September 4, 2018

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Sam Beyer, Superintendent

Multnomah Education Service District

11611 Northeast Ainsworth Circle

Portland, OR 97220

Dear PARENT and Mr. Beyer,

This letter is the Final Order on the February 21, 2018, appeal filed by PARENT (Parent) alleging that Multnomah Education Service District (District) violated the following statutes and administrative rules:

* ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570, which prohibit the unlawful restraint or seclusion of a student by a public education program.

The objective of this order is to determine whether the District is in compliance with the applicable statutes and administrative rules and, if necessary, specify corrective action to be completed by the District.

## PROCEDURAL BACKGROUND

This is an appeal of the final decision issued by the District on September 5, 2017. Parent filed a complaint with the District on June 21, 2017. In the complaint, Parent alleged that the District committed several violations of Oregon’s restraint and seclusion law, ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570. Parent alleged that the District committed 16 unlawful restraints of her son (Student) and 14 unlawful seclusions of Student. Parent also alleged that the District failed to provide her with proper notice that district staff members had restrained or secluded Student on several occasions and failed to conduct a debriefing meeting with her after district staff members had restrained or secluded Student on several other occasions.

In its final decision, the District acknowledged the Parent’s complaint and agreed to ensure the following:

* That all district staff members are trained and certified each year in Safety Care.
* That all district staff members are trained in the use and importance of reports documenting restraints and seclusions.
* That the District will provide district staff members with additional opportunities to train on how restraint and seclusions should be utilized.
* That the parents of students who are restrained or secluded will be invited to the debriefing meeting.
* That parent will receive the Safety Care Training Manual used by the District.
* That parent will receive the District’s Safety Care Plan for Student.
* That the District will review Student’s behavior plan as often as necessary for him to succeed.

Parent filed an appeal with the Oregon Department of Education (Department). Under OAR 581-002-0040 (1), a complainant may appeal a final decision by an education service district involving restraint or seclusion. The Department accepted Parent’s appeal under OAR 581-002-0040 (2)(a)(A), under which a decision by an education service district is a final decision if the complainant has exhausted the education service district’s complaint process.

## FINDINGS OF FACT

1. Documents provided by the District substantiate that Student was restrained by district staff members on the following dates:
	* February 13, 2017, at 12:10 pm
	* February 13, 2017, at 1:30 pm
	* February 27, 2017, at noon
	* February 28, 2017, at noon
	* March 3, 2017, at 10:49 am
	* April 13, 2017, at 1:45 pm
	* April 19, 2017, at 11:50 am
	* April 25, 2017, at 10:00 am
	* May 4, 2017, at 10:00 am
	* May 4, 2017, at 1:15 pm
	* May 8, 2017, at 8:50 am
	* May 12, 2017, at 10:00 am
	* May 12, 2017, at 10:30 am
	* May 15, 2017, at 10:10 am
	* May 18, 2017, at 1:55 pm
	* May 23, 2017, at 10:45 am
	* June 2, 2017, at 9:56 am
	* June 5, 2017, at 11:00 am
	* June 9, 2017, at 2:04 pm
	* June 14, 2017, at 11:12 am
	* June 15, 2017, at 10:50 pm
	* August 30, 2017, at noon
	* September 6, 2017, at 10:00 am
	* September 8, 2017, at 1:00 pm
	* September 11, 2017, at 12:50 pm
	* September 15, 2017, at 11:45 am
	* September 27, 2017, at 10:15 am
	* September 27, 2017, at 2:10 pm
	* October 6, 2017, at 8:50 am
	* October 24, 2017, at 2:30 pm
	* November 8, 2017, at 10:30 am
	* November 14, 2017, at noon
2. Documents provided by the District substantiate that Student was secluded by district staff members on the following dates:
	* February 28, 2017, at noon
	* April 13, 2017, at 1:45 pm
	* April 25, 2017, at 10:00 am
	* May 1, 2017, at 10:47 am
	* May 2, 2017, at 11:14 am
	* May 4, 2017, at 10:00 am
	* May 5, 2017, at 8:50 am
	* May 8, 2017, at 8:50 am
	* May 12, 2017, at 10:00 am
	* May 12, 2017, at 10:30 am
	* May 15, 2017, at 10:10 am
	* May 16, 2017, at 12:44 pm
	* May 17, 2017, at 8:00 am
	* May 18, 2017, at 1:55 pm
	* May 22, 2017, at 1:15 pm
	* May 23, 2017, at 10:45 am
	* June 9, 2017, at 2:04 pm
	* June 15, 2017, at 10:50 pm
	* June 16, 2017, at 9:12 am
	* August 30, 2017, at noon
	* September 8, 2017, at 1:00 pm
	* September 15, 2017, at 11:45 am
	* September 27, 2017, at 10:15 am
	* October 6, 2017, at 8:50 am
	* November 14, 2017, at noon
3. Parent alleges that the District secluded Student on seven additional dates: February 13, 21, and 27, 2017, April 18 and 19, 2017, May 9, 2017, and June 12, 2017. The District stipulates that on those dates district staff members placed Student in the room that the District uses to seclude students. Both parties stipulate that the door to the room remained open when Student was in the room. Both parties also stipulate that a district staff member supervised Student the entire time Student was in the room.
4. District used the same room to give students a “time out” as it used to seclude students. If the door was open while a student was in the room, the District used the room as an in-school timeout (ISTO) room and did not notify the student’s parents. If the door was purposely closed while a student was in the room, the District used the room as a seclusion room and notified the student’s parents.
5. Documents proved by the District substantiate that on all but three occasions, district staff members believed, at the time they restrained or secluded Student, that Student’s behavior constituted a reasonable threat of imminent, serious bodily injury.
6. Documents provided by the District substantiate that on March 3, 2017, a district staff member told Student to “give up electronics (MP3, headphones)” and that Student refused to hand over the MP3 player. Because Student refused, “a finger pry was given.”
7. Documents provided by the District substantiate that on May 3, 2017, district staff members found it “extra challenging” to move Student to the ISTO room because he was kicking the staff members. The staff members forcibly transported him to the room. During an interview conducted by the Department on June 4, district staff members explained that during this incident, Student was on the floor, flailing and kicking, and that his behavior placed him in imminent risk of serious bodily injury.
8. Documents provided by the District substantiate that on May 15, 2017, district staff members were keeping Student in the ISTO room with the door open. Student exited the room on more than one occasion. He “[w]rap[ped] his legs around [a] computer desk” and “[t]ried climbing behind [the] computer desk” so the staff members could not transport him into the room. Student cursed at the staff members and wrapped his arms around their bodies. Student tried to “trip” the staff members. The staff members forcibly transported Student into the room and “the door was shut for his aggression.” During an interview conducted by the Department on June 4, district staff members explained that during this incident, Student’s behavior placed him in imminent risk of serious bodily injury.
9. Parent alleged that the District failed to provide her with written notice of Student being restrained or secluded until the summer of 2017. During an interview conducted by the Department on June 4, 2018, a district staff member (Staff Member 8) indicated that it had been the District’s practice to provide a written report of a restraint or seclusion upon request. Another district staff member (Staff Member 2) interjected and stated that the District invites parents to a debriefing meeting within 48 hours of the occurrence of a restraint or seclusion. A third district staff member (Staff Member 3) also interjected and stated that the District had a new policy of sending a form letter to parents within 24 hours of the occurrence of a restraint or seclusion.
10. Documents provided by the District substantiate that the District notified Parent of Student being restrained and secluded on August 30, 2017, on the day after the incident occurred, August 31, 2017.
11. Documents provided by the District substantiate that the District did not notify Parent of Student being restrained and secluded on September 27, 2017, at 10:15 am.
12. Documents provided by the District substantiate that the District notified Parent of Student being restrained and secluded November 14, 2017, on the second day after the incident occurred, November 16, 2017.
13. Documents provided by the District substantiate that the District did not hold a debriefing meeting after Student was restrained and secluded on September 27, 2017, at 2:10 pm.
14. Documents provided by the District substantiate that district staff members occasionally used a supine hold to restrain Student. District staff members used a supine hold on August 30, 2017, and September 6, 2017. At a meeting held on September 12, 2017, Parent and the District met to discuss Student. Parent alleges that the District agreed not to use a supine floor hold at the meeting. The District denies Parent’s allegation. During the interview conducted on June 4, a district staff member (Staff Member 1) stated that the topic of using a supine floor hold was “not even mentioned” at the meeting. A summary of the September 12 meeting substantiates that Parent and the District discussed whether to continue using a supine floor hold. The summary also substantiates that the District agreed to “talk to staff about grabbing arms,” which the District conceded “is not a part of safety care.”
15. Documents provided by the District substantiate that on November 8, 2017, district staff members “used a two-person stability hold that moved to [a] floor supine hold with another staff member holding [Student’s] legs.”
16. Documents provided by Parent substantiate that on November 14, 2017, during an incident where district staff members were escorting Student to the ISTO room, Student “dropped to the ground” where he remained for “about 20 minutes.” When Student stood up, the staff members approached him. Student “punched” the staff members, at which point they restrained him and transported him to the room.
17. During the interview conducted on June 4, three district staff members (Staff Member 5, Staff Member 6, and Staff Member 7) recounted the November 14 incident as follows:
18. Staff Member 5 and Staff Member 7 transported Student to the ISTO room. After Student was in the room, Staff Member 5 and Staff Member 7 attempted to shut the door. Student pushed against the door, making it difficult to shut.
19. At some point during the altercation, Staff Member 5 left the scene and Staff Member 6 replaced him.
20. The door of the room had a small, rectangular window with a metal frame. Student pulled the metal frame off the door and broke the window. Student reached through the window and grabbed and scratched Staff Member 7’s arms. Staff Member 7 grabbed Student’s sleeves and pulled them over his hands. Staff Member 7 held the sleeves shut to: (1) prevent Student from grabbing and scratching his arms and (2) prevent Student from injuring himself on the broken glass remaining in the window frame.
21. During an interview conducted by the Department on May 25, 2018, Parent alleges that when she arrived at the school after the November 14 incident, Student’s sleeves were tied together. Parent claims that the sleeves were tied “tightly” and that it was difficult to untie them.
22. The District denies that Student’s sleeves were tied together. During the interview conducted on June 4, Staff Member 7 suggested that Parent mistook Student’s sleeves for being tied together because when she arrived at the school, his sleeves were still pulled over his hands, making it appear as if they were tied together.
23. Documentation provided by the District suggests that after the November 14 incident, before Parent arrived at the school, district staff members escorted Student to the bathroom.
24. The District stipulates that it video tapes the rooms that it uses to seclude students.
25. Documents substantiate that on November 17, 2017, Parent and the District held a meeting to discuss Student’s placement. At the meeting, Parent requested a copy of the video tape of the November 14 incident. The District denied Parent’s request. The District told parent that she “could come to the school and watch it.”
26. During the June 4 interview, the Department inquired about the video tape of the November 14 incident. Staff Member 5 responded that the video tape exists. Staff Member 1 interjected and stated that the District erased and reused video tapes after a period of time and that the video tape had been erased. Staff Member 3 also interjected and stated that on November 14 the video equipment was not yet operational, implying that there never was a video tape of the November 14 incident.
27. Following the June 4 interview, the District provided the Department with correspondence from the District’s surveillance system provider. In that correspondence, the surveillance system provider stated that the video equipment was operational on September 14, 2017, and that video tapes were retained for 83 days before being erased and reused. Under this process, the video tape of the November 14 incident would have been erased on February 5, 2017.
28. With respect to the November 14 incident, the Department finds that Parent’s statements are credible. On numerous occasions, Parent has told Department the same, specific, and detailed version of events: when she arrived at the school, Student’s sleeves were tied together, they were tied “tightly,” and it was difficult to untie them.

## Restraint and Seclusion

In this state, a child may not be restrained or secluded in a public education program except as provided by law. *See* ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570. For purposes of Oregon’s restraint and seclusion law, a public education program is an early childhood education program, elementary school, or secondary school that (1) is under the jurisdiction of a school district, education service district, or another educational institution or program and (2) receives support, either directly or indirectly, from funds appropriated by the Oregon legislature to the Department.

If the Department determines on appeal that a public education program has unlawfully restrained or secluded a student, the public education program has 30 days from the date on which the Department issues its final order to remedy the restraint or seclusion. OAR 581-002-0040 (8)(b). If the Deputy Superintendent requires additional corrective action as part of the final order, the education program must complete the corrective action before the beginning of the following school year unless the Deputy Superintendent grants an extension. OAR 581-002-0040 (8)(b). If the education program does not remedy the retaliatory act or complete the corrective action in a timely manner, the Deputy Superintendent may withhold moneys otherwise required to be distributed to the education program pursuant to statute. OAR 581-002-0040 (9)(b).

### 1. Arguments Presented

Parent alleges that the District is in violation of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 because the District:

* Failed to notify her that Student was secluded on February 13, 21, and 27, April 18 and 19, 2017, May 9, 2017, and June 12, 2017;
* Unlawfully restrained and secluded Student on multiple occasions because district staff members used restraint and seclusion for discipline, punishment, or convenience;
* Did not provide written notice of restraints and seclusions occurring before the summer of 2017;
* Did not provide proper notice of restraints and seclusions occurring on August 30, 2017, September 27, 2017, and November 14, 2017;
* Did not invite her to several debriefing meetings and did not hold a debriefing meeting after a restraint and seclusion occurred on September 27, 2017;
* Unlawfully restrained student by placing him in a supine floor hold after agreeing not to place him in that type of hold at a meeting held on September 12, 2017; and
* Unlawfully restrained student by placing him in a mechanical restraint on November 14, 2017.

With respect to the first allegation, the District responds that the ISTO room was not used to seclude Student on February 13, 21, and 27, April 18 and 19, 2017, May 9, 2017, or June 12, 2017.

With respect to the second allegation, the District responds that on all occasions, Student was restrained or secluded because his behavior constituted a reasonable threat of imminent, serious bodily injury, and because other less restrictive interventions would not effectively stop his behavior.

With respect to the fifth allegation, the District responds that it never agreed to not use a supine floor hold at the meeting held on September 12, 2017.

With respect to the sixth allegation, the District responds that it never placed Student in a mechanical restraint.

The District did not specifically respond to the third or fourth allegations, except to state that whenever a district staff member notified Parent of a restraint or seclusion, the staff member invited her to a debriefing meeting as a matter of practice.

### 2. Seclusion

Parent alleges that the District secluded Student on seven dates—February 13, 21, and 27, April 18 and 19, 2017, May 9, 2017, and June 12, 2017—and did not comply with state law and rule pertaining to seclusion on those dates. The District responds that it did not seclude Student on those dates.

Under state law and rule, a seclusion occurs when a student is involuntarily confined “alone in a room from which the student is physically prevented from leaving.” ORS 339.285 (3)(a) and OAR 581-021-0550 (6). In contrast, a seclusion does not occur if a student is removed “for a short period of time to provide the student with an opportunity to regain self-control if the student is in a setting from which the student is not physically prevented from leaving.” ORS 339.285 (3)(b) and OAR 581-021-0550 (6). Following a seclusion, an education service district must provide a parent with “verbal or electronic notification of the incident by the end of the school day when the incident occurred,” and “written documentation of the incident within 24 hours of the incident.” ORS 339.294.

District used the same room to give students a “time out” as it used to seclude students. If the door was open while a student was in the room, the District used the room as an ISTO room and did not notify the student’s parents. If the door was purposely closed while a student was in the room, the District used the room as a seclusion room and notified the student’s parents. The District acknowledges that the room was used on the dates in question. Parent and the District agree that Student was placed in the room, the door remained open when Student was in the room, and a district staff member supervised Student the entire time that Student was in the room. The parties disagree about whether those actions constitute seclusion for purposes of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570.

Parent argues that a student, when kept in a room with the door open and supervised by a district staff member, is confined “alone in a room from which the student is physically prevented from leaving.” ORS 339.285 (3)(a) and OAR 581-021-0550 (6). The District argues that a student, under the same circumstances, is removed “for a short period of time to provide the student with an opportunity to regain self-control . . . in a setting from which the student is not physically prevented from leaving.” ORS 339.285 (3)(b) and OAR 581-021-0550 (6).

Discerning whether the District complied with ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 requires the Department to discern legislative intent. Specifically, what did the legislature intend when it adopted the terms “confined,” “alone,” and “physically” as part of ORS 339.285 (3)(a)?[[1]](#footnote-1) Under the circumstances present in this case, was the Student “confined” in the room? Was the Student “alone” in the room? Was the Student “physically” unable to leave the room?

The Oregon Supreme Court prescribed the method for discerning legislative intent in *Portland General Electric, Co. v. Bureau of Labor and Industries*, 317 Or. 606 (1993),and *State v. Gaines*, 346 Or. 160 (2009). Under this methodology, a person must analyze the text, context, and legislative history of a law and, if legislative intent remains unclear after analyzing the text, context, and legislative history of the law, employ general maxims of statutory construction to resolve the ambiguity. *Portland General Electric*, 346 Or. at 610-611; *Gaines*, 317 Or. at 171-172.

To discern the plain meaning of a term in statute, Oregon appellate courts consult *Webster’s Third New International Dictionary*. *See Comcast Corp. v. Dept. of Revenue*, 356 Or. 282 (2014). That dictionary defines “confine” to mean “to hold within bounds” or “to restrain from exceeding boundaries.” Under the circumstances present in this case, Student was being “held” in the room and “restrained” from leaving the room.

*Webster’s Third New International Dictionary* defines “alone” to mean “separated . . . physically from all other individuals” or “isolated.” In this case, where the door to the room was open and a district staff member supervised Student, Student was not separated physically from all other individuals. In fact, Student had immediate physical access to another person: the staff member. Under the plain meaning of the statute, Student was not “alone.”

Finally, the dictionary defines “physically” to mean “in respect to the body.” If the door to the room had been closed, Student would have been “physically” unable to leave the room. However, where the door was open, and absent any other fact indicating Student could not leave the room, Student was not “physically” unable to leave the room.

After reviewing all pertinent legislative history, the Department has determined that the legislative history does not further elucidate the meaning of the term “seclusion” for purposes of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570.[[2]](#footnote-2)

The Department finds that under the circumstances present in this case, Student was removed “for a short period of time” to provide Student with “an opportunity to regain self-control” in a setting from which Student “is not physically prevented from leaving.” The District did not seclude Student on February 13, 21, and 27, April 18 and 19, 2017, May 9, 2017, and June 12, 2017.

### 3. Use of Restraint or Seclusion for Discipline, Punishment, or Convenience

Parent alleges that the District unlawfully restrained and secluded Student because district staff members restrained and secluded him for discipline, punishment, or convenience. The District responds that on all occasions, Student was restrained or secluded because his behavior constituted a reasonable threat of imminent, serious bodily injury, and because other less restrictive interventions would not effectively stop his behavior.

State law and rule prohibits the use of restraint and seclusion for discipline, punishment, or convenience. ORS 339.291 (1)(b) and OAR 581-021-0553 (2)(b).

State law and rule specify that a district staff member may restrain or seclude a student only if the student’s behavior imposes a reasonable threat of imminent, serious bodily injury, and because another less restrictive intervention would not effectively stop the student’s behavior. ORS 339.291 (1)(a) and OAR 581-021-0553 (2)(a).

Documents provided by the District substantiate that on all but three occasions, district staff members ascertained, at the time they restrained or secluded Student, that Student’s behavior constituted a reasonable threat of imminent, serious bodily injury. For instance, during an incident occurring on May 4, when Student’s class was preparing to go outside, Student suddenly “yelled” and “threw a chair and materials.” A district staff member tried to talk to Student and diffuse the situation, but Student “became increasingly erratic in speech [and] body movements and . . . became violent — charging and pushing staff.” Student made “several charges, waiving arms and push[ing] staff.” The staff member, for “safety’s sake,” decided to restrain Student for purposes of transporting him to the ISTO room.

The other three incidents occurred on March 3, 2017, and May 3 and 15, 2017.

During the March 3 incident, a district staff member told Student to “give up electronics (MP3, headphones)” and that Student refused to hand over the MP3 player. Because Student refused, “a finger pry was given.” Under these circumstances, Student’s behavior did not impose “a reasonable threat of imminent, serious bodily injury.” Student’s behavior merely exhibited noncompliance. To make Student comply, the staff member gave him a “finger pry.” Under these circumstances, the staff member gave Student a “finger pry” for discipline, punishment, or convenience.

During the May 3 incident, district staff members found it “extra challenging” to move Student to the ISTO room because he was kicking district staff. District staff responded by forcibly transporting him to the room. Unlike the March 5 incident, where Student was only being noncompliant, in this situation Student was “kicking staff.” Also, during an interview conducted by the Department on June 4, district staff members explained that Student was on the floor, flailing and kicking. They ascertained that Student’s behavior placed him in imminent risk of serious bodily injury if he remained on the floor, flailing and kicking. All together, the evidence suggests that the staff members ascertained that the Student’s behavior imposed a reasonable threat of imminent, serious bodily injury.

Finally, during the May 15 incident, district staff members were keeping Student in the ISTO room with the door open. Student exited the room on more than one occasion. He “[w]rap[ped] his legs around [a] computer desk” and “[t]ried climbing behind [the] computer desk” so the staff members could not transport him into the room. Student cursed at staff and wrapped his arms around their bodies. Student tried to “trip” the staff members. The staff members forcibly transported Student into the room and “the door was shut for his aggression.” During the June 4 interview, staff members again explained that there response to this incident was not merely because of Students “aggression,” but because his behavior placed him in imminent risk of serious bodily injury. Although documents provided by the District indicate the reason for shutting Student in the seclusion room was “for his aggression,” altogether, the evidence suggests that the staff members ascertained that the Student’s behavior imposed a reasonable threat of imminent, serious bodily injury.

The Department acknowledges that on most occasions, Student’s behavior did constitute a threat of imminent, serious bodily injury to either himself or others. For the most part, the District acted appropriately with respect to the challenges posed by Student. However, with respect to the incidents occurring on March 3, 2017, and May 3 and 15, 2017, the Department finds that the District unlawfully restrained and secluded Student because it restrained and secluded him for discipline, punishment, or convenience.

### 4. Notice and Debriefing Requirements

Parent alleges that the District did not provide written notice of restraints and seclusions occurring before the summer of 2017 and did not provide proper notice of restraints and seclusions occurring on August 30, 2017, September 27, 2017, and November 14, 2017. Parent also alleges that the District did not invite her to several debriefing meetings and did not hold a debriefing meeting after a restraint and seclusion occurred on September 27, 2017.

The District did not specifically respond to Parent’s allegations, except to state that whenever a district staff member notified Parent of a restraint or seclusion, the staff member invited her to a debriefing meeting as a matter of practice.

ORS 339.294 establishes the procedures by which an education service district must provide notice to a parent following a restraint or seclusion of the parent’s child. Under the statute, following a restraint or seclusion, an education service district must provide a parent with “verbal or electronic notification of the incident by the end of the school day when the incident occurred,” and “written documentation of the incident within 24 hours of the incident.” ORS 339.294 (2)(a) and (b). The written documentation must include:

 (A) A description of the physical restraint or seclusion, including:

 (i) The date of the physical restraint or seclusion;

 (ii) The times when the physical restraint or seclusion began and ended; and

 (iii) The location of the physical restraint or seclusion.

 (B) A description of the student’s activity that prompted the use of physical restraint or seclusion.

 (C) The efforts used to de-escalate the situation and the alternatives to physical restraint or seclusion that were attempted.

 (D) The names of the personnel of the public education program who administered the physical restraint or seclusion.

 (E) A description of the training status of the personnel of the public education program who administered the physical restraint or seclusion, including any information that may need to be provided to the parent or guardian [concerning the reason the physical restraint or seclusion was administered by a person without training]. ORS 339.294 (2)(b).

The statute also requires an education service district to provide a parent with “[t]imely notification of a debriefing meeting to be held [by the education service district] . . . and the parent’s right to attend the meeting.” ORS 339.294 (2)(c). The debriefing meeting “must be held within two school days of the incident.” ORS 339.294 (4)(a).

OAR 581-021-0556 imposes requirements similar to those imposed under ORS 339.294. Under the rule, a parent must be verbally or electronically notified of a restraint or seclusion by the end of the school day on which the restraint or seclusion occurred. OAR 581-021-0556 (2)(a). Under the rule, a parent must receive written notification of the incident within 24 hours. OAR 581-021-0556 (2)(b). The rule sets forth the exact same requirements for the contents of the notice as ORS 339.294, except that the rule also requires the written notice to include “[t]imely notification of a debriefing meeting to be held [by the education service district] and of the parent’s . . . right to attend the meeting.”[[3]](#footnote-3) Finally, the rule similarly requires the debriefing meeting to be held “within two school days of the incident.” OAR 581-021-0556 (4).

During an interview conducted by the Department on June 4, 2018, Staff Member 8 indicated that it had been the District’s practice to provide a written report of a restraint or seclusion upon request. Staff Member 3 interjected and stated that the District had a new policy of sending a form letter to parents within 24 hours of the occurrence of a restraint or seclusion. These statements support Parent’s claim that the District did not provide her with written notice of restraints and seclusions occurring before the summer of 2017 in violation of ORS 339.294 (2)(b) and OAR 581-021-0556 (2)(b).

Documents provided by the District substantiate that the District failed to timely notify Parent of Student being restrained and secluded on August 30, 2017, and November 14, 2017. On the first occasion, the District notified Parent on the day after the incident occurred, August 31, 2017. On the second occasion, the District notified Parent on the second day after the incident occurred, November 16, 2017. On both occasions, the District failed to provide Parent with “verbal or electronic notification of the incident by the end of the school day when the incident occurred,” as required by ORS 339.294 (2)(a) and OAR 581-021-0556 (2)(a). On the second occasion, the District failed to provide Parent with “written documentation of the incident within 24 hours of the incident,” as required by ORS 339.294 (2)(b) and OAR 581-021-0556 (2)(b).

Documents provided by the District substantiate that the District did not notify Parent of Student being restrained and secluded on September 27, 2017, at 10:15 am. The District did notify Parent of Student being restrained at 2:10 pm on the same day. However, there is no evidence to suggest that the District notified Parent of both incidents as part of that notice. Under the facts presented, the Department finds that the District failed to notify Parent as required by ORS 339.294 (2)(a) and (b) and OAR 581-021-0556 (2)(a) and (b).

The Department acknowledges that the District’s current practice of sending a form letter to parents within 24 hours of the occurrence of a restraint or seclusion complies with both law and rule. The Department also acknowledges that the District timely notified Parent on most occasions, excepting those incidents where the District only provided written notice “upon request” before the summer of 2017. However, with respect to the incidents occurring on August 30, 2017, September 27, 2017, and November 14, 2017, the Department finds that the District failed to provide notice as required by law.

With respect to Parent’s allegation that the District failed to not invite her to several debriefing meetings, the Department finds that there is no evidence to support Parent’s allegation. With respect to this allegation, the Department finds that the District is not deficient.

Finally, with respect to Parent’s allegation that the District did not hold a debriefing meeting after a restraint occurred on September 27, 2017, at 2:10 pm, documents provided by the District substantiate that the District did not hold a debriefing meeting. The District did hold a debriefing meeting to discuss a restraint and seclusion occurring at 10:15 am on the same day. However, there is no evidence to suggest that the District discussed the incident occurring at 2:10 pm during that meeting. Under the facts presented, the Department finds that the District failed to hold a debriefing meeting for the September 27 incident as required by ORS 339.294 (4)(a) and OAR 581-021-0556 (4).

### 5. Agreement Not to Use Restraint or Seclusion

Parent alleges that District unlawfully restrained student by placing him in a supine floor hold after agreeing not to place him in that type of hold at the meeting held on September 12, 2017. The District responds that it never agreed to not use a supine floor hold at the meeting.

Under state law and rule,

If a student is involved in five incidents in a school year involving physical restraint or seclusion, a team consisting of personnel of the [education service district] and a parent or guardian of the student must be formed for the purposes of reviewing and revising the student’s behavior plan and ensuring the provision of any necessary behavioral supports. ORS 339.294 (5). *See also* OAR 581-021-0556 (5) (setting forth the same requirement).

Parent’s allegation raises two questions of law.

First, for purposes of ORS 339.294 (5), does an incident involving both a restraint and a seclusion count as one incident or two incidents? The September 12 meeting was held after Student had been restrained on three occasions: August 30, 2017, and September 6 and 8, 2017. The September 12 meeting was held after Student had been secluded on two occasions: August 30, 2017 and September 8, 2017. The August 30 and September 8 incidents involved both a restraint and a seclusion. If, for purposes of ORS 339.294 (5), an incident involving both a restraint and seclusion counts as one incident, then the September 12 meeting was held only after three incidents involving restraint and seclusion, not five incidents. If the meeting was held only after three incidents, then ORS 339.294 (5) would no longer serve as a basis for enforcing any agreement made at the meeting.

Second, does law or rule provide that a violation of an agreement made at the meeting required by ORS 339.294 (5) is also a violation of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570? ORS 339.294 (5) requires an educational service district to hold a meeting. It does not expressly address the enforceability of decisions made at such a meeting.

For purposes of this appeal, the Department does not need to answer these questions of law because the evidence does not substantiate that the District violated an agreement made at the September 12 meeting. A summary of the meeting between Parent and the District substantiates that they discussed whether to continue using a supine floor hold. The summary also substantiates that the District agreed to “talk to staff about grabbing arms.” The evidence suggests that if any agreement was made at the September 12 meeting, the agreement did not concern using a supine floor hold, but concerned grabbing Student’s arms.

Documents provided by the District substantiate that during both incidents occurring after the September 12 meeting, district staff members did not grab Student’s arms. On November 8, 2017, district staff members “used a two-person stability hold that moved to [a] floor supine hold with another staff member holding [Student’s] legs.” On November 14, 2017, during an incident where district staff members was escorting Student to the ISTO room, Student “dropped to the ground” where he remained for “about 20 minutes.” When Student stood up, the staff members approached him. Student “punched” the staff members, at which point they restrained him and transported him to the room.

With respect to ORS 339.294 (5) andOAR 581-021-0556 (5), the District is not deficient.

### 6. Mechanical Restraint

Parent alleges that the District unlawfully restrained student by placing him in a mechanical restraint on November 14, 2017. The District responds that it never placed Student in a mechanical restraint.

State law and rule prohibit “the use of a mechanical restraint, chemical restraint or prone restraint on a student.” ORS 339.288 (1) and OAR 581-021-0553 (1). A mechanical restraint is “a device used to restrict the movement of a student or the movement or normal function of a portion of the body of a student.” ORS 339.288 (3)(b)(A) and OAR 581-021-0550 (2).

During the November 14 incident, Staff Member 5 and Staff Member 7 transported Student to the ISTO room. After Student was in the room, Staff Member 5 and Staff Member 7 attempted to shut the door. Student pushed against the door, making it difficult to shut. At some point during the altercation, Staff Member 5 left the scene and Staff Member 6 replaced him. The door of the room had a small, rectangular window with a metal frame. Student pulled the metal frame off the door and broke the window. Student reached through the window and grabbed and scratched Staff Member 7’s arms. During an interview conducted by the Department on June 4, Staff Member 7 stated that he grabbed Student’s sleeves and pulled them over his hands to prevent Student from grabbing and scratching his arms and to prevent Student from injuring himself on the broken glass remaining in the window frame.

Parent and the District recounted two different versions of what happened next. During an interview conducted by the Department on May 25, Parent alleges that when she arrived at the school after the incident, Student’s sleeves were tied together. Parent claims that the sleeves were tied “tightly” and that it was difficult to untie them. The District denies that Student’s sleeves were tied together. During the June 4 interview, Staff Member 7 suggested that Parent mistook Student’s sleeves for being tied together because when she arrived at the school, his sleeves were pulled over his hands, making it appear as if they were tied together.

Before further addressing the discrepancy in Parent’s and the District’s versions of what happened during the November 14 incident, the Department necessarily must discern legislative intent. Specifically, if clothing is used to restrict a student from using his or her arms, is a “device” being used “to restrict the movement of [the] student or the movement or normal function of a portion of the body of [the] student?” Under Parent’s version of events, Student’s sleeves were tied together, restricting Student from moving or using his arms. The question is whether “clothing” constitutes a “device” for purposes of ORS 339.288 (2)(b)(A).

As explained earlier in this order, to discern legislative intent, a person must analyze the text, context, and legislative history of a law and, if legislative intent remains unclear after analyzing the text, context, and legislative history of the law, employ general maxims of statutory construction to resolve the ambiguity. *Portland General Electric*, 346 Or. at 610-611; *Gaines*, 317 Or. at 171-172. To discern the plain meaning of a term in statute, Oregon appellate courts consult *Webster’s Third New International Dictionary*. *See Comcast Corp. v. Dept. of Revenue*, 356 Or. 282 (2014).

*Webster’s Third New International Dictionary* defines “device” to mean “something that is formed or formulated by design and usually with consideration of possible alternatives, experiences, and testing: something devised or contrived,” or “a piece of equipment or a mechanism designed to serve a special purpose or perform a specific function.” Clothing is not “a piece of equipment” or “a mechanism.” However, clothing is “formed or formulated by design.” Further, the definition does not preclude a “device” being used for purposes other than that for which it is designed. A device may be used “in consideration of possible alternatives.” The plain meaning of the term “device” indicates that clothing is a device for purposes of ORS 339.288 (2)(b)(A).

Legislative history confirms this reading. The House Committee on Education held a public hearing for House Bill 2939 (2011)—the bill that is codified at ORS 339.285 to 339.303—on February 16, 2011. The Senate Committee on Education and Workforce Development held a public hearing for the bill on May 12, 2011. At both public hearings, testimony was proffered about how the bill would prevent tying students down or otherwise restricting their movement. Legislative history also indicates that clothing is a device for purposes of ORS 339.288 (2)(b)(A).

In consideration of both the plain meaning of the term “device” and the legislative history of House Bill 2939 (2011), the Department finds that clothing is a device for purposes of ORS 339.288 (2)(b)(A). If a district staff member used Student’s clothing to restrict Student from moving his arms or otherwise using them normally, the staff member used a mechanical restraint in violation of ORS 339.288 (1) and OAR 581-021-0553 (1).

Parent claims that because the District video tapes the rooms that it uses to seclude students, evidence exists to substantiate her allegations. Following the June 4 interview, the District provided the Department with correspondence from the District’s surveillance system provider. In that correspondence, the surveillance system provider stated that video tapes were retained for 83 days before being erased and reused. Under this process, the video tape of the November 14 incident would have been erased on February 5, 2017.

It should be noted that the correspondence from the District’s surveillance system provider does not fully confirm what happened to the video tape of the November 14 incident. During the June 4 interview, Staff Member 5 stated that the video tape exists. Staff Member 1 interjected and stated that the District erased and reused video tapes after a period of time. Staff Member 3 interjected and stated that on November 14 the video equipment was not yet operational, implying that there never was a video tape of the November 14 incident. The fact that the District generally adheres to a process for erasing and reusing video tapes does not necessarily mean that the video tape of the November 14 incident was erased and reused in accordance with that process.

It should also be noted that a video tape of the November 14 incident would not fully substantiate whether Student’s sleeves were tied together. Documentation provided by the District indicates that immediately after the November 14 incident, before Parent arrived at the school, district staff members escorted Student to the bathroom. Student’s sleeves could have been tied together after he used the bathroom. In other words, Student’s sleeves could have been tied together in a place that was not under surveillance.

With respect to Staff Member 7’s explanation for Parent’s allegation—that Student’s sleeves were still pulled over his hands when Parent arrived at the school, making it appear as if they were tied together—the Department finds this explanation unlikely. If Student used the bathroom after the November 14 incident, then his sleeves could not be “still pulled over his hands” at the time that Parent arrived at the school. Further, Staff Member 7’s explanation does not account for Parent’s statement that the sleeves were tied tightly and that it was difficult to untie them.

With respect to Parent’s description of the November 14 incident, the Department finds her statements credible. On numerous occasions, Parent has told the Department the same, specific, and detailed version of events: when Parent arrived at the school, Student’s sleeves were tied together, they were tied tightly, and it was difficult to untie them.

In consideration of the above, the Department finds that it is more likely than not that at some point after the November 14 incident, Student’s sleeves were tied together to restrict him from moving his arms or otherwise using them normally.

However, even if Student’s sleeves were not tied together, by its own admission, the District used a mechanical restraint. During the June 4 interview, Staff Member 7 admitted to grabbing Student’s sleeves, pulling the sleeves over his hands, and holding the sleeves shut. In other words, Staff Member 7 admitted that he used Student’s clothing to restrict him from moving his arms or otherwise using them normally. Staff Member 7 admitted to using a “device” to restrict “the movement or normal function of a portion of the body” of Student.

The Department finds that the District violated ORS 339.288 (1) and OAR 581-021-0553 (1) by using a mechanical restraint.

### 5. Conclusion

The Department finds that the District is deficient under ORS 339.294 (2) and (3) and OAR 581-021-0556 (2) and (3) for the following reasons:

* On March 3, 2017, the District unlawfully restrained and secluded Student because it restrained and secluded him for discipline, punishment, or convenience in violation of ORS 339.291 (1)(b) and OAR 581-021-0553 (2)(b).
* The District did not provide Parent with written notice of restraints and seclusions occurring before the summer of 2017 in violation of ORS 339.294 (2)(b) and OAR 581-021-0556 (2)(b).
* On August 30, 2017, September 27, 2017, and November 14, 2017, the District failed to provide notice as required by ORS 339.294 (2)(a) and (b) and OAR 581-021-0556 (2)(a) and (b).
* The District failed to hold a debriefing meeting for an incident occurring on September 27 as required by ORS 339.294 (4)(a) and OAR 581-021-0556 (4).
* On November 14, 2017, the District used a mechanical restraint in violation of ORS 339.288 (1) and OAR 581-021-0553 (1).

The District must submit to the Department a plan for becoming compliant with those statutes and rules. For purposes of developing the plan, the District must contact Lisa Bateman, Office of Student Services, Oregon Department of Education. The Department will provide contact information for Ms. Bateman upon request.

The District must be back in compliance before the beginning of the 2019-2020 school year. If the Director of the Oregon Department of Education determines that the District is not compliant by the beginning of the 2019-2020 school year, the director may allow an extension of time to demonstrate compliance, not to exceed 12 months. If the District fails to show compliance within the required time, the director may withhold state school funds.

Sincerely,

Mark Mayer

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1. Because the State Board of Education adopted the exact same language for the rule as exists in statute, the meaning of the term “secluded” for purposes of OAR 581-021-0550 to 581-021-0570 is the same as the meaning of the term “secluded” for purposes of ORS 339.285 to 339.303. [↑](#footnote-ref-1)
2. The House Committee on Education held a public hearing for House Bill 2939 (2011)—the bill that is codified at ORS 339.285 to 339.303—on February 16, 2011. The House Committee on Education held a work session for the bill on April 6, 2011. The Senate Committee on Education and Workforce Development held a public hearing for the bill on May 12, 2011, and work sessions for the bill on May 17, 2011, and May 24, 2017. The bill was subsequently referred to the Joint Committee on Ways and Means, where the Subcommittee on Capital Construction held a work session for the bill on June 10, 2011, and the Full Committee held a work session for the bill on June 15, 2011. The legislative history for the bill is available at <https://olis.leg.state.or.us/liz/2011R1/Measures/Overview/HB2939>. [↑](#footnote-ref-2)
3. Under ORS 339.294 (2)(c), notice of the debriefing must be provided, but not as part of the written notice of the restraint or seclusion that must be provided. [↑](#footnote-ref-3)