

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-03

PROCEDURAL HISTORY

On January 22, 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 Tacoma School District (District). The Parent alleged the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On January 24, 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 February 14, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent on February 18, 2020. OSPI invited the Parent to reply.

On February 26, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the Parent. OSPI received the requested information from the Parent on February 27, 2020 and March 2, 2020. OSPI forwarded that information to the District on February 28, 2020 and March 2, 2020 respectively.

On February 26, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information from the District on March 2, 2020. OSPI forwarded that information to the Parent on March 3, 2020.

On February 27, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District on February 28, 2020.

On March 3 and 4, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information from the District on March 4, 2020. OSPI forwarded that information to the Parent on March 5, 2020.

Separately on March 3, 2020, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information from the District on March 9, 2020. OSPI forwarded that information to the Parent the same day.

On March 9, 2020, OSPI received additional information from the Parent. OSPI forwarded that information to the District the same day.

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

ISSUES

1. Did the District follow special education referral procedures following the Parent's referral on October 28, 2019?

2. Did the District follow proper prior written notice procedures in regard to its decision as to whether to evaluate the Student?

LEGAL STANDARDS

Referral: Any person who is knowledgeable about the student may make a referral of a student suspected of having a disability. When a student suspected of having a disability is brought to the attention of school personnel, the district must document that referral. It must provide the parents with written notice that the student has been referred because of a suspected disabling condition and that the district, with parental input, will determine whether the student is a good candidate for evaluation. It must review the referral, and it must collect and examine existing school, medical, and other records. The district must determine within 25 school days after receipt of the referral whether it will evaluate the student. The district must provide the parent with written notice of its decision. 34 CFR §300.301; WAC 392-172A-03005. While a district must gather parental input as part of the referral process, it is not required to hold an actual meeting with the parent. See *generally* WAC 392-172A-03005.

Definition of a Free Appropriate Public Education (FAPE): Every student eligible for special education between the ages of three and twenty-one has a right to receive a FAPE. 34 CFR §300.101; WAC 392-172A-02000. An eligible student receives a FAPE when he or she receives, at public expense, an educational program that meets state educational standards, is provided in conformance with an individualized education program (IEP) designed to meet the student's unique needs and includes whatever support services necessary for the student to benefit from that specially designed instruction. 34 CFR §300.17; WAC 392-172A-01080. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

Prior Written Notice: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate. 34 CFR 300.503; WAC 392-172A-05010.

Written notice must be provided to the parents of a student eligible for special education, or referred for special education a reasonable time before the school district: (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. The notice must include: (a) a description of the action proposed or refused by the agency; (b) an explanation of why the agency proposes or refuses to take the action; (c) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (d) a statement that the parents of a student eligible or referred for special education have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be

obtained; (e) sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice; (f) a description of other options that the IEP team considered and the reasons why those options were rejected; and (g) a description of other factors that are relevant to the agency's proposal or refusal. 34 CFR 300.503; WAC 392-172A-05010.

FINDINGS OF FACT

2019-2020 School Year

1. The District's first day of school was September 5, 2019.
2. At the start of the 2019-2020 school year, the Student was in the second grade, attended a District elementary school, and was not eligible for special education.¹
3. On October 28, 2019, the Parent emailed the psychologist, the instructional coach, the counselor, and the principal, stating, in part:

Based on what we are currently seeing with Student, we feel he is no longer able to continue and be successful with just 504 support. Please see the attached [private] evaluation for Student...Ideally, we'd like the [individualized education program] IEP to be in place before Christmas. Please let us know next steps.

We also realize this may be confusing considering we've been emailing this morning about meeting later this week on his recent behaviors. We'd still like to meet for this and at least share an update and come together to set up a plan until he can get IEP support.
4. On October 29, 2019, the general education teacher acknowledged having received the Parent's email, stating: "Yes, I received the attachments. We can discuss next steps at our upcoming meeting when we talk more in person."
5. Also, on October 29, 2019, the District sent the Parent a 'Notification of Guidance Team Referral' invitation for a meeting scheduled for October 30, 2019. According to this document, the following individuals were invited to attend the October 30, 2019 meeting: Parent, general education teacher, and counselor.

According to the related 'Contact Attempt Report,' that same day (October 29, 2019), the Parent stated she would attend the October 30, 2019 meeting.

6. The District's response included a 'Guidance Team Record – Special Education Referral' that related to the October 30, 2019 meeting. It read, in part:

Parent contacted the education support team on October 28, 2019 due to concerns over Student's difficulties with attention and his new diagnosis of autism from [a private]

¹ The Student did, though, have a 504 plan under the Rehabilitation Act of 1973. "Under Section 504, students with disabilities can access the accommodations, aids, and services they need to access and benefit from education"—the notable difference from the IDEA being that, under Section 504, a student is not entitled to specially designed instruction. <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/section-504-students-disabilities>.

psychologist. Student's psychologist's report included the following diagnoses: [attention deficit hyperactivity disorder] ADHD; adjustment disorder mixed anxiety and depressed mood.

Student's private psychologist also diagnosed a specific learning disability in the area of reading, based on a discrepancy between his full IQ and his basic reading score on the Wechsler Individual Achievement Test (WIAT-III), but indicated that a reading score in that range would not likely qualify for school-based services, so he recommended tutoring.²

A variety of strategies have been used to help student be successful at school. He currently has a 504 plan, which includes the following accommodations: implementing strategies to use sensory tools appropriately; reducing workload to allow him to demonstrate mastery with fewer complete problems; teacher will send homework and family will determine work completion; an alternate testing location for computerized testing; allowing extra processing time and work time; giving positive praise and reinforcement; and affording student opportunities to demonstrate his strengths.

Present instruction levels:

Reading:

Reading is not an area of concern for Student and he is a strong reader. On his September 18, 2019 I ready assessment, Student earned an overall reading score of 485, which places his overall reading ability on the first grade reading level.

Math:

Student performs well in math and this is not an area of concern for Student. On his September 19, 2019 I ready assessment, he earned an overall math score of 409, which places his overall math ability on the first grade level.

Written Language:

Student's writing skills are within a year of grade level expectations and are not a concern at this time.

...

Needs:

Social/Emotional:

Student was recently diagnosed with autism, ADHD, and adjustment disorder with mixed anxiety and depressed mood. Per his evaluation reports from [his private psychologist], student struggles with sensitivity to bright lights and clothing textures, reciprocal communication, conversation repair, reading nonverbal behaviors, attention, and demonstrates a need for sensory breaks to help himself sooth. Student's report noted that at home, Student struggles to regulate himself emotionally, notes that this is not concern

² A supplemental response by the District provided the following clarification on this statement: "[The private psychologist] found that there was a discrepancy between Student's full scale IQ and his basic reading score on the WIAT-III. However, Student's reading score was still in the average range. [The private psychologist] indicated that because the Student's reading score was in the average range, he would likely not qualify for school-based services. District staff reviewed [the] findings and agreed that the fact that there was a discrepancy between the scores, by itself, would not qualify Student for special education services under the IDEA because eligibility also requires an adverse educational impact and a need for special education services."

in the school setting where Student maintains self well. This is often a helpful adaptive strategy where students work hard to maintain themselves during the school day and are free to 'let it out' at home in their safe space. With regards to his anxiety, Parent shared that Student takes a pill before bed to help him sleep. Parent reported that Student's [private] psychologist suggested also taking the anxiety medication each afternoon.

Other Considerations:

The team discussed Student's new diagnoses and how they are impacting him at school. Together, the team created a plan to help improve Student's ability to identify and communicate his emotions, increase his class participation during intervention, and ask an adult when he needs help, using a check-in/check-out system. They also decided on giving Student a social story on expressing his feelings³, a feelings cartwheel, and sentence starters help him communicate his feelings.⁴ [These are all Tier 2 interventions the District utilizes as part of its Multiple Tiered-System of Support (MTSS).]

Guidance Team Recommendation:

No further action needed.

According to the Parent's reply, at the October 30, 2019 meeting, she "made clear...that [her] special education [referral] request still stood."

According to the District:

At the conclusion of the October 30, 2019 meeting, Student's [general education] teacher and the counselor were under the impression that Parents no longer wanted to proceed with a special education evaluation at that time. [Their understanding was] that Parents instead wanted the District to implement the additional interventions discussed during the meeting to determine whether they were successful. Because the District was not proposing or refusing any action at that time, the District did not believe it was necessary to send a Prior Written Notice.

7. The District provided the following information on the "check-in/check-out system" it provided to the Student beginning November 2019:

The check-in/check-out system was developed by the counselor, the general education teacher, and Parent. Essentially, the Student would check in with a staff member during the morning, lunch, recess, specialist time (library, music, PE), and the afternoon. The purpose of the check-ins was to review the Student's progress on four goals. Those goals were to: (1) Ask adults for help; (2) Share his feelings rather than making unexpected faces; (3) Get started on a choice during intervention; and (4) Be safe by staying in the correct location (e.g., playground, lunchroom, classroom). The Student could earn one point for each of the

³ According to the District, "Social stories are short descriptions of a particular situation or event that are used to teach/model appropriate behaviors, communication skills, coping strategies, or social interaction skills. They can be used as a behavioral strategy to help students learn how to behave appropriately in certain situations or environments, what to do if they are upset, how to communicate feelings, or how to cope with situations that might be distressing."

⁴ According to the District, "Sentence starts can be used to help students communicate their feelings by giving them the beginning of a sentence and then having them complete the sentence. For example, 'when [event/situation] happens, I feel ____.'"

four goals he met during the five check-ins. So, he could earn a maximum of 20 points per day.

The check-in/check-out system was not part of the Student's 504 Plan. It was a Tier 2 intervention⁵ provided in addition to the Student's 504 Plan.

The staff members who implemented the system were: general education teacher and paraeducator. [These staff members] would check-in with Student at the designated times to discuss how Student was doing on his four goals and whether he earned a point at those times. The check-in consisted of a conversation with the Student and filling out the [check-in/check-out data] chart.

8. In November 2019, the Student averaged 15 out of 20 points on the check-in/check-out data chart.
9. On November 5, 2019, the psychologist emailed the Parent the following dates "to meet to consider evaluating Student: December 3, 6, and 9."
10. The District was on break November 11, 2019.
11. On November 11, 2019, the Parent responded to the psychologist's November 5, 2019 email, stating: a) she (and the Student's father) could not meet in the mornings, as they both worked; b) a meeting was already scheduled for December 3 to talk about the Parent's other child; and, c) "please send some other date options for a meeting on Student that [are] for [the afternoon]."

That same day, the psychologist responded to the Parent, stating: "One idea is that we can discuss [your other child's] reevaluation at his IEP meeting on November 22, 2019. That would free up December 3, 2019 to be used for Student."

12. On November 12, 2019, the Parent responded to the psychologist, stating: a) she wanted to keep the originally-agreed upon dates for her other child's reevaluation and IEP meetings, and so she was therefore unavailable to discuss her referral for Student on November 22, 2019 or December 3, 2019; b) the morning of December 6 would not work because both she and her husband were working; and, c) the afternoon of December 9 would not work because of "a prior commitment."

That same day, the psychologist responded, stating: a) the afternoon of November 19, 2019 would work "but [that] this may not give the behavior plan the time it needs to determine whether or not it's [been] effective;" and b) "an alternative date is [the afternoon] of December 6, 2019."

⁵ According to the District: "Tier 1 are interventions or teaching strategies that teachers use for all students. Tier 2 includes supplemental instruction or intervention provided to students not meeting benchmarks. Tier 3 includes intensive, small group or individual interventions for students showing significant barriers to learning the skills required for school success."

13. On November 14, 2019, the general education teacher emailed and stated: "I have a...meeting after school on November 19, 2019 [but] I am willing to come to the meeting for Student, but I may need to leave around 4:15...I am also available to meet December 6, 2019."
14. The District was on break November 27-29, 2019.
15. In December 2019, the Student averaged approximately 19 out of 20 points on the check-in/check-out data chart.
16. The District's elementary schools did not hold school on December 2, 2019.
17. On December 5, 2019, the Parent emailed the general education teacher, stating she was concerned the check-in/check-out data sheet was "being used to help determine if Student is placed in special education...I am not sure there will be much data to use from it for the referral purpose since that was not its original purpose."

On December 6, 2019, the general education teacher responded, stating the interventions of redirecting the Student and offering the Student a time to check-in on how things were going for him both seemed to be helping the Student. The general education teacher also asked: "After our last meeting to update his 504, do you still want to pursue a special education referral for Student?"

18. According to the District's calendar, December 9, 2019 was 25 school days after October 28, 2019. As part of this investigation, OSPI asked the District:
[It appears that], as of December 9, 2019, which was 25 days after the referral, the District had the following information on the Student: the private psychologist's report; iReady assessment results; and teacher reports. Was there other data the District specifically felt it needed before it was able to make a decision on whether or not to evaluate? Or was it simply that the District believed the Parent needed to be given the opportunity to provide any additional input, if desired, at an actual in-person meeting?

In response, the District stated:

The Parent indicated that she wanted a meeting to discuss her evaluation request. So, the District felt it was important to provide the Parent with the opportunity to participate in a meeting and provide any additional input that she wanted considered as part of her referral. In addition, Parent was the one who referred the Student for an initial special education evaluation. The District therefore felt it was important to meet with her to gain a better understanding of why she suspected that Student needed special education services, as well as to understand the areas in which the Parent wanted the Student evaluated. The iReady assessment results and teacher reports did not necessarily indicate an adverse educational impact or that the Student needed special education and related services, so the District felt that meeting with Parent was vital to gain a full understanding of her concerns.

19. On December 17, 2019, following a meeting, the District issued the Parent a prior written notice that read, in part:

A meeting was held to discuss Student's progress, review his check-in/check-out data, and consider an evaluation. The team proposed that Student's tier-two behavior support continue, with some modifications to his goals because he is meeting them.⁶

Parent reported multiple times that she did not want the check-in/check-out data used as a factor for determining whether or not to evaluate Student. Parent reported that the data was invalid because Student's teacher did not send home daily copies as parent understood she would. Parent [stated] that she would be getting a lawyer/advocate, and left the meeting. Afterwards, the team discussed Student's behavioral growth and the need to adjust daily check-in/check-out goals.

At the previous meeting on October 30, 2019, Student's team discussed scheduling a future check-in where they could meet and review intervention data for Student. In between these meetings, there was a mix-up regarding Student's referral for special education, with his educational team believing that the intervention was in place to help the team to determine if special education was needed and that Parent was also using this intervention to determine if she was proceeding with a special education evaluation request.

Once it became clear that Parent still wanted the meeting, the following dates were offered and declined, or never received a response: November 19; December 3; December 6; December 9.

At another meeting (unrelated to Student) on December 3, the [instant] date was selected by Parent as the date that worked for her.

20. On December 19, 2019, the Parent emailed the director of student services (director) stating: a) the District had missed the deadline to determine whether or not to evaluate the Student; b) the December 17, 2019 meeting "did not result in an evaluation determination [because of] various communication breakdowns;" and, c) she still wanted Student to be evaluated for special education.

On December 20, 2019, the director responded, stating, in part: "The psychologist will reschedule the meeting after the winter break."

21. On December 20, 2019, the general education teacher emailed the Parent, stating, in part: I understand that the meeting this week did not end on a positive note. I was really hoping to have an opportunity to talk to you...about Student's progress and to discuss some ideas...about adjusting his check-in sheet and changing his goals to be more specific and provide better feedback to you about his idea.

That same day, the Parent responded, stating, in part: "Our first priority is getting Student evaluated."

22. The District was on break December 23, 2019 through January 3, 2020.

⁶ In its response, the District clarified that the 'goals' mentioned in the December 17, 2019 prior written notice referred "to modifying the goals in the Student's check-in/check-out system—not any goals related to the Student's 504 plan."

23. On January 9, 2020, the District issued the Parent a prior written notice pertained solely to the meeting that had taken place on October 30, 2019.⁷ It read, in part:

The team (Parent included) determined that a check-in/check-out behavior support system would be implemented, in addition to his 504 plan accommodations, to help Student improve his participation during intervention time⁸, ability to ask adults for help, and ability to share his feelings. In addition, Student will be given sentence starters to help him identify how he's feeling, a social story on how to express how he feels, and a copy of a feelings wheel/chart/cards.

Other support include allowing Student to wash the bottom of his shoe during the school day; dirty shoes tend to become something he fixates on and it stresses him out so he should be allowed to wash them when needed. Additionally, Parent is following up with his physician regarding adding an afternoon dosage of his anxiety medication.

The reason we are proposing...to take action is:

Parent is requesting additional support for Student and the team wants to implement interventions to determine if they are effective, and collect data to help the team determine how to best meet his educational needs moving forward.

...

Any other factors that are relevant to this action:

This meeting included the counselor, Student's family, and his classroom teacher. The psychologist was not present at the meeting, but debriefed with team members afterwards and collaborated with his teacher and counselor during the data collection period. The team discussed scheduling a future check-in where they could meet and review intervention data for Student.

24. On January 9, 2020, the psychologist emailed the Parent, stating, in part:

My understanding was that we were all on the same page regarding Student's interventions being used as a gauge for everyone on determining how to proceed...Here are some dates/times: afternoon of January 16; morning of January 17; afternoon of January 22; morning of January 23; morning or afternoon of January 24.

25. On January 13, 2020, the Parent's husband wrote the psychologist a letter that read, in part:

At the beginning of the meeting we discussed a communication log that was supposed to be sent home detailing Student's behavioral progress and a quick description of his day. We stressed in the meeting that the behavior log was meant as communication between Parent and the teacher, but that we had only received the log once. Parent was concerned

⁷ According to the District: "Given the misunderstandings and difficulty scheduling a meeting with Parents to discuss their evaluation request, the District felt it was important to document the October 30th meeting. So, it did so through a Prior Written Notice dated January 8, 2020, even though no decisions were made with regard to the evaluation request during the [actual] October 30th meeting."

⁸ According to the District, "Intervention time is not specific to the Student; all students participate in intervention time. It takes place from 10:55 a.m. to 11:50 a.m. During intervention time, students in each grade level are grouped according to their English language arts (ELA) levels and each teacher in the particular grade level is assigned a group...During intervention time, students have a choice of reading independently, reading with a partner, working on writing, working on technology, or listening to a story."

that the communication log was being used as data to disqualify her son from receiving an evaluation. Parent expressed that this did not seem fair seeing how she had never seen the data, and that other information like Student's autism and ADHD diagnoses and outside evaluations should be considered as well.

...

Now Parent has a prior written notice that gives her no indication whether or not Student will be evaluated, more than 34 days after Parent requested one. The prior written notice states that the school staff had a 'mix up regarding student's referral for special education, with his educational team believing that the intervention was in place to help the team determine if special education was needed and that parent was also using this intervention to determine if she was proceeding with his special education evaluation request.' Parent never made any indication that she was using the communication log or any other intervention to make up her mind about a referral for special education. Parent stated in an October 28, 2019 email that she wanted Student referred for special education and that request stands.

26. On January 13, 2020, the psychologist emailed the Parent again, stating: a) "I haven't heard back from you so I'm just touching base to see what date/time works for you;" b) the afternoon of January 24 is no longer an option for the District; and, c) additional options would be: February 3, February 4, February 6, February 7, February 11.
27. On January 15, 2020, the special assignment teacher emailed the Parent, asking if any of the dates in the psychologist's January 13, 2020 email worked for the Parent to meet to discuss her referral request.

On January 16, 2020, the Parent responded, stating, in part:

Unfortunately, I will be [unavailable] for most of the dates offered below. In order for the Parent's advocate (advocate) to attend, would it be possible to meet on January 29, 2020 after school? If this won't work, it would be great if a few more meeting options could be proposed. I realize that you are really going above and beyond to accommodate our meeting date and we're really grateful for this!

28. In emails dated January 16, 20, and 21, 2020, the District and the Parent determined that it would not be possible to have a meeting on February 11, 2020.
29. On January 23, 2020, the psychologist emailed the Parent, stating: "Here are two additional dates: the afternoon of February 5; the afternoon of February 12. Thus far only 1 of the 11 dates/times we've offered have worked for you...If neither of these additional offerings work for you, we can just send home the consent and begin the evaluation."

The Parent responded later that same day, stating, in part:

Thank you for agreeing to finally evaluate Student...Some of the dates you provided you stated yourself wouldn't work because data wouldn't have been collected in time or Student's teacher couldn't attend. Another meeting time coincided with my other son's meeting...My husband and I...care deeply about being an equal member of this process. If my husband and I would have known all along that you could have sent the consent form

home we would have...accepted that option. Please send the consent form home so we can start the process. Too much time has been lost.

Later that same day, the psychologist responded, stating, in part:

Normally we don't proceed without a student review team meeting, but if it's that hard for you to find a time that works, I'm just sending it home. I've never done this before but it seems like the best way we can accommodate you.

30. On January 31, 2020, the Parent's advocate emailed the psychologist and the general education teacher, stating, in part: "Parent has still not received an evaluation consent form. It was stated via email last week that it would be sent home to be signed. We feel the delay will continue to deny Student a [free appropriate public education] FAPE. Please email and send home a hard copy of the consent form today."

That same day, the psychologist responded, stating, in part:

Regarding the consent form, I wanted to speak with legal prior to sending the consent form home because I have never been in this situation for and wanted to make sure we are doing this correctly. Regarding going beyond the 25 day timeline, legal assured me that since we did that in an effort to give the parent the ability to participate at the meeting, we did the right thing. Legal said that when teams are in a situation where their choices are either (1) hold a meeting within the 25 days that the Parent can't attend, or (2) go a few days beyond so that they can, he advises that they exceed the 25 day timeline because parent participation is most important.

To be transparent, several members of our team will not meet with this family without our principal and a district administrator present, because they feel intimidated. No one that I've spoken with regarding this situation, including legal, believes that offering 13 dates is a sign of us trying to delay the timeline or avoid meeting with the family. Never in my career have I obtained consent without holding a referral meeting, but [we] are trying to accommodate Parent's needs.

...

I've also spoken with a district lawyer about how to proceed. He supports the idea that we evaluate the two areas we discussed thus far: medical-physical and social/emotional. No other data or conversations we've had suggests there are other areas of concern. The consent form will come home on Monday and we can proceed with the evaluation in the two aforementioned areas.⁹

Later that same day, the advocate responded, stating, in part:

The family has an explicit right to request an evaluation in every area of suspected disability, and a procedural right to have this request responded to within 25 days. The family was not notified of 13 possible meeting dates for an evaluation consent meeting for Student. They responded to the ones that were proposed...Give the family some meeting dates to

⁹ In explaining this decision, the District's response stated: "The District became concerned about its ability to hold the meeting within a reasonable time period, so [it] decided to proceed [with] an evaluation in the areas it believed Parent had concerns...Without [Parent's input], the District could not ensure that its evaluation of Student was sufficiently comprehensive and included assessments in all areas related to Student's suspected disability."

sit down and discuss the issue...and we can also discuss areas of suspected disability for the evaluation.

31. In its response, the District provided clarification on why, as of January 31, 2020, medical-physical and social/emotional were the only areas identified for potential evaluation:

The District's proposal to evaluate in the areas of medical-physical and social/emotional was based on its understanding of the areas in which the Parent had expressed concerns. Student had been diagnosed with Autism, ADHD, and Adjustment Disorder with mixed anxiety and depressed mood. Therefore, the District's understanding was that an evaluation in the areas of medical-physical and social/emotional would encompass the Parent's concerns related to those diagnoses. Parent had not expressed concerns related to academics, cognitive functioning, or any areas other than medical-physical and social/emotional, nor did any District staff members have concerns in any of those [other] areas. Additionally, the District had been attempting to schedule a meeting with the Parents to discuss their request for an evaluation and their areas of concern, but had been unsuccessful. So, the District's proposal to evaluate in the two areas was based on what it understood to be the areas in which the Parents wanted Student evaluated.

32. According to the Parent, prior to February 4, 2020:

No...District [staff member] discussed in person with her the areas she'd [have] liked Student [to be] evaluated in. It was not until February 4, 2020 that Parent was asked this question via [an] email from the psychologist. The reason why Parent was asked this question was [apparently because it] would enable the District to invite the correct parties to the meeting...I am not sure why the District believed only medical-physical and social/emotional were the areas Parent hoped Student would be evaluated in.

33. According to the Parent, on February 6, 2020, the advocate emailed the psychologist, stating that the Parent wanted the Student evaluated in the areas of reading, writing, and math.

34. According to the District's response, the Parent was "available on February 27, 2020, so the District scheduled a meeting with Parent for that date."

On February 27, 2020, according to the District:

During the meeting...the team reviewed data, discussed how Student was doing at school, and discussed Parents' concerns. In addition to social/emotional and medical-physical, Parents expressed concerns in the area of math and communication. Based on the discussion, the District proposed evaluating Student in the areas of math, social/emotional, communication, and medical-physical. The District provided Parent with a Consent for Initial Evaluation form, which Parent signed. The District is therefore proceeding with the evaluation.

According to the Parent:

Myself, my husband, our non-attorney special education advocate, the school psychologist, principal, district representative, general education teacher, special education teacher, and [speech language pathologist] SLP were all present [for the meeting on February 27, 2020]. The team decided to evaluate Student...I will say that the school staff were very resistant to evaluate in all our areas of concern, and refused to evaluate in reading and writing. After a lot of going back and forth, they did decide to evaluate him in the areas of social-emotional,

math, and communication...I stated on the consent form that I thought Student should also be evaluated in reading and writing as well. The school psychologist said they would provide a prior written notice with their refusal to evaluate in those areas.

35. On March 8, 2020, the District provided the Parent with a prior written notice related to the February 27, 2020 meeting. It read, in part:

The evaluation team is refusing to evaluate Student's reading and writing abilities as part of his evaluation for special education...His Developmental Reading Ability (DRA) score of 24, is mid-second grade level. He started the school year at DRA level 18, which falls at early 2nd grade level. His iReady Reading assessment (1/15/20) also places Student in the 'approaching' end of the year standards range, which means he is within a year of end of year standards. On this assessment, Student scored in the 'approaching grade 2' range for phonics, vocabulary, comprehending literature, and comprehending informational text; he tested out of phonological awareness and earned the maximum score on high-frequency words. In class, he participates during class read aloud and answers grade-level questions. He enjoys reading and is motivated to become a better reader.

Student's writing abilities are commensurate with his reading abilities. He is able to generate sentences and earns mostly scores of 2, which fall in the 'approaching grade level' range. His teacher reported that when he receives 2s, Student is inquisitive and wants to know how he can perform better. His teacher gave an example where he was given a writing assignment where he needed to include two ideas to tell why he likes something, he writes simple sentences like 'I like chocolate because it is good and sweet.' After seeking feedback on how to earn a 3, Student goes back to his desk, edits his writing, and is often able to meet the end of year standard. Parent concerns included spelling and suffixes.

Note: grade level assignment are scored based on 'end of year standards.' Since we are 60% of the way through the school year, earning a school of 2 'approaching grade level' means that they are meeting grade level expectations for this point in the school year.

Student's parents shared concerns that he sometimes struggles with inferencing when reading...Additionally, they said they were concerned with his spelling and suffix usage, in writing.

The team rejected testing based on Student's developing inferencing abilities because inferencing is also an end of year standard for 2nd graders; it's typical for students to be learning this skill and is a skill they're receiving instruction on in class.

Although Student's parents voiced concerns over Student's spelling and suffix usage, the team rejected testing in this area because his spelling errors and suffix mistakes are not typical compared to grade-level peers. Additionally, spelling is not an area of eligibility in special education.

Student's parents wanted Student tested in reading and writing; however, the majority of the team disagreed, based off data that demonstrates that Student is within a year of end of year standards in these areas. Members who did not believe testing was warranted include: principal; special education teacher; special assignment teacher; psychologist; general education teacher; speech language pathologist.

The team agreed to test in the following areas: medical-physical; social/emotional; communication; and math.

36. In its response, the District explained its rationale for responding to the Parent's referral in the manner that it did:

The Ninth Circuit Court of Appeals has held that, "[w]hen confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the [school district] must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing [a] [school district]'s action in such a scenario, we will allow the [school district] reasonable latitude in making that determination." *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1046 (9th Cir. 2013). In *Doug C.*, the Ninth Circuit found that a school district denied a student a free, appropriate public education (FAPE) because it held an IEP team meeting without the parents in order to meet the annual review deadline. *Id.* In that case, the parent had requested that the district reschedule the meeting for a later date, but the district decided to go forward with the meeting as scheduled in order to comply with the deadline for the student's annual IEP review. The Ninth Circuit found that parent participation in the IEP process was more important than complying with the annual review deadline and that the district should have rescheduled the meeting to ensure that the parent could attend.

In summary, while the District did not meet the 25 school day deadline in WAC 392-172A-03005(2), the District felt that Parents' participation in the evaluation process was more important than meeting that deadline. Failing to meet with Parents before proceeding with the evaluation would impede the District's ability to ensure that its evaluation was sufficiently comprehensive and that it assessed Student in all areas of suspected need. So, not meeting with Parents would have a far more substantial impact on Student's education than not meeting the 25 school day deadline.

CONCLUSIONS

Issue 1: Referral Procedures – The Parent alleged the District did not follow proper referral procedures. There are several components to proper referral procedures: 1) a school district has 25 school days to determine whether it will evaluate a student referred for potential eligibility under the IDEA; 2) the school district must seek parental input on the referral; 3) the school district must collect and examine existing school, medical, and other records on the student; and, 4) the school district must provide the student's parent with a prior written notice, both for the referral and for the decision as to whether to evaluate the student.

Component 1

A school district has 25 school days to determine whether it will evaluate a student referred for potential eligibility under the IDEA. Here, the initial referral took place on October 28, 2019 when the Parent emailed several District staff, stating: "We feel Student is no longer able...to be successful with just 504 support...Ideally, we'd like the [individualized education program] IEP to be in place before Christmas...We'd still like to meet...to set up a plan until Student can get IEP support."

According to the District's 2019-2020 calendar, 25 school days after October 28, 2019 was December 9, 2019. The District, though, did not decide whether to evaluate the Student until February 27, 2020. (On that date, the District determined that it would evaluate the Student.) Therefore, this is a violation of the IDEA.

The District stated the delay in deciding whether to evaluate the Student took place for two reasons. First, as the December 17, 2019 prior written notice read,

At the...meeting on October 30, 2019, Student's team discussed scheduling a future check-in where they could meet and review intervention data for Student. In between [the October 30, 2019 meeting and the instant meeting], there was a mix-up regarding Student's referral for special education, with his educational team believing that the intervention was in place to help the team to determine if special education was needed and that Parent was also using this intervention to determine if she was proceeding with a special education evaluation request.

OSPI notes that, for the following reasons, this explanation is odd: a) the Parent's October 28, 2019 email clearly stated she was making a special education referral; b) the District invited the Parent to a 'Guidance Team Referral' meeting on October 30, 2019; and, c) on December 5, 2019, the Parent emailed the general education teacher, stating she was concerned the check-in/check-out data sheet was "being used to help **determine if Student is placed in special education**...I am not sure there will be much data to use from it for **the referral** purpose since that was not its original purpose" (emphasis added).

Even assuming there was a genuine "mix-up" regarding the nature of Parent's initial request, this should have been resolved by December 19, 2019—at the latest. For example: a) the Parent's December 5, 2019 email explicitly mentioned a 'referral' for 'special education'; b) the December 17, 2019 prior written notice explicitly mentioned the Parent's thought on whether a certain piece of information should be "used as a factor [in] determining whether or not to evaluate Student"; and, c) the Parent's December 19, 2019 email stated the District had missed the legally-required deadline to determine whether to evaluate the Student and that the Parent still wanted the Student to be evaluated for special education.

After missing the 25-day referral timeline and the Parent emphasizing that she still wanted the Student evaluated for special education, there was further delay in making a decision. The District explained this delay by stating: a) it wanted to have an in-person meeting with the Parent, so as to ensure her a full opportunity to participate in the decision; but b) the Parent was not cooperative in setting up a time to meet; and, c) the December 17, 2019 meeting dissolved before a thorough discussion on the referral could be had.

Second, the District stated that the Parent was not cooperative in scheduling a meeting to discuss her referral request. OSPI recognizes that, in this instance, it does appear the Parent was not fully cooperative in setting a time to meet and the District made several efforts to get a meeting scheduled.¹⁰ **However, the regulations do not require that a district actually meet with a**

¹⁰ Prior to December 9, 2019, the District offered at least three different dates to meet with the Parent. In January and February 2020, the District offered at least 10 different dates to meet with the Parent.

parent before determining whether to evaluate a student; rather, a district must simply gather “parental input” during the 25 school days after the referral.

In sum, the District did not determine whether it would evaluate the Student within 25 school days of October 28, 2019. This is a violation of the IDEA, and certain staff members will be required to attend a training on referral procedures.

The following question also needs to be addressed: did the delay in determining whether to evaluate the Student negatively affect the Student’s access to a free appropriate public education (FAPE). If the District does find the Student eligible for services under the IDEA, then the Student’s access to a FAPE will have been delayed. For example, if the District had decided to evaluate the Student on December 9, 2019, then the Student would have likely received IEP services for the first time beginning around March 16, 2020.¹¹ Here, though, if the District finds the Student eligible on or about April 28, 2020, it’s possible the Student will not begin receiving IEP services until May 28, 2020. Therefore, if the Student’s evaluation group does find the Student eligible for special education, then the District will provide OSPI with a copy of the IEP that is developed for the Student, and OSPI will review it to determine an appropriate corrective action.

Component 2

After a referral is made, the school district must seek parental input on the referral.

Here, prior to December 9, 2019, the District received the following input from the Parent: a private psychologist’s report stating the Student had autism, ADHD, and an adjustment disorder mixed [with] anxiety and depressed mood; the Parent’s belief that the Student’s 504 supports were no longer sufficient for the Student; the Student occasionally had difficulty with emotional regulation in the home environment; the Student takes anxiety medication before going to bed at night; and the Parent’s belief that the check-in/check-out data sheet did not provide good insight into whether the Student potentially had a qualifying disability under the IDEA. On the basis of these facts, it is clear the District sought parental input prior to December 9, 2019.

Between December 9, 2019 and February 27, 2020 (when the District actually determined it would evaluate the Student), the District gathered additional input from the Parent: the Parent’s belief that the Student should be evaluated in the following areas: reading, writing, math, communication, medical-physical; and social-emotional. Therefore, the District also gathered Parental input between these dates.

Overall, on this component, the District sought and received input from the Parent and OSPI finds no violation related to this element of the referral procedures.

¹¹ A school district has 35 school days to complete an evaluation. WAC 392-172A-03005(3)(a). If it finds a student eligible, a school district then has 30 days to develop an IEP. WAC 392-172A-03105(2)(a). The school district must then implement that IEP “as soon as possible” after it is created. WAC 392-172A-03105(2)(b).

Component 3

Following a referral, a school district must: collect and examine existing school, medical, and other records on the student.

Here, prior to December 9, 2019—in addition to the information mentioned above, the District gathered the following information on the Student: teacher reports; iReady assessment results; and data related to the Student's check-in/check-out intervention. Between December 9, 2019 and February 27, 2020—in addition to the information mentioned above, the District gathered the following information on the Student: additional data related to the Student's check-in/check-out information; DRA scores.

On the basis of the foregoing, the District did gather school, medical, and other information on the Student following the referral. OSPI finds no violation related to this component of the referral procedures.

Component 4

A district must provide the student's parent with a prior written notice, both for the referral and for the decision as to whether to evaluate the student. Prior written notice ensures the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate.

Here, the District did not provide the Parent with a prior written notice, documenting that she had made a referral on October 28, 2019. This is a violation of the IDEA.¹² The training on referral procedures will also address prior written notice requirements.

On December 17, 2019, the District did provide the Parent with a prior written notice that addressed the Parent's referral. The December 17, 2019 prior written notice stated the District now understood the Parent intended to make a referral on October 28, 2019, and that the District would make a decision on whether to evaluate the Student, but it first wanted to meet with the Parent again. This prior written notice met regulatory requirements.

On March 8, 2020, after the District decided to evaluate the Student on February 27, 2020, the District provided the Parent with a prior written notice that also met regulatory requirements. This

¹² On January 9, 2020, the District did provide the Parent with a prior written notice that related to the meeting that took place on October 30, 2019—two days after the Parent made her referral. This prior written notice did state the District was going to provide additional supports to the Student. It did not, though, explicitly state the District's response to the Parent's referral. For example, it did not state whether the District intended to reach an evaluation determination within 25 school days after October 28, 2019. Instead, it merely said the District was going "to implement [additional] interventions to determine...how to best meet Student's educational needs moving forward."

prior written notice clearly stated that the District was going to: evaluate the Student in the areas of math, social-emotional, communication, and medical-physical; and not evaluate the Student in the area of reading and writing. The prior written notice also explained why it was proposing to take this action. Therefore, it was a proper prior written notice under the IDEA.

Issue 2: Prior Written Notice – This requirement was addressed above.

CORRECTIVE ACTIONS

By or before **March 25, 2020, April 28, 2020, May 28, 2020, September 9, 2020, and September 22, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

By or before **April 28, 2020**, the District will inform OSPI whether its evaluation group has found the Student eligible for special education and provide OSPI with a copy of the evaluation report relating to the Student, as well as any meeting invitations or prior written notices related to the evaluation group's determination.

If the District does find the Student eligible for special education, then, by or before **May 28, 2020**, the District will provide OSPI with a copy of the IEP that is developed for the Student. OSPI will then review this IEP and order additional corrective actions, if needed, by June 5, 2020.

DISTRICT SPECIFIC:

The following District staff will receive training: special education administrators, the principal, the assistant principal, and special education certified staff, including educational staff associates (ESAs), at the school that the Student was enrolled in during the 2019-2020 school year. The training will cover: Referral Procedures (WAC 392-172A-03005) and Prior Written Notice Requirements (WAC 392-172A-05010). The training will include examples.

The training will not be presented by someone who is (or was) an employee of the District during the timeline of this complaint. The individual that presents the training will be required to consult with ESD 121 staff in the creation of the training materials.

By or before **March 25, 2020**, the District will notify OSPI of the name of the trainer and provide documentation that the District has provided the trainer with a copy of this decision for use in preparing the training materials.

By or before **September 9, 2020**, the District will submit a draft of the training materials for OSPI to review. OSPI will approve the materials or provide comments by September 16, 2020.

By **September 18, 2020**, the District will conduct the training regarding the topics raised in this complaint decision.

By **September 22, 2020**, the District will submit documentation that required staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) a separate official

human resources roster of all staff required to attend the training, so OSPI can verify that all required staff participated in the training.

If, for public health reasons, the District prefers to conduct this training via Zoom or Skype, that is permitted. In that instance, though, the District will still be required to certify which staff logged in to receive the training.

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 March, 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.)