

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-75

PROCEDURAL HISTORY

On July 20, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Seattle School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On July 23, 2018, 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 August 14, 2018, OSPI received the District's response to the complaint and forwarded it to the Parent on August 15, 2018. OSPI invited the Parent to reply with any information he had that was inconsistent with the District's information.

On August 24, 2018, OSPI received the Parent's reply. OSPI forwarded that reply to the District on August 27, 2018.

On August 23, 2018 and August 24, 2018, OSPI asked the District for additional information/documentation. On August 24, 2018, OSPI received the requested information from the District. OSPI forwarded the additional information to the District on August 27, 2018.

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

OVERVIEW

In the spring of 2018, the Student was hospitalized due to medical issues and as a result, the Student's individualized education program (IEP) team agreed to change his educational placement to a home-bound setting. The District attempted to secure a tutor to provide the Student with home-bound instruction for the remainder of the 2017-2018 school year, but it was unable to secure a tutor before the end of the school year.

On June 22, 2018, a District special education program supervisor sent the Parent – via email – a letter, offering the Student compensatory education. The Student's special education teacher, the middle school assistant principal, and a District special education program specialist, were carbon copied on this email. Subsequently, a District special education director received a hard copy of the letter.

On July 10, 2018, the Parent had a text message conversation with the parent of another student at the Student's middle school. This parent was under the belief that the District had offered "money for tutoring" for the Student because the Parent had threatened to sue the District.

According to the Parent, the June 22nd letter qualifies as a confidential student record under the Family Educational Rights and Privacy Act (FERPA), and the July 10th text message conversation is evidence that one or more District employees improperly disclosed the contents of the letter. The District denies this allegation.

ISSUE

1. Did the District follow procedures for protecting the Student's personally identifiable information?

LEGAL STANDARDS

Education Records: Education records means the type of records covered under the definition of "education records" in FERPA. 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. The information may be recorded in any way, including, but not limited to, handwriting, print, computer media, videotape, audiotape, film, microfilm, microfiche, and e-mail. 34 CFR §99.3.

The term "education records" does not include records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute; records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement; or, in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose. 20 USC §1232 (g)(4)(b).

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. 34 CFR §300.622; WAC 392-172A-05225. This rule is subject to a number of 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(2).

Evidentiary Weight: According to the Office of Special Education and Rehabilitative Services, "it would not be inconsistent with the IDEA...for a State to use a 'preponderance of the evidence' standard in making independent determinations as to whether a public agency violated a requirement of Part B of the IDEA." *Letter to Reilly*, 64 IDELR 219 (OSERS 2014). Merriam-Webster's

Dictionary of Law defines the phrase “preponderance of the evidence” as “the standard of proof...in which [a] party [wishing to establish a factual premise] must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.” MERRIAM-WEBSTER’S DICTIONARY OF LAW 377 (1996).

FINDINGS OF FACT

2017-2018 School Year

1. During the 2017-2018 school year, the Student attended a District middle school and was eligible for special education under the category of autism. At the beginning of the 2017-2018 school year, the Student’s January 2017 individualized education program (IEP) was in effect. The January 2017 IEP included goals in the areas of social/behavior and communication, and provided for specially designed instruction to address the goals.
2. On January 23, 2018, the Student’s IEP team developed the Student’s annual IEP. The January 2018 IEP included goals in the areas of social/behavior and communication, and provided for specially designed instruction to address the goals.
3. In the spring of 2018, the Student was hospitalized due to medical issues and as a result, the Student’s IEP team agreed to change his educational placement to a home-bound setting, beginning on June 11, 2018.
4. The District then attempted to secure a tutor to provide the Student with home-bound instruction for the remainder of the 2017-2018 school year, but it was unable to secure a tutor before the end of the school year.
5. The last day of the 2017-2018 school year was June 22, 2018.
6. On June 22, 2018, a District special education program supervisor emailed the Parent, the Student’s special education teacher (special education teacher), the middle school assistant principal, and a District special education program specialist. Attached to this email was a letter. In pertinent part, it read:

This letter is to confirm [District’s] agreement to offer [Student]...500 minutes of compensatory education for missed instruction from June 4, 2018—June 22, 2018, in the form of reimbursement for tutoring services or summer camp registration. Service providers will be a determination of your choosing and the District will reimburse your costs, not to exceed \$750.

The agreed upon compensatory education is based on the [specially designed instruction] provided for in [Student’s] current IEP. The amount of compensatory service time is calculated to reasonably provide the educational benefits that likely would have accrued should [Student] have received the missed instruction spanning two weeks from June 4, 2018 to June 22, 2018. The point is not to provide a day-for-day compensation for time missed, but instead to tailor the compensatory education to meet your child’s needs and reasonably compensate him for the missing services.

The District is making this offer of compensatory education to address any disputes arising from IEP services during the period of 6.4.2018 – 6.22.2018.

The following individuals were carbon copied on the letter: the middle school principal and a director of special education, located at the John Stanford Center for Education Excellence¹ (special education director).

7. According to the District's response to this complaint, despite the fact that the middle school principal was carbon copied on the June 22 letter, the special education program supervisor never provided the middle school principal with a copy of the letter.
8. On July 20, 2018, the Parent filed this special education citizen complaint. In his complaint, the Parent stated:

I was told by an individual that they knew of the existence and contents of [the June 22 letter] from contacts in the [Parent Teacher Student Association]. I had not told this individual, nor any other individuals other than professionals, of the existence or contents of this letter.
9. On August 14, 2018, the District submitted its response to the Parent's complaint, which included several "Declarations"² from the District's personnel who sent and/or received the June 22, 2018 email and/or letter.
10. In pertinent part, the special education program supervisor's Declaration read:
 4. On June 22, 2018, I emailed [Parent] a letter outlining the District's offer of compensatory education services for Student. Attached to that email was a letter outlining the District's offer of compensatory education services. I copied [the special education program specialist], [the middle school assistant principal], and [the special education teacher] on the email.
 5. I also provided a hard copy of the letter to [the special education director]. I did not provide a hard copy of the letter or email to anyone at [the Student's middle school].
 6. At no time did I share the letter or any information regarding Student with anyone outside of the District, or with any District employee or contractor who is not involved in Student's educational program.
11. In pertinent part, the special education program specialist's Declaration read:
 2. On June 22, 2018, I was copied on an email that was sent by [the special education program supervisor] to [the Parent] regarding an offer of compensatory education services for [Student]. Attached to that email was a letter outlining the District's offer of compensatory education services for Student.

¹ The Seattle School District's main administrative building is named the John Stanford Center for Education Excellence.

² A "Declaration" is a written statement confirmed under oath of affirmation, for use as evidence in court.

3. At no time did I share the letter or any information regarding Student with anyone outside of the District, or with any District employee or contractor who is not involved in Student's educational program.

12. In pertinent part, the special education teacher's Declaration read:

2. On June 22, 2018, I was copied on an email that was sent by [the special education program supervisor] to [the Parent] regarding an offer of compensatory education services for [Student]. Attached to that email was a letter outlining the District's offer of compensatory education services for Student.

3. At no time did I share the letter or any information regarding Student with anyone outside of the District, or with any District employee or contractor who is not involved in Student's educational program.

13. In pertinent part, the middle school assistant principal's Declaration read:

2. On June 22, 2018, I was copied on an email that was sent by [the special education program supervisor] to [the Parent] regarding an offer of compensatory education services for [Student]. Attached to that email was a letter outlining the District's offer of compensatory education services for Student.

3. At no time did I share the letter, email³, or any information regarding Student with anyone outside of the District, or with any District employee or contractor who is not involved in Student's educational program.

14. In pertinent part, the special education director's Declaration⁴ read:

2. On June 22, 2018, I received a copy of a letter [that] was emailed by [the special education program supervisor] to [the Parent] regarding an offer of compensatory education services for [the Student]. I was not copied on the email; nor did I ever receive a copy of the email.

3. At no time did I share the letter or any information regarding Student with anyone outside of the District, or with any District employee or contractor who is not involved in Student's educational program.

15. In its response to this complaint, the District stated that the June 22nd letter was maintained in accordance with the District's Student Records Policy.⁵

16. On August 24, 2018, the Parent submitted its reply to the District's response. The Parent's reply included the following transcript of a text message conversation that occurred on July

³ The other Declarations do not reference the email. When asked about this by OSPI, the District stated, "That discrepancy was not intentional, and was likely a typographical error. The intent was to confirm that staff members did not share any information regarding the Student regardless of the record's form."

⁴ The special education director's Declaration was provided to OSPI in a supplementary response from the District on August 24, 2018.

⁵ The District also refers to its Student Records Policy as "Superintendent Procedure 3231 SP."

10, 2018, between the Parent and the parent of another child (other parent), at the Student's middle school:

Parent: [Student's] not going to summer school. Is there a way he can spend a few hours at your house...?

Other parent: I am not comfortable with that after finding out that you are trying to sue [the District].

Parent: What? Who said that?? I am not. Absolutely not.

Other parent: I hope so. I know a lot of [Parent Teacher Student Association] people.

Parent: I have no idea where such a rumor would come from.

Other parent: Hard to help [Student] when there is that kind of threat and no support.

Parent: I made no such threat...

Other parent: ...So you weren't offered money for tutoring to not sue??

According to the Parent, the other parent "is friendly with administration at [the Student's middle school] and [the parent-teacher-student association]." Furthermore, the Parent stated:

The last line makes it clear that [the other parent] was aware of the content of [the June 22] letter. [The other parent] has strong ties to [the Student's middle school] administrators and I strongly suspect was told of [the June 22 letter] by an administrator. How else would [the other parent] know its content?

At the time of this (unsolicited) text message I had discussed the letter with NO non-professionals and certainly no [parents at the Student's middle school], and I would be happy to sign an affidavit attesting to such.

(emphasis in original).

CONCLUSIONS

The Parent alleged that the June 22nd letter represented an "education record" under FERPA. 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. In this case, the June 22nd letter clearly "related to" the Student. For example, the letter contained the Student's name, and the letter dealt exclusively with the District's offer of compensatory education to the Student. It was also a type of document "maintained by" the District. For example, in its response, the District stated that the June 22nd letter was maintained in accordance with the District's Student Records Policy. Therefore, the June 22nd letter represented an "education record" under FERPA.

The Parent alleged that the District, without his consent, disclosed the contents of the June 22nd letter. FERPA requires districts to maintain the confidentiality of students' education records. Generally, personally identifiable information may not be disclosed without specific, informed

parental consent. In resolving a contested factual issue, OSPI must determine which evidence bearing on that issue is most credible. To support his allegation, the Parent relies on a text message he received from another parent at the Student's middle school – a parent that was allegedly "friendly with [the] administration." In this text message, the other parent stated that he or she had "[found] out" that the District had offered the Student "money for tutoring" because the Parent threatened to sue the District. For three reasons, this text message does not support the conclusion that the other parent had been told of the contents of the June 22nd letter. First, the text message misstates the June 22nd letter; as stated in the letter, the District offered the Student compensatory education because the Student had "missed instruction from June 4, 2018 – June 22, 2018," not because the Parent had threatened to sue the District. Second, the text message lacks specificity. For example, the test message does not detail how much "money for tutoring" the District offered the Student. It also fails to mention that the money could have been used for summer camp registration, as opposed to tutoring services. Third, the other evidence bearing on this issue must also be considered. Each of the District personnel that sent or received the email and letter submitted Declarations that they did not "share...any information regarding Student with anyone outside of the District, or with any District employee or contractor who is not involved in Student's educational program." In sum, the record does not support the conclusion that the District improperly disclosed the contents of the June 22nd letter.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ____ day of September, 2018

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
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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.)