may result in discrimination against students with

¹ In this document, *school district* and *public elementary and secondary school systems* are used synonymously and include all local educational agencies (LEAs) and public charter schools. Charter schools are subject to the same Federal civil rights obligations as all other public schools. The use of the term *charter schools* includes schools that are public schools of a school district as well as charter schools that operate as LEAs under State law. For additional information about the applicability of Federal civil rights laws to charter schools, see OCR and Office of Special Education and Rehabilitative Services, *Dear Colleague Letter about the Rights of Students with Disabilities in Public Charter Schools* (Dec. 28, 2016), www.ed.gov/ocr/letters/colleague-201612-504-charter-school.pdf, and OCR, *Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973* (Dec. 28, 2016), www.ed.gov/ocr/docs/dcl-faq-201612-504-charter-school.pdf.

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100
www.ed.gov

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

disabilities, thereby violating Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) (both as amended).²

In broad terms, restraint of a student means restricting the student's ability to move his or her torso, arms, legs or head freely, and seclusion of a student is confining a student alone in a room or area that he or she is not permitted to leave (see detailed definition below in the accompanying questions and answers). OCR's Civil Rights Data Collection (CRDC), which includes self-reported data on 99 percent of the public school districts in the nation, indicates that schools restrain and seclude students with disabilities at higher rates than students without disabilities.³

According to the CRDC, during the 2013-14 school year, students with disabilities were subjected to mechanical and physical restraint and seclusion at rates that far exceeded those of other students.⁴ Specifically, students with disabilities served by the Individuals with Disabilities Education Act (IDEA) represented 12% of students enrolled in public schools nationally, but 67% of the students who were subjected to restraint or seclusion in school.⁵ Based on data reported to OCR, approximately 100,000 students were placed in seclusion or involuntary confinement or were physically restrained at school to immobilize them or reduce their ability to move freely, including more than 69,000 students with disabilities served by the IDEA.⁶ Data disparity alone does not prove discrimination. The existence of a disparity, however, does raise a question regarding whether school districts are imposing restraint or seclusion in discriminatory ways.

² Section 504 is a Federal law that prohibits discrimination against individuals with disabilities in programs or activities of entities, such as public schools and charter schools, that receive Federal financial assistance. 29 U.S.C. § 794; 34 C.F.R. pt. 104. OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including public school districts. Title II is a Federal law that prohibits discrimination against individuals with disabilities in State and local government services, programs, and activities (including public schools and public school districts), regardless of whether they receive Federal financial assistance. In the education context, OCR shares in the enforcement of Title II with the U.S. Department of Justice (DOJ). Section 504 and Title II use the same definition of disability. 29 U.S.C. § 705(9) (B), (20) (B) (definition of disability under Section 504 is the same as under the ADA); 42 U.S.C. § 12102. As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. 28 C.F.R. § 35.103. Accordingly, this guidance will not directly address Title II requirements. To the extent that Title II provides additional or greater protection, covered entities must also comply with Title II's substantive requirements. 42 U.S.C. § 12201(a).

³ OCR, *2013-2014 Civil Rights Data Collection: A First Look*, 4 (updated Oct. 28, 2016), www.ed.gov/ocr/docs/2013-14-first-look.pdf; see also U.S. Government Accountability Office, GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, 1 (May 19, 2009), www.gao.gov/assets/130/122526.pdf (reporting that seclusion and restraint "can be dangerous because they may involve physical struggling, pressure on the chest, or other interruptions in breathing," and that "individuals can be severely traumatized during restraint").

⁴ OCR, *2013-2014 Civil Rights Data Collection: A First Look*, 4 (updated Oct. 28, 2016), www.ed.gov/ocr/docs/2013-14-first-look.pdf.

⁵ *Id.*

⁶ *Id.*

A school district discriminates on the basis of disability in its use of restraint or seclusion by (1) unnecessarily treating students with disabilities differently from students without disabilities; (2) implementing policies, practices, procedures, or criteria that have an effect of discriminating against students on the basis of disability or defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities; or (3) denying the right to a free appropriate public education (FAPE).⁷ When investigating a school district, OCR would examine any available data as well as the school district's policies, practices, procedures, and criteria to determine whether unlawful discrimination has occurred and, if so, would craft an appropriate remedy with the school district.

Through a series of questions and answers below, OCR provides a summary of the disability discrimination laws that it enforces and seeks to clarify for schools, school districts, States, parents, students and other stakeholders how the use of restraint and seclusion can violate these Federal laws. While this guidance addresses the circumstances under which the use of restraint or seclusion can violate Section 504 and Title II, a May 15, 2012, *Restraint and Seclusion: Resource Document* publication by the U.S. Department of Education on this issue offers further information on the topic, including discouraging the use of restraint or seclusion more generally.⁸ OCR notes that in the *Resource Document*, as a part of fifteen guiding principles, the Department recommended that school districts never use mechanical restraint, that school districts never use physical restraint or seclusion for disciplinary purposes, and that trained school officials should use physical restraint or seclusion only if a child's behavior poses imminent danger of serious physical harm to self or others. This guidance, however, is intended to clarify Federal laws, but does not add additional requirements for complying with existing statutes.

OCR is committed to ensuring equal access to education, and to promoting educational excellence throughout the nation, through vigorous enforcement of civil rights. An important part of our mission is to ensure that students with disabilities are not subjected to discrimination. We look forward to working with you to achieve this shared goal.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

⁷ 34 C.F.R. §§ 104.4, 104.33-35.

⁸ U.S. Department of Education, *Restraint and Seclusion: Resource Document* (May 15, 2012), www.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.

TABLE OF CONTENTS

Introduction.....5

How OCR Defines the Practices of Restraint and Seclusion

1. What is restraint?..... 6

2. What is seclusion?..... 7

OCR’s Authority to Protect Students with Disabilities

3. What is OCR’s jurisdiction with respect to the rights of students with disabilities? 7

4. Who is protected by Section 504?..... 8

The Legal Standards OCR Uses to Determine Whether the Use of Restraint or Seclusion Has Violated Section 504

5. What is a school district’s Section 504 evaluation obligation and how does the use of restraint or seclusion of a student implicate that obligation? 9

6. How does the use of restraint or seclusion of a student who was already identified as a student with a disability implicate a school’s Section 504 reevaluation obligation? 11

7. Does Section 504 prohibit the use of restraint or seclusion in all situations?..... 12

8. When does Section 504 require a school to treat a student with a disability differently from students without disabilities?..... 13

9. How could a school’s use of restraint or seclusion be different treatment that violates Section 504? 13

10. Could a school’s use of restraint or seclusion have a discriminatory effect on students with disabilities in violation of Section 504? 16

11. Can the use of restraint or seclusion deny a student’s receipt of Section 504 FAPE Services?..... 16

12. Does Section 504 require the school to assess the effects of restraint or seclusion on a student’s receipt of FAPE?..... 17

13. How must a school respond if a student has been denied Section 504 FAPE by the use of restraint or seclusion?..... 21

Resources Concerning the Use of Restraint and Seclusion

14. Where can school districts turn in order to learn how to reduce or eliminate the use of restraint or seclusion in their schools? 22

15. Are there other Departmental resources on the use of restraint and seclusion?..... 23

Introduction

In the questions and answers and illustrative examples below, the Office for Civil Rights (OCR) of the U.S. Department of Education (Department) seeks to inform school districts about how the use of restraint or seclusion may result in discrimination against qualified students with disabilities⁹ in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II).¹⁰ This guidance document sets forth OCR's interpretation of these laws and regulations.

If you would like information about the Department's suggested best practices to prevent the use of restraint or seclusion, please see the Department's May 15, 2012, *Restraint and Seclusion: Resource Document*.¹¹ That document recommended that school districts never use physical restraint or seclusion for disciplinary purposes and never use mechanical restraint, and that trained school officials use physical restraint or seclusion only if a child's behavior poses imminent danger of serious physical harm to self or others.

⁹ Even though this guidance focuses on the elementary and secondary education context, educators should be aware that restraint and seclusion can impact a student's access to a program at the preschool level, and educators have nondiscrimination obligations under Federal disability civil rights laws to these students as well. *See, e.g.*, 34 C.F.R. § 104.38 (preschool education). Section 504 obligations to preschool students with disabilities are not the same as the obligations to elementary or secondary school students with disabilities. *Id.*

For the purposes of this document, all references to *students with disabilities* means elementary and secondary school students who meet the relevant definition of qualified student with a disability in the Department's Section 504 regulation. 34 C.F.R. § 104.3(j). With respect to public elementary or secondary educational services, a qualified person with a disability is one who is (i) of an age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). 34 C.F.R. § 104.3(l)(2).

¹⁰ This letter focuses on the laws that OCR is responsible for enforcing, which do not include the IDEA. The Office of Special Education Programs in the Department's Office of Special Education and Rehabilitative Services (OSERS) administers the IDEA. All students with disabilities who are eligible for special education and related services under the IDEA, however, are also protected by Section 504 and Title II. Consequently, OCR enforces the Section 504 and Title II rights of students with disabilities who are also covered by the IDEA. For general information about the IDEA, please see www.osepideasthatwork.org.

School districts are also prohibited from discriminating on the basis of race, color, national origin, or sex, in their use of restraint or seclusion. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. 42 U.S.C. §§ 2000d-2000d-7; 34 C.F.R. pt. 100. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs and activities operated by recipients of Federal financial assistance. 20 U.S.C. §§ 1681-1688; 34 C.F.R. pt. 106.

¹¹ www.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.

How OCR Defines the Practices of Restraint and Seclusion

1. What is restraint?

In general, OCR uses the following definitions for mechanical restraint and physical restraint.¹²

Mechanical restraint refers to the use of any device or equipment to restrict a student's freedom of movement.¹³ The term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed, such as:

- Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
- Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
- Restraints for medical immobilization; or
- Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.¹⁴

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

¹² See, e.g., OCR, 2015-16 CRDC School Form, www.ed.gov/ocr/docs/crdc-2015-16-all-schools-form.pdf.

¹³ For example, if a school relies on law enforcement personnel to handcuff students to obtain compliance (but not for the sole purpose of arrest), such students are "subjected to mechanical restraint" under OCR's definition. See OCR, 2015-16 CRDC School Form, Section X, www.ed.gov/ocr/docs/crdc-2015-16-all-schools-form.pdf. Further, stakeholders have reported mechanical restraints such as tape, straps, tie downs, ropes, weights, weighted blankets and a wide variety of other devices have been used by educators to attempt to control student behavior. See Council for Children with Behavioral Disorders, Council for Exceptional Children, *The Use of Physical Restraint Procedures in School*, 2 (July 2009), casecec.org/pdf/seclusion/Accepted,%20CCBD%20on%20Use%20of%20Restraint,%207-8-09.pdf.

¹⁴ Note that items used in a therapeutic manner for a particular student in one context could be used as a mechanical restraint in a different context; the proper inquiry, therefore, to determine whether an item is a mechanical restraint is not based solely on what the item is, but also how the item is used.

2. What is seclusion?

In general, OCR uses the following definition for seclusion.¹⁵

Seclusion refers to the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.

OCR's Authority to Protect Students with Disabilities

3. What is OCR's jurisdiction with respect to the rights of students with disabilities?

OCR enforces Section 504 and Title II in schools and both Federal laws prohibit disability discrimination. Section 504 prohibits disability discrimination by recipients of Federal financial assistance.¹⁶ OCR has Section 504 enforcement authority over entities that receive Federal financial assistance from the Department, including all public schools, school districts, public charter schools and magnet schools.¹⁷ Under Section 504, recipients of Federal funds from the Department that operate a public elementary or secondary education program or activity must provide students with disabilities equal educational opportunities, including needed regular or special education and related aids and services that are designed to meet the needs of students with disabilities as adequately as the needs of students without disabilities are met.¹⁸

Title II prohibits disability discrimination by public entities, including all public schools, school districts, public charter schools and magnet schools, regardless of whether they receive Federal financial assistance.¹⁹ OCR, along with the U.S. Department of Justice (DOJ), enforces Title II in public elementary and secondary schools.²⁰

¹⁵ See OCR, *2015-16 CRDC School Form*, Section X, www.ed.gov/ocr/docs/crdc-2015-16-all-schools-form.pdf.

¹⁶ 29 U.S.C. § 794; 34 C.F.R. pt. 104.

¹⁷ In this document, *schools* and *school districts* are used synonymously and refer to public elementary and secondary schools, including public charter schools and magnet schools, which receive Federal financial assistance from the Department.

¹⁸ 34 C.F.R. §§ 104.4, 104.33.

¹⁹ 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

²⁰ As noted, this document focuses on OCR's work in public elementary and secondary schools. Readers should be aware, however, that Section 504 and Title II, as well as the IDEA, also generally apply also apply to recipients of Federal financial assistance that are responsible for the education of students in juvenile justice facilities. See OCR and DOJ, *Dear Colleague Letter: Civil Rights of Students in Juvenile Justice Residential Facilities* (Dec. 8, 2014), www.ed.gov/policy/gen/guid/correctional-education/cr-letter.pdf. In addition, readers should be aware that DOJ has jurisdiction to investigate and litigate cases involving whether seclusion or restraint violates youths' constitutional right to reasonably safe conditions of confinement in juvenile justice or adult facilities. See www.justice.gov/crt/rights-juveniles and www.justice.gov/crt/special-litigation-section-cases-and-matters0#juv.

Title II is generally construed to provide no less protection than Section 504.²¹ For ease of reference, the remainder of the document will focus on Section 504.

4. Who is protected by Section 504?

Section 504 protects students with disabilities. Under Section 504, in the context of public elementary and secondary education, a student is considered to have a disability if the student: (1) has a physical or mental impairment that substantially limits one or more major life activities; or (2) has a record of such an impairment; or (3) is regarded as having such an impairment.²²

Section 504 requires that students with disabilities receive a free appropriate public education (FAPE). The Section 504 regulation defines FAPE as the provision of regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met.²³

A school district has an obligation under Section 504 and Title II to make reasonable modifications in criteria, policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.²⁴

²¹ 42 U.S.C. § 12201(a).

²² 29 U.S.C. § 705(9)(B), (20)(B); 42 U.S.C. § 12102. The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), Pub. Law No. 110-325, which amended the definition of disability under that law, amended the definition of disability under Section 504 and Title II, as well. The Amendments Act also requires that the term disability be interpreted broadly under these statutes. For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR, *Dear Colleague Letter: ADA Amendments Act of 2008 and Students with Disabilities Attending Public Elementary and Secondary Schools* (Jan. 19, 2012), www.ed.gov/ocr/letters/colleague-201109.html, and OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

²³ 34 C.F.R. § 104.33. In this letter, the term *Section 504 FAPE services* is used to refer to the regular or special education and related aids and services provided to students with disabilities as specified in 34 C.F.R. § 104.33(b). Implementation of an individualized education program (IEP), developed in accordance with the IDEA, is one means of meeting the FAPE standard under Section 504. 34 C.F.R. § 104.33(b)(2). The Department has previously stated that while the “IDEA emphasizes and encourages the use of positive behavioral interventions and supports, [it] does not prohibit the use of other measures, such as seclusion, non-emergency restraint, or aversive behavioral intervention, when appropriate to address student behavior.” Letter to Weiss (National Leadership Consortium on Developmental Disabilities) from Secretary Arne Duncan, 55 IDELR 173 (Jan. 26, 2010), www.ed.gov/policy/speced/guid/idea/letters/2010-1/weiss012610seclusionandrestraints1q2010.doc. More recently, the Department has stated that there continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques, and that every effort should be made to prevent the need for the use of restraint and seclusion. See U.S. Department of Education, *Restraint and Seclusion: Resource Document*, iii (May 15, 2012), www.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.

²⁴ 34 C.F.R. § 104.4(b); 28 C.F.R. § 35.130(b)(7); see *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985); 34 C.F.R. §§ 104.33-37; see also OCR, *Dear Colleague Letter: Equal Access to Extracurricular Athletics for Students with Disabilities*, 8 n.17 (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.pdf. But see 28 C.F.R. § 35.130(h).

All persons protected by Section 504, including students with disabilities who are covered by the Individuals with Disabilities Education Act (IDEA),²⁵ are protected from discrimination under the Section 504 general nondiscrimination regulatory provisions, as well as under the regulatory provisions addressing program and physical accessibility requirements and retaliation.²⁶

The Legal Standards OCR Uses to Determine Whether the Use of Restraint or Seclusion Has Violated Section 504

5. What is a school district's Section 504 evaluation obligation and how does the use of restraint or seclusion of a student implicate that obligation?

Section 504 requires a school district to evaluate any student who needs or whom the district has reason to believe needs special education or related services because of a disability.²⁷ A student's behavioral challenges, such as those that lead to an emergency situation in which a school believes restraint is a justified response, could be a sign that the student has a disability and needs special education and related services. OCR would likely find it to be a justified response to restrain or seclude a student with a disability in situations where the student's behavior poses imminent danger of serious physical harm to self or others. OCR would likely not, however, find the repeated use of restraint and seclusion to be a justified response where alternative methods also could prevent imminent danger to self or others. When a student exhibits behavior that interferes with the student's education or the education of other students in a manner that would reasonably cause a teacher or other school personnel to believe or suspect that the student has a disability (i.e., to suspect that the behavior is caused by or related to a disability), the school district must evaluate the student to determine if the student has a disability and needs special education or related services because of that disability.²⁸

A student who experiences behavioral challenges in school may have a disability, even if the behavioral challenges are not accompanied by academic challenges. If school officials are restraining or secluding a student for behavioral challenges, that student could be a student with a disability in need of special education or related services to address those behavioral challenges. Some students, due to an as yet unidentified disability, may engage in behaviors that do not conform to school conduct codes because they are not receiving needed educational services,

²⁵ Students with disabilities who are IDEA-eligible also have rights under Section 504 and Title II.

²⁶ 34 C.F.R. §§ 104.4, 104.21-23, 104.61 (incorporating 34 C.F.R. § 100.7(e)).

²⁷ 34 C.F.R. § 104.35(a). In some circumstances, the IDEA evaluation process may provide the school district with the necessary information, required by Section 504, to determine whether a student has a disability, and whether that student needs related aids and services or supplementary aids and services in the regular education environment because of that disability. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in Section 504. 34 C.F.R. § 104.35(b).

²⁸ 34 C.F.R. § 104.35(a). Non-disruptive behaviors, such as staring into space, failing to engage in class activities, or poor hygiene can also be indications of a need for a disability evaluation. This document, however, focuses on aggressive or disruptive behaviors that could trigger the need for an evaluation.

including services to address the student's needs related to his or her behavior. Evidence that the student's behavior is out of the expected range of behaviors of students that age could trigger a school district's obligation to evaluate that student for a disability and need for special education and related services.

Alternatively, there could be circumstances in which a school restrains or secludes a student for behavior not caused by or related to a disability. For example, a student might be experiencing a crisis, such as due to a divorce in the family, a recent death, or other traumatic incident. Such a crisis could cause a student to engage in behavior that might lead a school to believe restraint or seclusion is a justified response. (The fact that a student is undergoing a traumatic event, such as a parental divorce, would not excuse the school district from its obligation to evaluate in those cases in which the student's behavior or other information provides the school with reason to suspect the student has a disability.²⁹)

When a school district suspects a student may have a disability because of social, emotional, or behavioral needs, and requires special education or related services to address those needs, the evaluation and placement process must draw upon information from a variety of sources and include an assessment of the student's social, emotional, or behavioral needs to address the identified concerns.³⁰

²⁹ 34 C.F.R. § 104.35(a).

³⁰ Under Section 504, an evaluation must: consist of more than mere intelligence quotient (IQ) tests; and measure specific areas of educational need, such as speech processing issues, inability to concentrate, and behavioral needs. Also, as part of the evaluation, Section 504 requires that tests are selected and administered to the student in a manner that best ensures that the test results accurately reflect the student's aptitude or achievement or other factor being measured, rather than reflect the student's impaired sensory, manual, or speaking skills, except where those skills are the factors being measured; that tests and other evaluation materials are validated for the specific purpose for which they are used; and that tests are appropriately administered by trained personnel. 34 C.F.R. §§ 104.33, 104.35(b); 34 C.F.R. pt. 104, App. A (discussing Subpart D, ¶ 23) ("Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.")

6. How does the use of restraint or seclusion of a student who was already identified as a student with a disability implicate a school's Section 504 reevaluation obligation?

For a student already identified as a student with a disability, a school's use of restraint or seclusion could be³¹ evidence that the student's current array of regular or special education and related aids and services is not addressing the student's needs. Because the Section 504 FAPE obligation is ongoing, when a school district has reason to believe that the student's educational needs are not being met, it must consider different or additional approaches or services to address the student's behavioral needs, and if necessary, reevaluate the student,³² which could include evaluating the need for positive behavioral interventions and supports and other strategies to address the student's behavior that could mitigate or eliminate the need for restraint and seclusion.³³

In OCR's view, persuasive indicators that a student's needs are not being met appropriately would include: situations that would impede the student's learning or that of others, such as new or more frequent emotional outbursts by the student, or an increase in the frequency or intensity of behavior; a sudden change into withdrawn, non-communicative behavior; and/or a significant rise in missed classes or sessions of Section 504 services. A notable drop in academic performance, such as a sudden decline in grades, could also be an indicator of the need to consider different or additional approaches or services, but a change in a student's academic performance is not a necessary indicator in every instance. Alternatively, a student's current array of services might only address the student's academic challenges but now must be modified to address new or changed disability-related behavioral challenges that the student may be experiencing. These and other indicators that the student's behavior is out of the expected range of behaviors of students that age could trigger a school district's Section 504 obligation to determine if the student's needs are being met appropriately, and whether a reevaluation is needed under Section 504.³⁴

³¹ As stated earlier, there could be circumstances in which a school restrains or secludes a student in an emergency for behavior not caused by or related to a disability, such as behavior in response to a personal crisis.

³² 34 C.F.R. § 104.33(b). Section 504 requires placement decisions to be made by a group of knowledgeable persons often known as a Section 504 team (which, for an IDEA-eligible student, would be an IEP or placement team). 34 C.F.R. § 104.35(c). In this document, the *Section 504 team* refers to the group of knowledgeable persons that determines for a qualified student with a disability the appropriate Section 504 FAPE services and the appropriate setting to receive those services.

³³ The IDEA specifically requires IEP teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose behavior impedes his or her learning or that of others. 34 C.F.R. §§ 300.320(a)(4), 300.324(a)(2)(i) and (b)(2). For further discussion on positive behavioral interventions and supports, please see OSERS, *Dear Colleague Letter: Ensuring Equity and Providing Behavioral Supports to Students with Disabilities* (Aug. 1, 2016), www.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

³⁴ In OCR's view, if a student is provided FAPE consistent with the requirements of Section 504, it would result in reduced frequency of those situations in which school districts believe the use of restraint or seclusion is justified.

If such a reevaluation is conducted that identifies additional needs, then the school has an obligation under Section 504 to reconvene the Section 504 team (or IEP team) to (1) determine whether and to what extent additional or different interventions or supports and services are needed; (2) ensure that any needed changes are made promptly; and (3) remedy any negative effects that may have resulted from the school's prior use of restraint or seclusion that, if left unaddressed, would result in a denial of FAPE.³⁵

School districts must also establish and implement a system of procedural safeguards for parents to appeal district actions regarding the identification, evaluation, or educational placement of students with disabilities who need or are believed to need special education or related services.³⁶ The school district must tell parents and guardians about this system, notify them of any evaluation or placement actions, allow them to examine their child's records, afford them an impartial hearing with opportunity for parent or guardian participation and representation by counsel, and provide them a review procedure.³⁷

7. Does Section 504 prohibit the use of restraint or seclusion in all situations?

No. Section 504 prohibits the use of restraint or seclusion that constitutes disability discrimination.³⁸ As explained in the following questions and answers, the use of restraint or seclusion could violate Section 504 in several ways, if the restraint or seclusion of a student with a disability: (1) constitutes unnecessary different treatment (discussed in Q&As 8 and 9); (2) is based on a policy, practice, procedure, or criterion that has a discriminatory effect on students with disabilities (discussed in Q&A 10) or (3) denies a student's right to FAPE (discussed in Q&As 5-6 and 11-13).³⁹

³⁵ 34 C.F.R. §§ 104.33, 104.35; *see also* 34 C.F.R. § 300.324(b) (IEP review and revision procedures for IDEA-eligible students). Additionally, as part of that reevaluation process and in determining where the student shall receive the changed Section 504 FAPE services, school districts must remain aware of their obligation to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability. This is the regular educational environment unless it is demonstrated that the education of the student in the regular educational environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 104.34; *see also* 34 C.F.R. § 300.114-116 (IDEA least restrictive environment and placement provisions); OSERS, *Dear Colleague Letter: Ensuring Equity and Providing Behavioral Supports to Students with Disabilities* (Aug. 1, 2016), www.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

³⁶ 34 C.F.R. § 104.36.

³⁷ *Id.*

³⁸ The use of restraint or seclusion may, of course, be prohibited by State law or local school district policy.

³⁹ Depending upon the circumstances, a school district's use of restraint or seclusion could constitute disability-based harassment, and OCR has made such a finding in the past. Disability harassment under Section 504 is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the school's program. In the context of restraint or seclusion, for example, a teacher could create a hostile environment by subjecting a student to unjustified physical restraint because of conduct related to the student's disability, with the result that the student tries to avoid school, such as through increased absences. If the school determines that the use

8. When does Section 504 require a school to treat a student with a disability differently from students without disabilities?

Section 504 requires different treatment of a student with a disability when different treatment is necessary to ensure that a student with a disability has an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as a student without a disability.⁴⁰ In order to ensure equal opportunity in the elementary and secondary school setting, schools must, among other things, provide FAPE to students with disabilities.⁴¹ As part of the FAPE requirement, Section 504 requires reevaluations to be conducted periodically, and before a significant change in placement.⁴²

Though not explicitly required by the Department's Section 504 regulations, school districts often record the elements of an individual student's FAPE under Section 504 in a document, typically referred to as a *Section 504 Plan*. A written plan is often a useful way to document that the school district engaged in a process that included a group of knowledgeable persons to identify and address the needs of a student with disabilities and to communicate, to school personnel, the information needed for successful implementation.⁴³ OCR would also consider the provision of services and supports to ensure the provision of FAPE to be necessary different treatment.

9. How could a school's use of restraint or seclusion be different treatment that violates Section 504?

When a school district restrains or secludes a student with a disability for behavior that would not result in the restraint or seclusion of peers without disabilities, OCR would likely find that the school district engaged in unnecessary different treatment on the basis of disability prohibited by Section 504.⁴⁴ Similarly, a school district that subjects a student to restraint or seclusion on

of unjustified restraint or seclusion based on disability created a hostile environment, the school must take prompt and effective steps reasonably calculated to suspend the use of unjustified restraint or seclusion, eliminate the hostile environment, prevent it from recurring, and, remedy its effects. For further information on disability harassment please see OCR and OSERS, *Dear Colleague Letter, Prohibited Disability Harassment*, (July 25, 2000), www.ed.gov/ocr/docs/disabharassltr.html.

⁴⁰ 34 C.F.R. § 104.4(b)(1), (2); see also Q&A 4 and footnote 24, above.

⁴¹ 34 C.F.R. § 104.33.

⁴² 34 C.F.R. § 104.35(a), (d).

⁴³ As mentioned above, implementation of an individualized education program (IEP), developed in accordance with the IDEA, is one means of meeting the FAPE standard under Section 504. 34 C.F.R. § 104.33(b)(2). IDEA-eligible students who have an IEP are not required to also have a Section 504 plan even though they are protected under Section 504. For these students, the IEP is sufficient to meet the Section 504 FAPE standard.

⁴⁴ 34 C.F.R. § 104.4(b)(1)(iv). Cf. footnote 23, above.

the basis of assumptions or stereotypes about disability also engages in conduct prohibited by Section 504.⁴⁵

Example 1: Student A, an eighth-grader in junior high school, has a panic disorder. She was evaluated under Section 504 and receives Section 504 FAPE, including assistance with medication administration. One day, after lunch, she and a classmate were running around the classroom carrying sharp scissors and waving their arms. Eventually, they put the scissors away and sat down after repeated requests by their teacher, who was also Student A's homeroom teacher for her seventh-grade year. The school's restraint and seclusion policy states that school personnel have the discretion to restrain a student if staff deem it to be a justified response to ensure the safety of the student or others and to enlist the assistance of a school resource officer (SRO) to do so. Even though the students stopped running and waving the scissors, the teacher called the SRO and asked that the SRO restrain Student A, which the SRO did by pinning Student A's arms to her torso, thus preventing her from moving. The SRO then escorted Student A to the principal's office where she was told she would stay until she could "chill out." The other student with whom Student A was running, who did not have a disability, was not restrained.

Upon investigation, the teacher reported that she knew of Student A's disability from Student A's time in the teacher's homeroom class; Student A used the homeroom period to regularly visit the nurse's office to receive medication to treat her panic disorder. The teacher further reported that she viewed herself as generally knowledgeable about panic disorders and believed students with those disorders have a difficult time following directions and become upset easily. The teacher believed that having the SRO restrain Student A and allowing her time by herself in the principal's office was the best way to help Student A calm down. This student's Section 504 FAPE services do not address actions the school needs to take when the student runs or waves sharp objects.

Both Student A and the other student were later equally disciplined. Both were prohibited from attending the upcoming school-sponsored field trip that both students had previously planned to attend.

Given these facts, OCR would likely find that the restraint of Student A constituted unlawful different treatment in violation of Section 504.

In this instance, the teacher treated Student A differently than the other student involved in the running and waving the scissors behavior based on the teacher's generalizations and assumptions about individuals who have a panic disorder, not because of any individualized knowledge of the

⁴⁵ 34 C.F.R. § 104.4. Additionally, even if the use of restraint or seclusion does not constitute unnecessary different treatment, if a school knows or believes that a student's behavior is caused by or related to the student's disability, the school must consider whether the FAPE services the student is receiving are appropriate to address the student's behavior. 34 C.F.R. § 104.33. Please see Q&As 5-6 and 11-13 for further discussion about these FAPE obligations.

nature of Student A's disability or specific action that occurred at that time. In this situation, restraining Student A constitutes unnecessary different treatment on the basis of disability, and therefore violates Section 504.⁴⁶ A school district that operates its programs or activities on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally or specific disabilities in particular is likely in violation of Section 504.

The same result would be true if the SRO, rather than the teacher, made the decision to treat Student A differently than the other student involved in the same behavior. Section 504 covers school officials, school employees, and everyone over whom a school exercises some control, whether through contract or other arrangement, including SROs, whether they are school district employees or work for a non-district law enforcement agency.⁴⁷ Schools cannot divest themselves of responsibility for the nondiscriminatory administration of school policies, including restraint, by relying on SROs, school district police officers, contract or private security companies, security guards or other contractors, or other law enforcement personnel to administer school policies.⁴⁸

Furthermore, in this example, the use of restraint violated school policy. The policy allowed for the use of restraint if a justified response to ensure the safety of the student or others. Even if restraint would have been a justified response, to ensure the safety of the student or others at the time of the incident when the students were running around the classroom and waving the scissors, the student had stopped her behavior and had returned to her seat before the teacher called the SRO. Any safety concern had already been resolved, and therefore restraint of either student would have also violated school policy.

An appropriate remedy for the school's violation of Section 504 could include training its teachers and staff, as well as SROs, to implement its policies in a neutral, nondiscriminatory manner. To ensure future compliance with Section 504, the training could focus on prevention of the use of restraint and incorporate de-escalation strategies so that staff and SROs are equipped to accurately identify, and respond to, emergencies in ways that are safe for all involved. Where SROs are employed by a non-school law enforcement agency, an appropriate remedy could also include creating a memorandum of understanding or other similar document between the school district and the law enforcement agency to clarify when it is and is not appropriate for school personnel to seek the assistance of an SRO.⁴⁹ As discussed in Q&A 12, the school would also

⁴⁶ 34 C.F.R. § 104.4(b)(1)(iv).

⁴⁷ 34 C.F.R. § 104.4(b)(1).

⁴⁸ The nondiscrimination requirements of Section 504 extend to conduct undertaken by entities that carry out some or all of the schools' functions through contractual or other arrangements. 34 C.F.R. § 104.4(b).

⁴⁹ OCR notes that DOJ's Office of Community Oriented Policing Services (COPS Office) requires that jurisdictions that receive COPS grant funding to hire SROs must have a Memorandum of Understanding between schools and law enforcement that clearly documents the roles, responsibilities, and expectations of the individuals and partners involved. See Office of Community Oriented Policing Services, *Memorandum of Understanding Fact Sheet* (May 2015), cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP_MOU_Fact_Sheet.pdf.

have an obligation to monitor the student who was restrained or secluded to observe any adverse changes that could occur in her academic performance or behavior, and ensure current supports and services are being properly implemented. If there were any adverse changes observed, the school would be required to take action to ensure the continued provision of FAPE under Section 504, as discussed in Q&A 13.⁵⁰

10. Could a school's use of restraint or seclusion have a discriminatory effect on students with disabilities in violation of Section 504?

Yes. Section 504 prohibits a school from using criteria, policies, practices, or procedures that are neutral in language and evenhandedly implemented with respect to students with and without disabilities but that nonetheless have the effect of discriminating against students with disabilities on the basis of disability, or defeating or substantially impairing accomplishment of the objectives of the school's programs with respect to students with disabilities.⁵¹ This prohibition applies even when schools adopt the criteria, policies, practices, and procedures without the intent to discriminate. The resulting discriminatory effect is commonly referred to as *disparate impact* discrimination.⁵²

11. Can the use of restraint or seclusion deny a student's receipt of Section 504 FAPE Services?

Yes. There are multiple ways in which the use of restraint or seclusion might deny FAPE. For example, the use of restraint or seclusion may have a traumatic impact on that student,⁵³ such that even if she were never again restrained or secluded, she might nevertheless have new academic or behavioral difficulties that, if not addressed promptly, could constitute a denial of FAPE. Depending on the nature of his or her disability, a student with a disability may be especially physically or emotionally sensitive to the use of such techniques.⁵⁴ That traumatizing effect could manifest itself in new behaviors, impaired concentration or attention in class, or increased absences, any of which could, if sufficiently severe and unaddressed, result in a denial

⁵⁰ 34 C.F.R. § 104.33(a).

⁵¹ Recipients of Federal financial assistance are prohibited from utilizing criteria or methods of administration that have the effect of subjecting qualified students with disabilities to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to persons with disabilities. 34 C.F.R. § 104.4(b)(4). *See also* 28 C.F.R. § 35.130(b)(3), (8).

⁵² *See, e.g., Choate*, 469 U.S. at 299.

⁵³ *See National Center for Trauma-Informed Care and Alternatives to Seclusion and Restraint* (last updated Oct. 26, 2015), www.samhsa.gov/nctic/about; *see also* Substance Abuse and Mental Health Services Administration, U.S. Dep't of Health & Human Services, *The Business Case for Preventing and Reducing Restraint and Seclusion Use*, HHS Publication No. (SMA) 11-4632 (2011), www.store.samhsa.gov/shin/content/SMA11-4632/SMA11-4632.pdf.

⁵⁴ *See generally id.*

of FAPE for that student.⁵⁵ Other effects could include socially withdrawn behavior, or diminished interest or participation in class.⁵⁶

Furthermore, the repeated use of restraint or seclusion in school could deny a student's receipt of FAPE in another way. Consider a student with a disability who engages in behavior in response to which the school secludes him for extended periods and on multiple occasions. While secluded, the student does not receive educational instruction or services. Cumulatively, the school's repeated use of seclusion with that student could result in the school's failure to comply with the Section 504 team's decision about the regular or special education, related aids and services, or supplemental services and modifications that the student needs, or the appropriate setting in which to receive those services and therefore may constitute a denial of FAPE.

12. Does Section 504 require the school to assess the effects of restraint or seclusion on a student's receipt of FAPE?

If there is reason to believe that the provision of Section 504 FAPE services to the student has been adversely affected by the use of restraint or seclusion, such that the student's needs are not being met, a school has an obligation under Section 504 to: (1) determine the extent to which additional or different interventions or supports and services, including positive behavioral interventions and supports and other behavioral strategies may be needed; (2) determine if current interventions and supports are being properly implemented; (3) ensure that any needed changes are made promptly; and (4) remedy any denial of FAPE that resulted from the school's prior use of restraint or seclusion.⁵⁷ A school might need to provide counseling, as a related service, to specifically address any new education-related needs that may have arisen from use of the restraint or seclusion on a student.

Example 2: In the second grade, Student C was evaluated as having a disability due to oppositional defiant disorder. He receives special education and related aids and services, in a regular education setting through an individualized education program (IEP), including a one-on-one aide. The last IEP notes that, instead of verbally communicating with teachers when frustrated, the Student would lose control, start tearing out pages from textbooks and notebooks, and sometimes verbally threaten to injure staff. That IEP, therefore, noted that the IEP team would identify and implement positive behavioral

⁵⁵ See National Child Traumatic Stress Network, *Age-Related Reactions to a Traumatic Event* (undated), www.nctsn.org/sites/default/files/assets/pdfs/age_related_reactions_to_a_traumatic_event.pdf.

⁵⁶ *Id.*

⁵⁷ 34 C.F.R. § 104.33. Section 504 requires placement decisions to be made by the Section 504 or IEP team. 34 C.F.R. § 104.35(c).

supports and interventions. The IEP team,⁵⁸ however, never revised the IEP to include additional interventions and supports and other strategies to address these behaviors.

In the third grade, Student C begins experiencing difficulty concentrating in class and begins to run around the classroom whenever he is unable to follow his teacher's instructions. Running around is new behavior for him, and the teacher with the assistance of the one-on-one aide, responds each time by sending him to the school's seclusion room to calm down. The seclusion room has no furniture in it, no desk, chair or any other object. The staff state they only use the seclusion room when Student C presents a danger to himself or others, however, the seclusion room logs that are maintained contemporaneously with use indicate that Student C is placed in the seclusion room for a variety of behaviors, including destroying textbooks, refusing to return to his seat, and speaking in a loud voice. The teacher is aware of Student C's disability and the IEP but believes seclusion is the preferred method for calming down any student. Student C's one-on-one aide did not provide any support or intervention other than placing the student in the seclusion room.

Over the course of one month, Student C is sent to the isolation room six times, for varying lengths of time. The student's parent never gave the school permission to put Student C in any type of seclusion and the IEP does not provide for seclusion. The student becomes anxious about going to school and the possibility that he will be secluded, and therefore, he often convinces his parents to keep him at home. The student's parent reported to the assistant principal that Student C was avoiding school because he was apprehensive about being secluded. The assistant principal never followed up with the teacher and the school never convened the IEP team.

In light of these facts, OCR would likely find that the school violated its FAPE responsibilities.

When the school has reason to believe a student's needs have changed based on behaviors that interfere with learning and contemplates the need for changes to the student's IEP, the school has an obligation to reconvene the IEP team to determine the extent to which additional or different services, including positive behavioral interventions and supports, are needed,⁵⁹ and the school must ensure that any needed changes are made promptly to ensure the continued provision of FAPE and that the changes are reflected in the student's IEP.⁶⁰

Here, the school personnel had reason to believe that the current FAPE services may not have been addressing all of the student's disability-related behavioral needs. Despite a documented

⁵⁸ In this example, the Section 504 group of knowledgeable persons is an IEP team. Here, the school is providing Section 504 FAPE through the implementation of an IEP. 34 C.F.R. § 104.33(b)(2).

⁵⁹ A reevaluation would not necessarily be needed unless there is a reason to believe the student's underlying disability or disabilities have changed, the student has an additional disability that has not been identified previously, or the student requires a significant change in placement. 34 C.F.R. § 104.35(a) and (d).

⁶⁰ 34 C.F.R. § 104.33(a), (b)(2).

need to do so, the IEP team never developed or implemented positive behavioral interventions and supports. Student C began engaging in new behavior (running around the class and yelling) that the teacher found disruptive, in addition to other noncompliant behavior, and in the course of one month was repeatedly removed from the classroom (due to seclusion). School personnel also knew that the student was avoiding school and had missed instruction by convincing his parents to keep him at home on several occasions.

Under these circumstances, the school's repeated use of seclusion was most likely an indication that Student C was not receiving sufficient or appropriate behavioral interventions and supports to address his disability-related needs and that his IEP needed to be revised to address these needs. (As the Department has stated previously, there is no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques.⁶¹)

Further, in light of the change in the student's attendance, school avoidance, and the frequency with which seclusion was used, the school should have convened Student C's IEP team. Because the school had evidence suggesting that this student's needs changed such that the student may no longer have been receiving FAPE, the school had an obligation to convene the team to determine whether that student's FAPE services should have been changed to include other aids or services to address his behavior and avoid the unjustified use of seclusion, and to determine if the student needed counseling services to address the student's reluctance to attend school. In taking these steps, the school would have ensured it was meeting the educational needs of Student C.⁶² The IEP team could have investigated the behaviors or circumstances which gave rise to the perceived need for seclusion and considered alternative approaches, such as implementation of positive behavioral interventions and supports to help change or minimize Student C's inability to focus. By failing to convene the IEP team, the school was unable to determine appropriately if it was providing FAPE and if not, to correct its failure to provide appropriate Section 504 services to Student C. If the student had been denied FAPE, the school could also specify compensatory education services to remedy such denial and include these services in Student C's IEP.

In addition, if Student C had been secluded for longer amounts of time, or on a repeated basis, that in and of itself could have resulted in a denial of FAPE. (Note, the analysis regarding the use of seclusion in this document applies regardless of what name the school uses to call the space in which the student is secluded. Seclusion that leads to a denial of FAPE can occur in settings that are named, or intended to serve, as therapeutic spaces (*i.e.*, there is sometimes no difference between what occurs in a "seclusion room" vs a "calm down room" or "reset room.")) Student C's current placement called for FAPE to be provided in the regular education setting. If he was

⁶¹ U.S. Department of Education, *Restraint and Seclusion: Resource Document*, iii (May 15, 2012), www.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.

⁶² 34 C.F.R. §§ 104.33-104.35.

being effectively removed from that setting, due to repeated seclusion, he was not receiving his needed FAPE services. In that event, a reconvening of the IEP team, or a reevaluation could be required. For example, had the IEP team consulted with a behavior specialist, the team could have devised appropriate positive behavioral interventions and supports to use with Student C to help him develop skills to positively address his difficulty focusing. The IEP team could also have determined that additional academic supports were needed. For example, if the student were having difficulty following a sequence of instructions, the teacher might have been able to devise an effective system of breaking down instructions.

Example 3: A third grade student with autism, Student D, has an IEP prescribing that he receive special education services in a separate special education class for students with similar disabilities and that also includes the following positive behavioral interventions and supports and other strategies: cueing and prompting strategies for effective transitions between activities, the opportunity to refocus in a quiet part of the classroom, and verbal and written instructions, repeated as necessary, for activities and assignments. These strategies have been generally effective in managing Student D's behaviors in class.

One afternoon, Student D becomes very agitated when the class transitions from a computer activity to a paper and pencil lesson. Although the teacher implemented the strategies called for in Student D's IEP to smoothly transition the student into the different lesson, he nevertheless becomes extremely upset and begins banging his head against a wall, repeatedly. The teacher attempts to step between the student and the wall to stop the behavior, but the student continually goes around the teacher to continue to beat his head against the wall. The teacher then restrains Student D, using a standing restraint technique for which she and other staff had received prior training. When Student D no longer presents an imminent risk of seriously harming himself, the teacher discontinues the use of the restraint consistent with prior training. The teacher then immediately takes him to the school nurse to determine whether the student suffered any physical injury, and to the school counselor, who, after speaking with the student, then notifies Student D's parent. The teacher timely documents the use of restraint consistent with the school district's policy.

Within ten school days, Student D's IEP team, including Student D's parent, meet to discuss the circumstances that led to the self-injurious behavior, whether the current strategies in place in the IEP are adequate or should be augmented, whether another evaluation is warranted, and what sort of alternative, appropriate behaviors could be taught to Student D to help him self-regulate his emotions. Also, the IEP team decides it will monitor the student's future behavior and academic performance to determine whether any additional measures are needed to ensure the student continues to receive FAPE.

In this example, OCR would likely not find that the school's use of restraint violated Section 504. The school first implemented the interventions and supports called for in the student's IEP in an attempt to smoothly transition the student to the next activity and avoid the problematic behavior. Despite those actions, the student nevertheless became upset enough that he was in imminent danger of serious physical harm to himself. The student was restrained in response to that emergency, and the restraint was discontinued as soon as the imminent danger of physical harm had passed. Furthermore, OCR would likely not find a Section 504 FAPE violation, in light of the school's reconvening of the IEP team to review and examine the current positive behavioral interventions and supports and other strategies, with input from the family, to determine its effectiveness. By taking prompt and effective steps to ensure that Student D's FAPE services were appropriate to his needs, the school met its obligations under Section 504.

13. How must a school respond if a student has been denied FAPE by the use of restraint or seclusion?

When the Section 504 team or the IEP team determines that the use of restraint or seclusion resulted in a denial of FAPE for the student, the team must determine whether the provision of compensatory educational services or other appropriate relief is warranted in order to ensure the student's continued equal access to the school's educational program.⁶³ If compensatory services are warranted, the school must offer and provide them to the affected student.⁶⁴

The Section 504 team (or IEP team) may also need to consider other placement options – including a self-contained classroom, a private setting, or a separate school – if the student's education “cannot be achieved satisfactorily in the regular education environment with the use of supplementary aids and services.”⁶⁵ Before changing a student's placement, however, the team must consider whether any supplementary aids, services or supports could be provided to maintain the student's placement in the regular education setting to the maximum extent appropriate to the needs of the student with a disability.⁶⁶ The team must conduct a reevaluation of the student if they believe a significant change in placement is necessary.⁶⁷

⁶³ 34 C.F.R. §§ 104.4, 104.33(a).

⁶⁴ 34 C.F.R. § 104.33(a).

⁶⁵ 34 C.F.R. § 104.34 (a school district must place a student with a disability in the regular educational environment unless the district can demonstrate that the education of that student cannot be achieved satisfactorily in the regular education environment with the use of supplementary aids and services).

⁶⁶ *Id.* Placement in the regular education setting may be inappropriate if the student's behavior due to disability impedes the learning of others. As noted above, the IDEA specifically requires IEP teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose behavior impedes his or her learning or that of others. 34 C.F.R. §§ 300.320(a)(4), 300.324(a)(2)(i) and (b)(2). For further discussion on positive behavioral interventions and supports, please see OSERS, *Dear Colleague Letter: Ensuring Equity and Providing Behavioral Supports to Students with Disabilities* (Aug. 1, 2016), www.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

⁶⁷ 34 C.F.R. § 104.35(a).

Resources Concerning the Use of Restraint and Seclusion

14. Where can school districts turn in order to learn how to reduce or eliminate the use of restraint or seclusion in their schools?

Schools may wish to consider the following:

- The Positive Behavioral Interventions and Supports Implementation Blueprint and Self-Assessment is a guide for leadership teams in the assessment, development, and execution of action plans. The outcome is the development of local capacity for sustainable, culturally and contextually relevant, and high fidelity implementation of multi-tiered practices and systems of support for supporting and responding to behavior. For further information, see www.pbis.org.
- Students who have experienced trauma in the past may be vulnerable in ways that some of their peers are not, and could therefore be impacted by the use of coercive practices in a much more significant way. The U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration's National Center for Trauma-informed Care and Alternatives to Seclusion and Restraint (NCTIC) offers consultation and technical assistance to develop trauma-informed care to eliminate the use of restraints, seclusion, and other coercive practices. NCTIC is also working to develop a knowledge base related to implementing trauma-informed approaches. Trauma-informed care is an approach to engaging people with histories of trauma that recognizes the presence of trauma symptoms and acknowledges the role that trauma has played in their lives. For further information, see www.samhsa.gov/nctic.
- The National Child Traumatic Stress Network, funded by the Substance Abuse and Mental Health Services Administration, provides several resources for educators, parents and children on the serious impact of traumatic stress on children. The Network works with established systems of care, including the health, mental health, education, law enforcement, child welfare, juvenile justice, and military family service systems, to ensure that there is a comprehensive trauma-informed continuum of accessible care. For further information, see www.nctsn.org/resources/audiences/school-personnel.
- "Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers" summarizes evidence-based, positive, proactive, and responsive classroom behavior intervention and support strategies for teachers. These strategies could be used classroom-wide, or intensified to support small group instruction, or amplified further for individual students. For further information, see www.osepideasthatwork.org/evidencebasedclassroomstrategies.

15. Are there other Departmental resources on the use of restraint and seclusion?

Yes. Please consider and consult:

- The Department's May 15, 2012, *Restraint and Seclusion: Resource Document* with fifteen principles for States, school districts, schools, parents, and other stakeholders to consider when developing or revising policies and procedures on the use of restraint and seclusion, at www.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.
- Then-Secretary of Education Arne Duncan's December 2009 letter to Congress regarding guiding principles that the Department believes would be useful in considering legislation on this issue, at www.ed.gov/policy/gen/guid/secletter/091211.html.
- Many States have already banned the use of seclusion in public schools. For a summary (as of October 17, 2013) of state laws, regulations, policies, and guidelines regarding the use of restraint and seclusion techniques in schools, at www.ed.gov/policy/seclusion/seclusion-state-summary.html.
- Reports, testimony, and letters regarding the use of seclusion and restraint, at www.ed.gov/policy/seclusion/index.html.
- Office of Special Education and Rehabilitative Services, *Dear Colleague Letter, Ensuring Equity and Providing Behavioral Supports to Students with Disabilities* (Aug. 1, 2016), www.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

Technical assistance about the requirements of Section 504 and other laws enforced by OCR is available, upon request, from the OCR enforcement office for the State in which a particular recipient or public entity is located. Contact information for these offices and for OCR's Customer Service Office is available at wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Alternatively, interested persons may contact OCR's Customer Service Office by phone at 1-800-421-3481; TDD: 1-800-877-8339.

OCR's website, www.ed.gov/ocr, also provides information on a variety of topics related to the rights of persons with disabilities and the obligations of recipients under Section 504 and public entities under Title II.

* Technical corrections made on January 10, 2017.