

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-126

PROCEDURAL HISTORY

On September 18 and 20, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Lake Stevens School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On September 18 and 20, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on September 21, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On October 6, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent on October 9, 2023. OSPI invited the Parent to reply.

On October 20, 2023, the Parent provided additional information to OSPI. OSPI forwarded a copy of that information to the District on October 24, 2023.

On October 24, 2023, OSPI's investigator conducted an interview of the Parent.

On November 6 and 11, 2023, the Parent provided OSPI with additional information. OSPI provided the District a copy of that information on November 14, 2023.

On November 16, 2023, the Parent provided OSPI with additional information. OSPI provided the District a copy of that information on November 17, 2023.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on September 19, 2022. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Beginning May 31, 2023, did the District follow proper procedures for responding to the Parent's request for an independent educational evaluation?
2. Beginning July 19, 2023, did the District follow proper procedures under WAC 392-172A-05190 for responding to the Parent's request to access certain educational records relating to the Student?

LEGAL STANDARDS

Independent Educational Evaluations (IEEs): A parent has the right to an IEE at public expense if the parent disagrees with an evaluation conducted or obtained by the school district. If the parent obtains an IEE at public or private expense, the results of the evaluation: (a) Must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the student. WAC 392-172A-05005.

Relationship Between Due Process Hearing Decisions and Community Complaints: If an issue is raised in a community complaint filed has previously been decided in a due process hearing involving the same parties: (a) The hearing decision is binding; and (b) OSPI must inform the complainant to that effect. WAC 392-172A-05035.

Parents' Access Rights to Student Records: Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained, or used by the district. The district must comply with a request promptly and before any meeting regarding an individualized education program (IEP), hearing, or resolution session relating to the identification, evaluation, educational placement of the student, or provision of a free appropriate public education (FAPE) to the student, including disciplinary proceedings. The district must respond in no more than 45 calendar days after the request has been made. 34 CFR §300.613; WAC 392-172A-05190.

FINDINGS OF FACT

2022–23 School Year

1. At the start of the 2022–23 school year, the Student was eligible for special education under the category of other health impairments, was in the 2nd grade, was not enrolled in the District, and the Student's October 2020 IEP (developed by another Washington school district) was in effect.
2. The Student transferred into the District in September 2022.
3. On September 1, 2022, one District school psychologist emailed another District school psychologist, stating, in part, "Student did not do well with remote learning (trouble focusing, not learning much) and mom chose to homeschool for kindergarten and first grade with 35-40 hours of in-home ABA therapy."
4. According to the District, on September 9, 2022, "the IEP team held a transfer review meeting to review Student's Reevaluation and IEP [from the prior district]. The IEP team accepted Student's [prior] Reevaluation as current, but could not accept Student's [prior] IEP, as it had expired as of October of 2021."
5. A September 16, 2022 prior written notice read, in part, "The District accepts the evaluation as it is current, however an early evaluation is recommended as Student has been out of school for 2 years."

6. On October 7, 2022, the District developed a new IEP for the Student.
7. The Student's IEP team met on May 17, 2023.

According to the District's narrative – and a May 17, 2023 prior written notice:

At that time, Parent expressed concern that the school evaluation team did not possess the requisite expertise to conduct a thorough, comprehensive reevaluation of Student. She requested having an outside expert be involved in Student's reevaluation. The IEP team agreed to follow-up with the Director of Special Services regarding Parent's request. Before the District could initiate Student's reevaluation, on May 31, 2023, Parent requested an Independent Educational Evaluation ('IEE') at public expense, also requesting a copy of the District's IEE criteria.

8. A May 19, 2023 prior written notice read, in part, "Parent would like an outside expert to be involved in some capacity in Student's evaluation."
9. On May 31, 2023, the Parent emailed the superintendent, stating, in part, "Can you please send me information about where an independent educational evaluation may be obtained, and any agency criteria applicable for independent educational evaluations?"
10. According to the District, on June 5, 2023, the executive director and the Parent spoke on the phone¹, and "during that call, Parent did not ask about the District's criteria for IEE providers."
11. According to notes included in the District's response, a District staff person spoke with the Parent on the phone on June 5 and 7, 2023.
12. On June 7, 2023, the school psychologist emailed the Parent an evaluation consent form, as well as authorizations for release of information for the Parent to sign, so that the Student's private providers could communicate with the District.

Separately on June 7, 2023, the executive director emailed the Parent, stating she had "not yet heard from you regarding your IEE request."

13. On June 9, 2023, the District informed the Parent it intended to initiate due process procedures, "seeking a determination that Parent was not entitled to an IEE at public expense."²

¹ A June 5, 2023 email, authored by the executive director, confirms she spoke with the Parent on that date regarding the IEE request. As OSPI read said email, the District was curious as to whether its offer to include a doctor from an outside medical group in the District evaluation process would address the Parent's concerns, and whether she would "withdraw her IEE request."

² The Parent's special education community complaint request read, in part, "A district choosing to defend its evaluation by initiating a due process hearing does not relieve said district from nonetheless providing to the parent information about where an IEE may be obtained and its criteria for IEEs. This is because parents are always entitled to obtain an IEE — at private expense."

The District's June 9, 2023 due process hearing request read, in part:

The [prior Washington State school district's] reevaluation was conducted via a records review because Parent did not sign consent for any new assessments.

...

The District is hereby refusing to initiate Parent's request for an IEE of Student at District expense for two reasons: (1) the [prior school district's] reevaluation is over two years old and Parent has waited too long to request an IEE based upon an alleged disagreement with that [prior district] reevaluation under the IDEA's two-year statute of limitations; and (2) given Parent's lack of consent, the [prior district's] reevaluation of Student was appropriate and complied with the IDEA's applicable rules in all material respects given the circumstances. The District considered funding the requested IEE but does not believe doing so is an appropriate use of public funds. The District's refusal decision is based upon consideration of the [prior] reevaluation dated October 15, 2020, District staff and Parent input, and Parent's May 31, 2023 IEE request.

14. According to emails, dated June 14 and 16, 2023, as of those dates, the Parent had not provided the District with a signed evaluation consent form or signed release of information forms for the Student's private providers.
15. June 16, 2023 was the final day of the 2022–23 school year.

Summer 2023

16. According to both the Parent and the District, during "the first telephonic prehearing conference" for the due process hearing—on either July 11 or 12, 2023—she "complained [she] had never received the IEE criteria information," and the District's attorney stated he would make sure she was provided with the same.
17. On July 13, 2023, the executive director emailed the Parent "the IEE Criteria [she had] requested during the [due process] prehearing conference."
18. The Parent's complaint request read, in part:

After more than 6 weeks since making my request for District IEE criteria, the District finally communicated with me on the issue on July 13, 2023. [The executive director] sent me an email stating she was providing me with 'the IEE criteria you requested at the prehearing conference'. She included a document containing the info as an email attachment.

The Word document attachment was almost a verbatim—albeit truncated—copy and paste of District Policy 6005.1. The document listed the names of just four individuals as evaluators (and curiously did not list the name of a particular outside evaluator the district itself often uses when FAPE is in dispute).

[The] criteria [in the document] does not satisfy the requirements of WAC 392-172A-05005. It stipulates an IEE cannot exceed by more than 25% of the prevailing average cost for similar evaluations in Washington State, but does not specify the cost of the prevailing average.

The remaining criteria also appear to grant the District say-so over whether an evaluator has the bona fides to perform an evaluation...[The conditions under which an outside evaluator not specifically listed in the July 13, 2023 email would be permitted to conduct an IEE were not specific]...With [the] laundry list [of conditions in the July 13, 2023 email], a parent might just be tempted to relinquish the selection of the independent evaluator to the District, to ensure the District approves of him or her.

...

Without the criteria, I was unable to obtain an independent evaluation of my child's needs.

The District's response read, in part:

The District also provided Parent a copy of its applicable criteria for an IEE provider on July 13, 2023. There is no requirement under the regulations regarding when a district must provide IEE criteria to a parent, which she originally requested on May 31, 2023. In this particular instance, the District believes that it reasonably responded to Parent...The information provided to her includes all of the necessary information required by the IDEA.

19. The IEE criteria provided by the District to the Parent, included, in part, the following criteria:

Criteria for Selection of an Independent Educational Evaluator

- Licensed, credentialed or otherwise qualified within the state of Washington or state of residence/practice to perform an evaluation in the specific professional discipline for which an independent evaluation is sought;
- Knowledgeable and experienced in evaluating children with similar disabilities;
- Geographically located within the state of Washington.
- Available to the district at a maximum fee that does not exceed by more than 25% the prevailing average for similar evaluations within the state of Washington.
- Exceptions to the criteria will be granted only when it can be shown that the unique circumstances of the child or the disability warrant an exception in order to obtain an appropriate evaluation.

The document went on to list four providers as referrals, noting for each that they provided "educational and neuropsychology evaluations", "behavioral and emotional evaluations", "clinical evaluations (psychiatric diagnosis)", and "clinical neuropsychological evaluations. Evaluations of cognitive, emotional and behavioral functioning", respectively.

20. On July 19, 2023, the Parent sent the following email to the District's attorney:

[The] IEE Criteria [previously provided by the District has certain insufficiencies].

...

I need to review all of my daughter's educational records. Can you please get back to me ASAP with the earliest date I can review them, and a location? And by that I mean all educational records, including all communications having to do with her, or her advocate's advocacy (hard copies, electronic, and otherwise), which is me. Thanks. Please consider this a formal request for same in case this isn't clear.

According to the District, "Parent did not copy any District staff or administrators on her [July 19, 2023] email."

21. According to the Parent, "the District's counsel...was notified of my [records] request a second time by the Office of Administrative Hearings, two days after I made the request of him via

email. Wherein I stated I needed the records for an educational related need (e.g., the hearing).”

22. According to the District, during two separate due process hearings in summer 2023, the Parent stated the previous school district’s evaluation report remained appropriate.

2023–24 School Year

23. At the start of the 2023–24 school year, the Student remained eligible for special education services, was in the 3rd grade, attended a District elementary school, and the Student’s October 2022 IEP was in effect.

24. A September 5, 2023 prior written notice read, in part:

The District is proposing to initiate the District’s proposed reevaluation of Student without holding another planning meeting to discuss the same. The team, including Parent, met on 5/17/23 and planned the District reevaluation.

...

The team discussed and was in agreement that the team should begin Student’s special education reevaluation in order to gather comprehensive and current information regarding Student’s educational needs. The team discussed the proposed testing areas, which the school psychologist entered into a draft reevaluation consent form in IEP online. The school psychologist answered questions from Parent regarding specific cognitive instruments and the relative advantages and disadvantages of including a cognitive assessment in Student’s special education reevaluation. The school psychologist asked Parent if she would be willing to sign forms permitting the school psychologist to exchange information with Student’s current and previous private therapy providers. Parent replied that she would like these data included in Student’s evaluation and provided a list of the private service providers who had seen Student. The school psychologist noted that he would like to contact the Executive Director of Special Services and the Director of Special Services to request more information regarding Parent’s request that an outside expert in Student’s dual diagnosis participate in Student’s reevaluation.

...

Following the 05/27/2023 team meeting, the District proposed completion of a comprehensive and individualized special education reevaluation to determine the full range of Student’s educational needs. The team discussed the proposed assessment areas to be included on the reevaluation consent form. Based upon Parent’s request to have an outside expert participate in Student’s special education reevaluation, the District subsequently proposed to include [a doctor from] the Brooks Powers Group as part of the District reevaluation team. Student’s triennial reevaluation is due on October 15, 2023 and the District is proposing to move forward with its proposed reevaluation activities without need for another team meeting.

25. The District’s 2023–24 school year began on September 6, 2023.

26. On September 18, 2023, the ALJ granted the District’s “Motion for Summary Judgment” in the due process hearing request, finding that the Parent was not entitled to an IEE at public expense. The order read, in part:

The District correctly argues that the Parent conceded and averred at least twice in her Objection that the October 2020 Reevaluation is appropriate. Given that the only issue for hearing is the appropriateness of that reevaluation, there are no material facts in dispute as to the appropriateness of the October 2020 reevaluation.

...

The District's Motion for Summary Judgment is GRANTED. The Parent is not entitled to an IEE at public expense.

27. According to a September 14, 2023 statement authored by the Parent, as of that date, she had not yet received access to the Student's educational records.

28. On September 20, 2023, the District produced a copy of the Student's educational records to the Parent.

According to the District, "Prior to filing the Complaint, Parent had not contacted the District staff, administration, or its counsel regarding the status of her record request."

29. The District's response read, in part:

The District notes that Parent has not identified that she obtained an IEE of Student from a provider who did not meet the District's IEE criteria.

...

Parent requested access to Student's educational records on July 19, 2023, which placed the 45-day deadline on September 2, 2023. School was not in session at the time of the request and did not resume until September 6, 2023. At the time of her request, Parent did not identify any education-related need for the records.

Parent's record request occurred in the midst of the District's summer break. Due to District staff availability in gathering responsive records over the summer and then District counsel time needed to review and redact records at the start of the new school year, the District was unable to produce the records by September 2, 2023. Instead, the District produced Student's educational records on September 20, 2023.

[During this general] time [period], there were no pending reevaluation, IEP team, or other meetings for which Parent required the records. Accordingly, the delay in the production of Student's educational records to Parent was harmless error.

...

The District admits that it did not comply with WAC 392-172A-05190 when it produced the requested educational records 18 days past the 45 calendar day deadline. However, the District believes that the delay was harmless error and no individual corrective action is warranted. The District nonetheless proposes a systemic corrective action for its admitted violation.

The District nonetheless proposes that the District special education administrator involved with Parent's IEE request participate in a training to review the requirements of WAC 392-172A-05190 regarding making available education records to parents within 45 calendar days of the request.

CONCLUSIONS

Issue 1: District’s Response to Parent’s Request for an IEE – The Parent alleged the District did not follow proper procedures for responding to her request for an IEE.

Here, the Student was last evaluated on October 15, 2020. On May 31, 2023, the Parent requested an IEE, as well as a copy of the District’s criteria for selecting an IEE provider. On June 9, 2023, the District filed a due process hearing request, “seeking a determination that Parent was not entitled to an IEE at public expense.” On July 13, 2022, the District provided the Parent with its Policy 6005.1, entitled, “Criteria for Selection of an Independent Educational Evaluator.” The Parent took issue with the following language in Policy 6005.1: “Available to the district at a Maximum fee that does not exceed by more than 25% the prevailing average for similar evaluations within the State of Washington.” Specifically, the Parent argued this language was so imprecise that it did not permit her to select an independent educational evaluator, in that she could not be sure any selected independent educational evaluator would not exceed “more than 25% the prevailing average [fee] for similar evaluations,” as this figure was not stated in the policy.

On September 18, 2023, the due process hearing officer issued its decision. The due process hearing officer’s order read, in part:

The District correctly argues that the Parent conceded and averred at least twice in her Objection that the October 2020 Reevaluation is appropriate. Given that the only issue for hearing is the appropriateness of that reevaluation, there are no material facts in dispute as to the appropriateness of the October 2020 reevaluation...The District’s Motion for Summary Judgment is GRANTED. The Parent is not entitled to an IEE at public expense.

By way of explanation, WAC 392-172A-05005(2)(a) reads, “A parent has the right to an independent educational evaluation at public expense if the parent **disagrees** with an evaluation conducted or obtained by the school district” (emphasis added). Instrumental to the due process hearing officer’s decision, then, was the fact the Parent did not appear to disagree with the October 2020 evaluation.

If an issue is raised in a community complaint that has previously been decided in a due process hearing involving the same parties: (a) The hearing decision is binding; and (b) OSPI must inform the complainant to that effect. Here, then, the due process hearing officer’s determination that the Parent was not entitled to an IEE is binding, and OSPI need not address the Parent’s argument that certain language in Policy 6005.1 was impermissibly vague, given that the Parent was not entitled to an IEE.³ OSPI does not find a violation.

³ Still, OSPI provides the parties with two reminders. First, the Parent may still procure an IEE, that she pays for herself, and if the Parent did this, the District would be obligated to consider its results if it met District criteria. WAC 392-172A-05005(5)(a) reads, “If the parent obtains an independent educational evaluation at...private expense, the results of the evaluation: must be considered by the school district...in any decision made with respect to the provision of FAPE to the student.” Second, if the District completes a reevaluation of the Student in the future, such as a review of existing data reevaluation, which can be completed without procuring the Parent’s informed consent, the Parent may make a new request for an IEE at that time.

Issue 2: Family Educational Rights and Privacy Act (FERPA) – The Parent alleged the District did not follow proper procedures for responding to her request for access to the Student’s educational records under FERPA.

Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained, or used by the district. The district must comply with a request promptly and before any meeting regarding an IEP, hearing, or resolution session relating to the identification, evaluation, educational placement of the student, or provision of a free appropriate public education (FAPE) to the student, including disciplinary proceedings. The district must respond in no more than 45 calendar days after the request has been made.

Here, on July 19, 2023, the Parent requested access to the Student’s educational records. September 2, 2023 represents 45 calendar days after July 19, 2023. But the District did not provide the Parent a copy of the Student’s educational records until September 20, 2023. This represents a violation of the IDEA.

While the District acknowledged the error and proposed systemic corrective action, it does not appear, though, that this violation impacted the Student’s ability to access FAPE. For example: the due process hearing officer had determined the Student was not entitled to an IEE; the delay was rather short; the Parent had not provided consent for a reevaluation the District proposed, and the documentation did not show the District was working to complete a reevaluation consisting of a review of existing data, for which, presumably, the Parent having access to the Student’s educational records would have at least been minimally relevant; and the documentation did not show the Parent procured an IEE at her own expense.

Accordingly, the following is a reasonable corrective action for this violation: the District will be required to email the members of the Student’s IEP team a reminder that responses to a request for educational records must be completed within 45 calendar days of the request.

CORRECTIVE ACTION

By or before **December 1, 2023**, the District will provide documentation to OSPI that it has completed the following corrective action.

STUDENT SPECIFIC:

Written Guidance

By **December 1, 2023**, the District will ensure the members of the Student’s IEP team are emailed the following reminder: responses to a request for educational records under FERPA must be completed within 45 calendar days of the request.

By **December 1, 2023**, the District will submit documentation that all required staff received the guidance. This will include a roster of the required personnel. This roster will allow OSPI to verify that all required staff members received the guidance.

DISTRICT SPECIFIC:

None.

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.

REMINDERS

First, the Parent may still procure an IEE, that she pays for herself, and, if the Parent did this, the District would be obligated to consider its results if it met District criteria. For example, in part, WAC 392-172A-05005(5)(a) reads, "If the parent obtains an independent educational evaluation at...private expense, the results of the evaluation: must be considered by the school district...in any decision made with respect to the provision of FAPE to the student."

Second, if the District completes a reevaluation of the Student in the future, such as a review of existing data reevaluation, which can be completed without procuring the Parent's informed consent, the Parent may make a new request for an IEE at that time.

Dated this 17th day of November, 2023.

Dr. Tania May
Assistant Superintendent of 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.)