

APPENDIX D

UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF CIVIL RIGHTS (“OCR”)

USE OF RESTRAINTS AND SECLUSION

In December 2016, Defendant US DOE’s Office for Civil Rights (“OCR”) issued a Fact Sheet detailing a list of Q&A to inform school districts how the use of restraint and seclusion may result in discrimination against students with disabilities in violation of Federal laws, including Section 504 of the Rehabilitation Act of 1973 (Section 504). Two of the questions asked and answered are relevant to this matter,

“Can the use of restraint or seclusion deny a student’s receipt of Section 504 FAPE?”

Yes. A school’s use of restraint or seclusion may have a traumatic impact on a student, 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. 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 of FAPE for that student.”

“Does the parent or guardian of a student with a disability have a right to discuss the impact of restraint or seclusion on their child’s access to FAPE?”

Yes. Section 504 requires that school districts establish and implement a system of procedural safeguards for parents or guardians 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. 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.”⁴²⁸

⁴²⁸ <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-restraint-seclusion-ps.pdf>

ASSISTANT SECRETARY'S LETTER

In the previously referenced December 28, 2016, Letter from Assistant Secretary for Civil Rights⁴²⁹, additional questions were posited and answered as follows:

“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 be⁴³⁰ 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,⁴³¹ 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.^{432”}

“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

⁴²⁹ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>

⁴³⁰ 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.

⁴³¹ 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.

⁴³² 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), <http://www.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>

result, to gain the same benefit, or to reach the same level of achievement as a student without a disability.⁴³³”

“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.⁴³⁴ 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.⁴³⁵”

“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,⁴³⁶ 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.⁴³⁷ 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 of FAPE

⁴³³ 34 C.F.R. § 104.4(b)(1), (2)

⁴³⁴ 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).

⁴³⁵ See, e.g., *Alexander v. Choate*, 469 U.S. 287, at 299 (1985)

⁴³⁶ See National Center for Trauma-Informed Care and Alternatives to Seclusion and Restraint (last updated Oct. 26, 2015), <http://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), <http://www.store.samhsa.gov/shin/content/SMA11-4632/SMA11-4632.pdf>.

⁴³⁷ See generally *id.*

for that student.⁴³⁸ Other effects could include socially withdrawn behavior, or diminished interest or participation in class.⁴³⁹

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."

“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.⁴⁴⁰ If compensatory services are warranted, the school must offer and provide them to the affected student.⁴⁴¹"

⁴³⁸ See National Child Traumatic Stress Network, Age-Related Reactions to a Traumatic Event (undated), http://www.nctsnet.org/sites/default/files/assets/pdfs/age_related_reactions_to_a_traumatic_event.pdf.

⁴³⁹ Id.

⁴⁴⁰ 34 C.F.R. §§ 104.4, 104.33(a).

⁴⁴¹ 34 C.F.R. § 104.33(a)