

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-48

PROCEDURAL HISTORY

On March 26, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the [REDACTED] School District (District). The Parent alleged the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On March 27, 2020, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District Superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On April 20, 2020, the District requested an extension of time to respond to this complaint. OSPI granted the extension and requested the District respond by April 24, 2020.

On April 22, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on April 23, 2020. OSPI invited the Parent to reply.

On April 23, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

On April 23, 2020, OSPI received additional information from the District. OSPI forwarded the additional information to the Parent on April 27, 2020.

On April 28, 2020, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on the same day.

On May 8, 2020, OSPI interviewed the Parent via telephone.

On May 8, 2020, OSPI requested clarifying information from the District. On May 12, 2020, OSPI made a follow up request for the information. The District responded via telephone on May 12, 2020.

OSPI considered all information provided by the Parent and the District as part of its investigation.

ISSUES

1. Did the District follow procedures to develop and implement the Student's individualized education program (IEP) with respect to paraeducator support and educating the Student in his least restrictive environment (LRE)?
2. Did the District follow FERPA procedures, ensuring the Student's personally identifiable information was not shared with the parents of other students?

LEGAL STANDARDS

IEP Development: When developing each child's individualized education program (IEP), the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 CFR §300.324(a). WAC 392-172A-03110.

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105.

IEP Must State Amount of Services: An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student. An IEP must also include a statement of the program modifications or supports for school personnel that will be provided to enable the student: to advance appropriately toward attaining the annual IEP goals; to be involved and progress in the general curriculum in accordance with present levels of educational performance and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the above activities. 34 CFR §300.320(a)(4); WAC 392-172A-03090(1)(d). "The amount of services to be provided must be stated in the IEP, so that the level of [the district's] commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP." Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (34 CFR Part 300, Question 35).

Supplementary Aids and Services: Supplementary aids and services means aids, services, and other supports that are provided in general education classes or other education-related settings to enable students eligible for special education to be educated with nondisabled students to the maximum extent appropriate in accordance with the student's least restrictive environment. 34 CFR §300.42; WAC 392-172A-01185.

Least Restrictive Environment: School districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided: 1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and 2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such

that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114; WAC 392-172A-02050.

Education Records: Education records means the type of records covered under the definition of "education records" in the Family Educational Rights and Privacy Act (FERPA), 34 CFR Part 99. WAC 392-172A-05180. Under FERPA, "education records" means those records that are: 1) directly related to a student; and 2) maintained by an educational agency or institution or by a party acting for the agency or institution. These records include but are not limited to grades, transcripts, class lists, student course schedules, health records (at the K-12 level), student financial information (at the postsecondary level), and student discipline files. 34 CFR §99.3.

Confidentiality of Education Records: FERPA requires districts to maintain the confidentiality of students' education records. 34 CFR §300.623; WAC 392-172A-05230. FERPA controls the circumstances under which a district may disclose personally identifiable information from educational records and prohibits non-authorized disclosure of that information. As a general rule, personally identifiable information may not be disclosed without specific, informed parental consent. This rule is subject to exceptions, including the allowance for school districts to disclose information to teachers within the district or officials of participating agencies for purposes of meeting a requirement of the Act. 34 CFR §300.622; WAC 392-172A-05225.

Disclosure of Student Records: Parental consent must be obtained before personally identifiable information is disclosed. If a request for personally identifiable information is received from officials with a participating agency, parental consent is not required. Additionally, parental consent may not be required if the information is contained in education records and the disclosure is authorized without parental consent under FERPA, 34 CFR Part 99. 34 CFR §300.622; WAC 392-172A-05225.

ISSUE ONE

1. Did the District follow procedures to develop and implement the Student's individualized education program (IEP) with respect to paraeducator support and educating the Student in his least restrictive environment (LRE)?

ISSUE ONE: FINDINGS OF FACT

1. During the 2019-2020 school year, the Student attended a District high school and was eligible for special education services under the category multiple disabilities.
2. The District's 2019-2020 school year began on September 4, 2019.
3. The Student's individualized education program (IEP) in effect during the time period relevant to this investigation was drafted on November 13, 2019. The IEP contained the following information related to paraeducator services. Under Student strengths and Parent concerns, the IEP documented these summarized Parent concerns:
 - For safety and maintenance of wheelchair, only adults are allowed to push his wheelchair.

- Only a certified teacher or administrator are allowed to make decisions regarding behavior and provide guidance for behavior with Student except in a life-threatening emergency.
- Student is to have a 1:1 paraeducator with him. The paraeducator is allowed to assist one other student that is functioning at a more advanced adaptive and academic level than him. Parent has requested that paraeducator 1 or paraeducator 2 be assigned to him.
- Substitutes working with Student must be given a detailed schedule of their duties.
- The Parent requested that the Student be given opportunities to be in classrooms and groups with students that are ambulatory and have more advanced verbal skills than him.
- The Parent requested that paraeducator 3 not be allowed in the same room with the Student or work/engage with the Student.
- The Parent requested that a certified teacher be in the room at all times when Student is there.

Under assistive technology devices and services needs, the IEP contained the following information:

- Student independently uses a wheelchair to manipulate his way around school/physical spaces.
- Student now has a power wheelchair that he uses for most of the day at school. He needs assistance to turn down the speed and maneuver in tight spaces.

In the "Present Levels of Educational Performance, Health & Development History," the IEP documented the following information:

- Student requires the use of a wheelchair and assistance from paraeducators. His wheelchair is now a power wheelchair and he is able to move himself independently with some guidance.
- Instructions per Parent: Student needs to have care given to his wheelchair to reduce damage to the device.

The "Adverse Impact Summary" stated the following:

[Student's] current academic levels combined with his required level of support through the school day adversely impacts his ability to learn in a general education setting. [Student] will continue to benefit from specially designed instruction in a special education setting where he will receive the support he needs to achieve both academic and adaptive/life skill goals. [Student] requires a 1-1 para at all times. The para may also work with a student who is functioning at a higher level than him in communication, adaptive and academic skills.

The "Gross Motor Skills" portion of the IEP described the following information: "[Student] is now using a power wheelchair at school. [Student] is able to safely propel his wheelchair through the room and hallways using a joystick in his right hand." Further, the following Student needs were identified:

- Student needs physical assistance to use the bathroom, safely maneuver his wheelchair, and access items that are below the size of the threshold of his current vision.
- Student sometimes runs into obstacles or people in his path when negotiating his classroom and school environment.
- The Student needs adult assistance for work tasks in order to access the work activity and manipulate it and to safely ambulate his wheelchair.

The service sections and service matrix of the Student's November 2019 IEP, including accommodations, modifications, supplementary aids and services, special education services, and related services, did not include the service of a paraeducator.

4. On February 14, 2020, the Student had an accident while operating his motorized wheelchair. Reports indicated the Student drove the wheelchair off a curb on his way to the bus at dismissal time. Witnesses observed and reported the following information, summarized below:
 - Paraeducator 1 was walking approximately three feet behind the Student.
 - After the fall, the Student was laying on his left side on the pavement still buckled into his chair.
 - There didn't appear to be any physical injuries and when asked, the Student said he was "OK."
 - Another paraeducator ran up to the Student. Paraeducator 1 was already there. "We got him upright. I checked his arm and head to see if he was alright. A paraeducator asked the student if he was hurt, and he said he was fine."
 - A third paraeducator performed a "small fall" check, and the Student was able to describe what happened, knew his name, and was able to say he felt "OK."
5. District reports documented the incident and described the process used to determine whether the Student was injured in the fall. The reports indicated that four District staff observed and verified that the Student suffered no apparent injury in the fall.
6. In her complaint, the Parent indicated that the accident occurred because the Student was permitted to use the motorized feature of his wheelchair outside of the school building, and due to the lack of 1:1 paraeducator assistance consistent with the Student's IEP. The Parent reported that the Student sustained bruising and abrasions in the fall, requiring medical intervention.

Further, in her reply to the District's response, the Parent stated that the Student's paraeducator was "not in arms distance" and that the Student said the paraeducator was "not with him and was dealing with [another student]" at the time of the accident.
7. The District was on mid-winter break from February 17 through 21, 2020.
8. The District, in its response, did note that as a result of the accident, they determined the Student "will no longer navigate his own motorized wheel chair outside of the school building except when he is supervised on the track," especially since the Student's IEP noted: "for the safety and maintenance of wheelchair, only adults are allowed to push his wheelchair." The District stated this new expectation would be communicated to the Student's paraeducator and other paraeducators working with the Student (e.g., substitute paraeducators). The District stated that previously they did not have a specific protocol in the IEP for when the wheelchair would be on manual.
9. The District also noted in the responsive documents that the Student's IEP had not yet been updated to include the new plan for navigating the wheelchair outside and to the bus because of the school facility closures due to COVID-19.
10. In its April 21, 2020 response to the allegations in the complaint, the District acknowledged that the Student was without a paraeducator during fourth period for 15 minutes on Tuesday and Thursday, and for 40 minutes on Monday, Wednesday, and Friday for a period of time spanning from January 6, 2020 to February 14, 2020. During this time period, the District stated

the Student was working with a “trained peer tutor”—with whom he had worked with since middle school—and not a paraeducator.

In addition, the District indicated that no paraeducator was assigned to the Student during his sixth period class and because the Student was working directly with a teacher during his sixth period class.

11. On May 12, 2020, the District’s director of human relations and the director of student support services provided additional clarification during this investigation. They indicated that the service of the paraeducator should have been listed as a supplementary aid or service on the Student’s IEP. According to these administrators, the IEP team intended to provide 1:1 paraeducator support to the Student throughout his day, unless he was working directly with a teacher.

ISSUE ONE: CONCLUSION

Issue One: Development and implementation of the IEP with respect to paraeducator support and educating the student in the LRE.

The Parent alleged in her complaint that the District failed to develop an individualized education program (IEP) to address the Student’s need for paraeducator assistance, and that the District failed to implement the portion of the IEP requiring 1:1 paraeducator assistance. A district is required to develop an IEP that addresses a student’s unique, disability related needs. The amount, type, and duration of services to meet a student’s unique educational needs must be specified in a manner that clearly communicates the services to be provided.

In this case, the District acknowledged that the Student’s IEP team agreed the Student needed the assistance of a 1:1 paraeducator throughout his day in order to participate in his least restrictive environment (LRE). However, while the IEP referenced the Student’s need for paraeducator support, the IEP did not clearly specify the amount of paraeducator service—in other words, the amount, type, and duration of paraeducator support was not defined. Further, the references to paraeducator support were confusing and contradictory. For example, the IEP referenced the need for 1:1 paraeducator support, but also stated the paraeducator may work with another student, which would mean the Student would not actually be receiving 1:1 paraeducator support during times when the paraeducator worked with another student. The Parent stated she believed the paraeducator should have been within an arm’s distance of the Student; however, this was not specified in the IEP. The District failed to develop an IEP for the Student to meet his unique educational needs. The District’s commitment of resources, like paraeducator support, must be clear to the Parent and other IEP team members. In this case, it was not, and it was clear the Parent and District did not always have the same understanding of the paraeducator’s role.

The District acknowledged that between January 6 and February 14, 2020, the Student was without a 1:1 paraeducator during fourth period for 15 minutes on Tuesday and Thursday and for 40 minutes on Monday, Wednesday, and Friday. In addition, the District indicated that no

paraeducator was assigned to the Student during his sixth period class because the Student was working directly with a teacher. While the Student's IEP was not clear as to the number of minutes of paraeducator support he should have received, the District acknowledged that the IEP team's intent was to provide the Student paraeducator support throughout the day. Thus, between January 6 and February 14, 2020, OSPI finds the District failed to provide the full amount of 1:1 paraeducator support the Student required.

Overall, the District failed to develop and implement an IEP to address the unique educational needs of the Student with respect to 1:1 paraeducator services to support the Student in the LRE. Thus, OSPI finds a violation and the District will be required to hold an IEP meeting to amend the Student's IEP.

ISSUE TWO

2. Did the District follow Family Education Rights and Privacy Act (FERPA) procedures, ensuring the Student's personally identifiable information was not shared with the parents of other students?

ISSUE TWO: FINDINGS OF FACT

1. In her complaint, the Parent stated she was concerned about a conversation that took place between District staff, paraeducator 3, and the parent of another student.
2. In January 2020, paraeducator 3 attended an IEP meeting regarding another student. After that meeting, paraeducator 3 acknowledged that she "may have said something about not being in 3rd period PE, but did not give a lot of details regarding this" to the other student's parent.

The Parent alleged the conversation was a FERPA violation.

3. Under strengths of the Student and concerns of the Parent portion of the Student's November 2019 IEP, the Student's IEP contained the following information regarding paraeducator 3: "The Parent has requested that [paraeducator 3] not be allowed to be in the room...or engage with or work with the Student." The remainder of the IEP was silent with respect to paraeducator 3 and did not specify which providers were to work with the Student.
4. The District's internal investigation into the allegations in this complaint confirmed that the parent of the student whose IEP meeting was held that day acknowledged that paraeducator 3 mentioned she could not be in 3rd period adaptive PE with her son (the other student) because of a conflict with a parent of another student in the class (the Parent and Student in this complaint). The Student was named in the conversation. Paraeducator 3 shared with this parent that she was not allowed to work with or be around the Student.¹

¹ The documents provided in this complaint also indicate that paraeducator 3 may have also made a reference to another student "who has a heart condition" during this conversation. Based on the

5. The District's April 21, 2020 response to the complaint summarized an internal District investigation, documenting that although the conversation occurred and was verified by staff, the District did not consider the verbal exchange between paraeducator 3 and the parent of another student to be a FERPA violation.

ISSUE TWO: CONCLUSION

ISSUE TWO: FERPA procedures and ensuring that the Student's personally identifiable information is not shared with parents of other students.

The Family Educational Rights and Privacy Act (FERPA) requires districts to maintain the confidentiality of a student's educational records. A student's IEP is considered an educational record; therefore, the content of the IEP is confidential and cannot be shared without parental (or adult student) consent.

In this situation, the Parent's concern regarding paraeducator 3 and limitation on paraeducator 3 working with the Student was documented in the Student's IEP. As part of the IEP, the District was required to treat the information as confidential and protect it from disclosure without parental consent. It is clear that here that the Parent did not consent to paraeducator 3 sharing information from the Student's IEP with another parent. Therefore, the District failed to ensure that the Student's personally identifiable information was not shared with the parents of other students. OSPI finds the District in violation and the District will be required to review its policies/procedures around confidentiality of student records and provide written guidance on the same.

CORRECTIVE ACTIONS

By or before **July 31, 2020, August 21, 2020, September 15, 2020, and September 22, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting

By **August 31, 2020**, the Student's IEP team will be required to meet to discuss the Student's needs related to paraeducator support and amend the IEP to clearly reflect the services required. At the IEP meeting, the Student's IEP team must address the following topics:

- The amount of paraeducator support required—what days, periods, and times does the Student need paraeducator support;
- Are there times the Student does not require a 1:1 paraeducator—e.g., when working with a peer tutor or directly with a teacher;

documentation, it does not appear this other student was the child of the parent the paraeducator was speaking to or the Student in this complaint. However, it is possible that sharing this information was also a potential violation of FERPA.

- Necessary definitions of the support provided—is it always 1:1, are there times the paraeducator will be providing support to other students (e.g., 2:1 support), does the paraeducator need to be an arm’s distance away or within the line of sight, etc.; and,
- How will the IEP be amended to document the support.

OSPI also recommends the team discuss including a wheelchair plan in the IEP as proposed by the District. The IEP team may meet sooner than August 31, 2020, via conference call or video conferencing.

By **September 15, 2020**, the District will provide OSPI with copies of: 1) the meeting invitation or communication regarding scheduling; 2) the Student’s amended IEP; 3) meeting notes or meeting agenda; 4) prior written notice; and, 5) any other relevant documentation.

DISTRICT SPECIFIC:

Review of Policies or Procedures

The District will review its current internal practices and the District’s procedures addressing FERPA and confidentiality of personally identifiable student information to determine whether it needs to revise internal practices or procedures in accordance with the IDEA and other law in order to ensure that the District is protecting confidential information in student records.

By **July 31, 2020**, the District will provide OSPI with the results of its review, including its rationale for either maintaining or revising the current internal practices and District record procedures. The District will also provide a copy of the current internal practices and record procedures and copies of any revised internal practices and record procedures for review. OSPI will review the documentation by August 14, 2020.

By **September 15, 2020**, the District will provide OSPI with documentation that any changes to internal practices or District records procedures have been approved and adopted by administration, including the date of approval. The District will also provide documentation that the District’s internal practices and record procedures are posted to the District’s inter-district website so that District staff members can easily access the information.

Training: Written Guidance

By **September 15, 2020**, the District will provide written guidance to paraeducators employed at District high school(s), which focuses on FERPA and confidentiality of personally identifiable information in student education records.

By **August 21, 2020**, the District will develop and submit a draft of the guidance to OSPI for review. The written guidance will include examples. OSPI will approve the materials or provide comments by August 28, 2020, and additional dates for review, if needed.

By **September 22, 2020**, the District will submit documentation that the required staff received the written guidance and were given an opportunity to ask questions, either via email or at a staff meeting.

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

Dated this ____ day of May, 2020

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)