

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-126

PROCEDURAL HISTORY

On October 6, 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 Mercer Island School District (District). The Parent alleged the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On October 6, 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 October 7, 2020, the Parent provided additional information and OSPI determined the Parent had raised an additional issue. OSPI modified the complaint, adding an issue, and notified the District and Parent the same day.

On October 7, 2020, OSPI received more additional information from the Parent. OSPI forwarded the additional information to the District on October 8, 2020.[-

On October 27, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On November 10, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District on November 12, 2020.

On November 26, 2020, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on November 30, 2020.

On November 30, 2020, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on December 2, 2020.

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

SCOPE OF INVESTIGATION

OSPI notes the Parent raised additional issues in her reply to the District's response to this complaint and supplemental information provided. For example, the Parent stated, "I am requesting an investigation due to the instability in members of [Student's] IEP team, lack of consistent communication" and the Parent raised concerns about sufficiency of the Student's reevaluation. OSPI notes these allegations are outside the scope of the issues identified in the original complaint and thus will not be investigated, nor does OSPI comment on whether these are potential violations of the IDEA. The Parent may wish to consider the special education dispute resolution options if she has concerns that are not addressed in this decision. Any references to

issues outside the scope are only included to add context to the issues under investigation and are not intended to identify additional issues or potential violations.

ISSUES

1. Did the District follow procedures to ensure parent participation in the September 30, 2020 meeting, including scheduling the meeting at a mutually agreeable time/place per WAC 392-172A-03100?
2. Did the District follow procedures for reporting the Student's progress on June 18, 2020?
3. Did the District respond to the Parent's August 10, 2020 request for the Student's educational records per WAC 392-172A-05190?

LEGAL STANDARDS

IEP Implementation during School Facility Closures for COVID-19: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

During the COVID-19 school facility closures, as students received general education instruction and student support services, districts must provide students with disabilities with the special education services—related services and specially designed instruction—supporting a free appropriate public education (FAPE). The U.S. Department of Education Office for Civil Rights (OCR) and Office for Special Education and Rehabilitative Services (OSERS) indicated the "exceptional circumstances" presented during the school facility closures caused by COVID-19 "may affect how all educational and related services and supports are provided" to students with disabilities. There is not an expectation that IEP services would be delivered exactly as the IEP states. *Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19* (OSPI March 24, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (OCR/OSERS March 21, 2020) ("It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities...during this national emergency, schools may not be able to provide all services in the same manner they are typically provided...The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency...FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.")

While there was not an expectation that districts implemented a student's IEP as written during school closures caused by COVID-19 in spring 2020, districts must have had a plan for how students with disabilities were to receive a FAPE, including the provision of special education. *Questions and Answers* (OSPI, March 24, 2020); *Questions and Answers* (OSPI, May 5, 2020). See also, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Department of Education, March 13, 2020) ("SEAs, LEAs, and schools must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under the IDEA"). All schools were expected to have begun providing educational services for all students by March 30, 2020, which OSPI termed "Continuous Learning 2020." OSPI Bulletin 024-20 (March 23, 2020).

Progress Reporting: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir, 2001) (parents must be able to examine records and information about their child in order to "guarantee [their] ability to make informed decisions" and participate in the IEP process). IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

Parent Participation in IEP Meetings: A school district must ensure that one or both of the parents of a student eligible for special education are present at each IEP team meeting or are afforded the opportunity to participate, including: (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place. If neither parent can attend an IEP team meeting, the school district must use other methods to ensure parent participation, including video or telephone conference calls. A meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as: (a) Detailed records of telephone calls made or attempted and the results of those calls; (b) Copies of correspondence sent to the parents and any responses received; and (c) Detailed records of visits made to the parent's home or place of employment and the results of those visits. 34 CFR §300.322; WAC 392-172A-03100.

Parent 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 FAPE to the student, including disciplinary

proceedings. The district must respond in no more than 45 calendar days after the request has been made. The right to inspect and review educational records includes: the right to a response from the district to a reasonable request for explanations and interpretations of the records; the right to request that the district provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising their right to inspect and review the records; and the right to have a representative of the parent or adult student inspect and review records. 34 CFR §300.613; WAC 392-172A-05190.

As a general rule, parents do not have a right under the Family Educational Rights and Privacy Act of 1974 FERPA to review and inspect documents that are not education records. 20 USC §1232g(a)(4); 34 CFR §99.3 Records that are not directly related to a student and maintained by an agency or institution are not 'education records' under FERPA and parents do not have a right to inspect and review such records. For example, a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be a part of his or her education records. However, if a school were to maintain a copy of a student's test answer sheet (an "education record") the parent would have a right under the IDEA and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the response in some other adequate manner that would inform the parent. *Letter to Shuster*, 108 LRP 2302, Office of Special Education Programs (August 2007). A school district should, upon request, provide an opportunity for a parent to review education records and provide any explanations and interpretations necessary. This could include the interpretation of standardized test scores, such as reviewing the test questions with the parent. *Letter to Fonda-Fultonville (NY) Central School*, 31 IDELR 149, Family Policy Compliance Office (April 1998).

Educational Records: Under FERPA, "education records" are broadly defined as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 USC §1232g(a)(4)(A); 34 CFR §300.99.3; WAC 392-172A-05180(2). 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, and email. 34 CFR §99.3.

The term "educational records" does not include records of instructional, supervisory, administrative personnel, and educational personnel ancillary to those persons if those records are in the sole possession of the maker of the records, and are not accessible or revealed to any other individual except a temporary substitute of the record maker. 20 USC §1232g(a)(4). "With regard to parents having access to 'raw data or notes,' FERPA exempts from the definition of education records under 34 CFR §99.3 those records considered to be 'sole possession records.' FERPA's sole possession exception is strictly construed to mean 'memory-jogger' type information. For example, a memory-jogger is information that a school official may use as a reference tool and, thus, is generally maintained by the school official unbeknownst to other

individuals." Individuals with Disabilities Act (IDEA), 64 Fed. Reg. 12,641 (March 12, 1999) (comment to 34 CFR §300.562).

FINDINGS OF FACT

2019-2020 School Year

1. During the 2019-2020 school year, the Student attended a District elementary school, was in the third grade, and was eligible for special education services under the category specific learning disability.
2. The Student's June 2019 individualized education program (IEP) was in place during the 2019-2020 school year. The IEP included two goals: one in reading (fluency) and one in written expression. The IEP indicated that progress reporting on the Student's goals would be provided at the end of each trimester.
3. On May 13, 2020, the Student's IEP team met—including the Parent—via video conference to develop the Student's annual IEP. The present levels in the IEP indicated the Student was reading "an average of 72 correct words per minute with a high of 87" at the third grade level, although his "fluency scores are very erratic, which might have to do with [Student's difficulty] sustaining focus." The IEP noted the Student's baseline was at the March 2020 data collection level, because a current baseline could not be obtained due to COVID-19. For written expression, the present levels indicated the Student can write "a 3-4 sentence informational report when provided with a graphic organizer and teacher support. [Student] has no difficulty coming up with story ideas and organizing information verbally, but will get caught up in what words to use and how to spell those words..." Similar to reading, an updated present level could not be obtained due to COVID-19, and so the baseline was set based on the March 2020 progress report.

The Student's IEP included annual goals in reading (fluency) and written expression (six sentence response), with progress reporting at the trimester. The IEP included the following specially designed instruction and related services:

- Reading: 40 minutes, 4 times per week (provided by special education staff in the special education setting)
- Written expression: 40 minutes, 4 times per week (provided by special education staff in the special education setting)
- Occupational therapy: 15 minutes weekly (provided by an occupational therapist (OT) in the special education setting)

The IEP indicated the Student would spend 81.1% of his time in the general education setting.

4. On May 19, 2020, the Student's special education teacher sent the Parent a progress report based on the Student's June 2019 annual goals. The progress report included the following information for both the reading and written expression goal: "05/13/2020 Goal did not receive focus after March 13, 2020 due to school closure per the Governor's stay-at-home

order in response to the Covid-19 pandemic. No further data was taken for this goal, thus, no further progress noted."

5. In her complaint, the Parent stated she received this progress report on June 18, 2020 and that the District "failed to monitor my son's progress on his annual IEP goals." The Parent noted in her complaint that during this same time period, the Student's private therapists had been able to monitor the Student's progress.

Further, in her reply to the District's response, the Parent stated that during the 2019-2020 school year, the Student was required to submit weekly "reading fluency tests" and that "multiple times over Spring 2020 [Student] was pulled out of his online general education class into a breakout room with his teacher 1:1 for approximately 10 minutes...then scored on reading fluency." The Parent stated these scores were "never provided to me as I requested or used to calculate goal progress from March through June 2020." The Parent noted the Student completed "every assignment from the district's learning grid and upload...items...to 'Seesaw' [sic] (a platform the District uses)...none of these records were provided by the District in my records request."¹ The Parent further noted that throughout the spring 2020 school facility closures, the Student's teachers commented on his progress in the Seesaw application and that the Student completed assignments on online platforms that track progress.

6. On June 18, 2020, the special education teacher sent the Parent a progress report on the Student's May 2020 IEP goals. The progress report included the following information:
 - Reading (fluency; goal move from 72 correct words per minute to average 100 correct): "IEP recently implemented. There has been less than a month since IEP initiation. During remote learning time, [Student] has attended core phonics classes focusing on spelling patterns, as well as completing work on the general education learning grid. [Student's] IEP was recently implemented. There has been less than a month since IEP initiation. He remains at baseline level."
 - Written Expression (6 sentence response; goal to score an average of 2.8 on the rubric): "IEP recently implemented. There has been less than a month since IEP initiation. During remote learning time, [Student] has participated in a small writing group as well as completing work on the general education learning grid. [Student] has participated at each session of our Zoom writing. We have worked on 3 and 4 sentence responses to reading using text evidence. We have also worked on taking notes from nonfiction sources and writing a report with text features. [Student's] IEP was recently implemented. There has been less than a month since IEP Initiation. He remains at baseline level...OT note: During this period...occupational therapy communicated with the family via email to offer support on an as-needed basis. Support provided to [Student] and family consisted of: adapted paper for written activities & activities to continue strengthening fine/visual motor skills at home."

¹ Despite the Parent's statement that these records were not provided by the District in response to her record request, the Parent included in her reply copies of the learning grid, and assignments and uploads to the Seesaw application.

Summer 2020

7. On August 8, 2020, the Parent emailed the Student's teacher from summer school and requested a copy of the "reports or notes" referring to the Student.
8. Also, on August 8, 2020, the Parent emailed the Student's special education teacher, requesting a copy of "notes, reports or other documentation" concerning the Student. The Parent stated she was especially interested in documents from the 2019-2020 school year.
9. On August 10, 2020, the Parent emailed the principal, associate principal, general education teacher, OT, and other District staff, stating, "I sent a previous email requesting all records relating to my son but am not sure I emailed the correct people." The Parent restated that she wanted "all records" related to the Student and asked that the response be "expedited so all parties can plan accordingly."

The same day, the school administrative assistant emailed the Parent and asked for clarification regarding the records the Parent was seeking. The District stated it could "email copies of all [Student's] report cards and state testing scores...[and that] the only other items in his student records are the enrollment forms...and his health information." The District advised the Parent that copies of IEPs were available from the special education department.

The Parent replied and indicated she wanted "notes, assessments/scores, and papers...ALL records" related to the Student.

The administrative assistant responded that "We do not keep anything in a student's cumulative file like you are requesting. We keep just the final report cards and the copies of the state testing scores (in addition to the enrollment paperwork and immunization form)." The assistant sent a subsequent email and attached the Student's report cards. She advised the Parent to email "Sped Records" to get the Student's special education records.

10. Also, on August 10, 2020, the Parent emailed the special education department and requested "any and all information you have" for the Student. The special services administrative assistant responded, attaching the Student's current IEP and evaluation (and advised the Parent to submit a records request to the District records email for general education records).
11. According to the Parent's reply to the District's response, the District's response to her record request was insufficient as she only received "4 report cards and 1 test that was administered during [Student's] 2018 evaluation." The Parent stated the Student's 2018 initial evaluation for special education "evaluation summary shows the multitude of tests performed, yet I have never been provided the results."
12. On August 11, 2020, the school psychologist emailed the Parent the Student's 2018 evaluation (which was the Student's initial evaluation for special education eligibility). The Parent responded and asked if "there [had] been any additional testing since this report in 2018," and

the school psychologist replied that she had not, as new testing would require consent for a reevaluation.

13. On August 12, 2020, the Parent clarified to the summer school teacher that she had the summer school online reports and was requesting the "initial assessment scores [the Student] took on June 27th for summer school."
14. On August 13, 2020, the teacher provided the Parent with the "pre-assessment" the Student took on June 27, 2020.

2020-20201 School Year

15. During the 2020-2021 school year, the Student attended a District elementary school, was in the fourth grade, and continued to be eligible for special education services. The Student's May 2020 IEP was in effect.
16. The District's 2020-2021 school year began on September 2, 2020.
17. On September 5, 2020, the Parent emailed the special education teacher and asked when a reevaluation of the Student could be done.
18. On September 7, 2020, the Parent emailed the District, requesting "all records related to [Student]" under the "Washington Public Records Act" (PRA) and stated, "we are only invoking FERPA insofar as there are additional records we could not otherwise get under the PRA and to ensure that you don't redact our names or our children's names." The Parent listed specific documents – "necessary documents but not limited to such" as follows:
 - Teacher report forms
 - Teacher observation documentation
 - Reading assessment logs
 - Math assessment logs
 - Writing assessment logs
 - PALS program checklist and notes (if your child has ever been enrolled in PALS)
 - Behavioral Pathways and Student Support (SST) referrals, notes, follow-ups and tracking logs
 - BGT meeting notes
 - 504 meeting notes
 - IEP meeting notes
 - Copies of all testing and evaluations done
 - All correspondence regarding your child
19. In her reply to the District's response, the Parent stated she has not received the records listed in her September 7, 2020 email.
20. On September 11, 2020, the District's public records officer emailed the Parent and stated the District would be able to provide the records in the Student's educational file before the end of the month, but that the request for "emails, notes, etc." will take "considerably longer." The Parent responded that her priority was records from 2018 through 2020.

21. Also, on September 11, 2020, the Parent emailed the Student's case manager, stating the Student had not been evaluated since 2018 and noting the Student made "significant educational progress March-August 2020, surpassing all stated IEP goals." The Parent stated she had requested an evaluation twice and "would like to know when and how that could be scheduled." The Parent also noted she had "requested all records from the district concerning his education but have not yet received them."

22. On September 15, 2020, the school psychologist emailed the Parent regarding the reevaluation and suggested a meeting to discuss the Student's present levels and a reevaluation. The school psychologist suggested September 23, 2020 for a meeting.

The Parent responded and asked whether there was another time an evaluation planning meeting could be held and provided input about the assessment tools she wanted administered during the reevaluation.

The school psychologist replied that she was waiting to hear about scheduling from the rest of the team.

23. On September 18, 2020, the Parent asked whether they could discuss the reevaluation via email instead of holding a meeting. In response, the school psychologist offered to hold the planning meet on September 22, 2020.

In subsequent emails on September 19 and 22, 2020, the Parent stated she wanted to move forward as soon as possible and asked if the school psychologist could email questions the District had about the reevaluation. The Parent asked why "questions holding up [Student's] evaluation" could not be emailed.

24. In her reply to the District's response, the Parent stated her intention in asking whether it would be "**possible** to email questions instead of the phone calls they requested was to allow a transparent exchange of information from and to [Student's] father...and myself" (emphasis in original). The Parent stated, "At no time did I convey that I did not want to meet or be an active participant at every level of our son's education and, most importantly, IEP meetings."

25. On September 22, 2020, the Student's father emailed the school psychologist to ask whether they were meeting that day.

26. On September 22, 2020, the District's assistant director of special education (assistant director) emailed the Parent to address several of the Parent's concerns. Regarding the reevaluation, the assistant director stated that the Student's triennial reevaluation was due in June 2021, but that in response to the Parent's request, they would initiate a reevaluation in October 2020, once Parent consent was provided.

The Parent responded with detailed concerns and asked, "what day and times such testing [reevaluation] can be completed."

The principal and assistant director replied, noting it appeared the Parent was requesting a reevaluation and an IEP amendment. The assistant director stated the IEP team would need to meet and could meet on September 30, 2020.

27. On September 23, 2020, the District provided the Parent with a copy of the Student's cumulative file and stated they were "working on getting all of his special education records scanned." The cumulative file included:

- The Student's "Elementary School Record" (noted the Student's academic record, grade year, and teachers);
- Enrollment forms, including immunization and health forms;
- The Student's report cards since kindergarten; and,
- Standardized test results.

28. On September 24, 2020, the Parent emailed the assistant director and stated she needed to have a copy of the Student's "full records" prior to a meeting. The Parent stated, "without such it will be difficult to discuss if our son has met his stated IEP goals, what services should be provided, and if any changes should be made to his IEP." The Parent stated, however, that she felt it was not a good use of time to hold an IEP meeting now when they would need to have an IEP meeting following the reevaluation anyway.

29. On September 25, 2020, the public records officer emailed the Parent a link to access "additional records for your son." The District stated, in its response, that it provided the Parent with access to all the Student's special education records. The public records officer noted that if the Parent was interested in viewing testing protocols, she could make an appointment to review them. The email also noted the District was working to provide the Parent with the requested emails as soon as possible, but that given the volume, the emails would likely not be completed prior to October 30, 2020.

The Parent responded that she wanted all communications related to the Student. The Parent also stated, "I noticed a teacher report from 6/2018 yet nothing from any other teacher. NO observations, notes, communications from [name], [name], anyone in the specialized educational [sic], any teacher class assessments as to know where [Student] falls next to his peers. Thank you for these files..."

30. On September 29, 2020, the assistant director clarified that the purpose of the meeting scheduled for the 30th was to review existing information and discuss the elements of the proposed reevaluation. The assistant director explained that the meeting was a pre-evaluation planning session to ensure the reevaluation addressed all areas of concern and that the team would not be discussing the Student's IEP goals or related items. She stated that the Parent was not required to attend the reevaluation planning meeting and could email the assistant director about additional areas in which the Parent believed the Student should be assessed.

The assistant director stated the team would meet tomorrow, regardless of whether the Parent chose to attend. The assistant director stated, "based on the input received in the meeting and whatever you share via email, should you not attend, a written consent to for [sic] evaluation

will be drafted and then emailed to you and [Student's father]. Once written consent to evaluate is obtained, the team will move forward with scheduling and conducting the re-evaluation."

31. Also, on September 29, 2020, the Parent responded to the assistant director and stated she was unable to attend. The Parent stated, "Parent participation is a requirement under IDEA. I have proposed multiple other dates of available [sic]...it is important that both parents are involved in the decision making process about his education and therefore it would be appropriate to a reschedule [sic]." In a second email, the Parent suggested meeting on October 14, 2020.
32. On September 30, 2020, prior to the meeting, the assistant director emailed the Parent, stating, "We are sorry you are not able to attend this morning. Should something change, the zoom link is below." The assistant director stated they would follow up with a consent form, outlining the areas of reevaluation, and that point, the Parent was welcome to consent or share further requests for assessment areas.
33. On September 30, 2020, the District held a reevaluation planning meeting. In attendance at the meeting were the principal, the school psychologist, the Student's general education teacher, the Student's occupational therapist, a special education teacher, the assistant director, and the Student's father. Based on the review of existing data, the team proposed to assess the Student in a review of medical-physical, a review of existing data, general education reports, academic, fine motor, and observation.
34. On September 30, 2020, the Parent emailed the assistant director several times and asked for a list of attendees at the meeting, the notes from the meeting, and the recording from the meeting. The assistant director responded with the attendees and stated her notes would be sent, but that the meeting was not recorded.
35. In its response to this complaint, the District emphasized that the September 30, 2020 meeting was held to plan the evaluation and was not an IEP team meeting, and that the District is not required to hold a meeting to determine the areas of a reevaluation, but chose to do so. The District noted that regardless, it "provided sufficient notice of the meeting" and the "Student's father attended the meeting;" thus, the District stated it "met its obligation to ensure that a parent was present at the meeting."

The District further noted in its response that the Parent had provided input prior to the meeting and "extensive input" following the meeting, which the District subsequently considered and adjusted the reevaluation plan based on the Parent's input.

36. Also, on September 30, 2020, the public records officer emailed the Parent that she would "continue to update my production as I have responsive records prepared."
37. On October 2, 2020, the District sent the Parent an evaluation consent form.

38. On October 2 and 6, 2020, the Parent requested a list of "each test proposed" and stated she would "not give consent until I am able to discuss my son abilities [sic] with all." The Parent then provided the District with detail input regarding areas in which she believed the Student should be assessed and suggested specific assessments and testing tools.
39. On October 6, 2020, OSPI received the Parent's complaint and opened this investigation. The Parent, in her complaint, stated she was not afforded the opportunity to participate in the Student's "IEP meeting" that was held on September 30, 2020. In her reply, the Parent stated the meeting was also held without the Student's vision therapist who the Parent "was planning to invite to the meeting to provide...expertise." The Parent stated the vision therapist completed an evaluation of the Student on January 27, 2020 (and included the vision evaluation in her reply) and stated she felt "confident that my expert would provide the rest of the team with crucial information about [Student's] visual impairment and the Team would agree that a vision evaluation is necessary." The Parent also stated another of the Student's teachers who tutored the Student weekly should have "been provided the opportunity to attend the IEP/evaluation decision meeting."

The Parent further stated in her reply that her "attendance [at] the evaluation meeting should have been made a priority over staff's urgency to hold the meeting."

40. There was no documentation provided in this complaint that the Parent provided the District with a copy of the January 2020 vision assessment as part of the evaluation planning process; although, the Parent's October 3, 2020 email did reference a private vision assessment and therapy.
41. On October 7, 2020, the assistant director emailed the Parent prior written notice regarding the evaluation. In the email, the director stated they were adding auditory and cognitive to the evaluation, per the Parent's input. The assistant director stated she would reach out to the team to determine whether there was consensus to add a vision assessment. The prior written notice documented that the District proposed to initiate a reevaluation in the areas of medical-physical, existing data, general education, academic, fine motor, and observation. The prior written notice also documented the District's agreement to evaluate the Student in the areas of auditory and cognitive based on the Parent's email input. The prior written notice indicated they were still determining if there was a need to add a vision assessment to the reevaluation.
42. A second prior written notice, dated October 13, 2020, documented the District's agreement to evaluate the Student in the area of speech (articulation and language) based on the Parent's input. The prior written notice also documented the District's refusal to add a vision assessment, stating:
- In response to the request for a school-based vision evaluation, we would like to clarify that the district only evaluates students with visual impairments that, even with correction, adversely affects the student's educational performance...we do not feel that a school-based vision evaluation would be appropriate for [Student]. That said, our occupational therapist will be assessing [Student's] visual perceptual skills in her evaluation. Visual perception assessments used by the occupational therapist in our district could include

the...[specific assessments]...These standardized testing measures provided valid, reliable, and comprehensive data regarding [Student's] visual discrimination, figure ground, eye-hand coordination...Additionally, we would take into consideration the evaluation results from [Student's] developmental optometrist/vision therapist, who looks closely at his functional vision skills as they relate to learning. We would appreciate the opportunity to connect with his developmental optometrist and/or review her evaluation report, as she and the occupational therapist may be able to collaborate on the implementation of appropriate accommodations for [Student] in the school setting to further support his learning.

43. The Parent, in her reply, stated that "due to the intentional exclusion of a parent (me) [from the September 30, 2020 meeting], the remaining IEP team members denied [Student] a vision evaluation."
44. On October 16, 2020, the District's public records officer emailed the Parent, checking whether the Parent had been able to access the District's drop box (wherein it placed records responsive to the Parent's record request). The public records officer stated she was continuing to process the emails and anticipated completing them by November 2, 2020.

According to the Parent's reply, as of November 10, 2020, the drop box had not been updated since October 16, 2020. The Parent's reply also included documents from the drop box, including, according to the Parent: "4 assessed writing samples from the 2019-2020 school year, mixed in with pages that were not completed and primarily from 2017-2019." (Not all the attached documents were dated, while others were dated 2017-2019, and some documents were labeled "reading fluency" or "IEP Goal Data Reading Decoding/Fluency"—all appeared to be related to reading and writing.) The document the Parent attached to her reply also included the assistant director's September 30, 2020 meeting notes.

45. In her reply to the District's response, the Parent stated, "Records that I know are in existence but have not received include," and listed the following, summarized:
 - Evidence the Student was provided the accommodations "take tests verbally" or "use text to speech;"
 - Scores and notes from a "learning path" meeting on April 2, 2020 with special education teacher;
 - Documentation or assessments from the LAP program;
 - "Fluency testing;"
 - "Grading 2019/2020 assignments;"
 - Notes or emails from teachers;
 - Notes from IEP meetings or meetings between staff concerning the Student;
 - "Documentation of any relevant factors affecting the learning environment" (e.g., information about disruptions in class, behavior of other students, classroom management);
 - Information regarding a discrepancy related to assistive technology between the Students 2018 evaluation and current IEP.

CONCLUSIONS

Issue One: Parent Participation – The Parent alleged the Student’s individualized education program (IEP) team met without her on September 30, 2020, despite her requests to reschedule the meeting at a mutually agreeable time.

Parental participation in the IEP and educational placement process is central to the IDEA’s goal of protecting the rights of students with disabilities and providing each student with a free appropriate public education (FAPE). The regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process. A meeting may only be conducted without a parent, if “the public agency is unable to convince the parents they should attend.” IEP meetings should be scheduled at a mutually agreeable time and a district must ensure that one or both of the parents of a student eligible for special education are present at each IEP team meeting or are afforded the opportunity to participate. If neither parent can attend an IEP team meeting, the school district must use other methods to ensure parent participation, including video or telephone conference calls. There is no requirement that a district have an IEP team meeting to plan for a reevaluation.

On September 5 and 11, 2020, the Parent contacted the District to ask when the Student could be reevaluated. In several emails, the Parent indicated she wanted to move forward with the reevaluation as soon as possible—although the Parent stated in her reply that her attendance at the eventual meeting should have been prioritized over staff’s urgency to hold the meeting. The Student’s triennial reevaluation was due in June 2021.

On September 15, 2020, the school psychologist suggested they have a meeting to discuss the Student’s present levels and initiating a reevaluation and suggested September 23, 2020. When the Parent indicated this date did not work, the psychologist suggested September 22, 2020 instead. The Parent questioned whether a meeting was necessary and asked whether they could instead discuss the reevaluation via email (e.g., September 18, 19, and 22, 2020 emails, indicating the Parent wanted to move forward as soon as possible and asking if the school psychologist could email questions the District had about the reevaluation, asking why “questions holding up [Student’s] evaluation” could not be emailed.) While the Parent stated in her reply that she was only asking whether it was *possible* to discuss via email and that “at no time did I convey that I did not want to meet or be an active participant at every level of our son’s education and, most importantly, IEP meetings,” the documentation indicates the Parent wanted to move quickly to initiate the reevaluation and that she had already shared some input via email.

Given the Parent’s unavailability on September 22 or 23, 2020, the District then suggested September 30, 2020 for a meeting. In one email, the principal and District’s assistant director of special education (assistant director) characterized this as an IEP meeting to discuss a reevaluation and IEP amendment. However, the eventual meeting did not function as an IEP meeting. The Parent noted they would need to have an IEP meeting following the reevaluation anyway and it did not make sense to have an IEP meeting now. Further, the assistant director clarified that the purpose of a meeting was to discuss the elements of the proposed reevaluation, and that it was not an IEP meeting and they would not be discussing the Student’s IEP, goals, or related items.

The assistant director stated that if the Parent was not able to attend the meeting, she could submit input about areas for evaluation via email. In response, the Parent stated she could not attend a meeting on September 30, 2020, that the group should not meet without her, and suggested they instead meet on October 14, 2020.

On September 30, 2020, the assistant director again encouraged the Parent to attend the meeting and provided the Zoom link. Ultimately, the meeting was held without the Parent on September 30, 2020. In attendance at the meeting were the principal, school psychologist, the Student's general education teacher, the Student's occupational therapist, a special education teacher, the assistant director, and the Student's father. The District emphasized in its response that this meeting was an evaluation planning meeting and not an IEP meeting and that the District is not required to hold a meeting to determine the areas of a reevaluation but chose to do so. The District noted that regardless, it "provided sufficient notice of the meeting" and the "Student's father attended the meeting;" thus, the District stated it "met its obligation to ensure that a parent was present at the meeting."²

The District noted—and the documentation reflects—that the Parent provided input prior to and after the meeting and that the reevaluation plan was adjusted based on the Parent's input. For example, the October 7 and 13, 2020 prior written notices recorded that the District proposed a reevaluation in the areas of medical-physical, existing data, general education, academic, fine motor, and observation. The prior written notices also indicated that, in response to input from the Parent, the District added auditory, cognitive, and speech (articulation and language) to the reevaluation. The only area the District declined to do new assessments in, that the Parent requested, was vision, although the District stated the occupational therapist would assess the Student's visual perceptual skills (visual discrimination, figure ground, and hand-eye coordination) and that the District would consider the results of the Student's private vision assessments, which look "closely at [the Student's] functional vision skills as they related to learning."³

² OSPI notes that this meets the requirements that the District "ensure that one or both of the parents of a student eligible for special education are present at each IEP team meeting." Although, OSPI finds that this provision of the regulations is not determinative of the outcome here, given that the meeting was not an IEP meeting. At the same time, the Parent notes several times in her complaint and reply that this was contrary to the parenting plan. Parenting plans are family law matters and outside the scope of the IDEA; thus, it is outside the scope of OSPI's authority to comment on or make a conclusion about whether the parenting plan was followed.

³ The Parent stated in her reply to the District's response that she was planning to invite the Student's vision therapist to this meeting and that she believes had the therapist been at the meeting, the team would have agreed to do a vision evaluation. However, OSPI notes that there is no indication prior to the meeting or during scheduling discussions that the Parent notified the District that she wanted to invite the vision therapist or that she provided the District with a copy of the Student's January 2020 private vision evaluation. Regardless, the District indicated it would consider the private vision evaluations as part of the reevaluation, despite the District stating it would not conduct new vision assessments as part of the reevaluation.

Ultimately, there is no requirement to hold a meeting to plan a reevaluation. However, if a district chooses to hold a meeting regarding a student's educational program—even a meeting just to plan a reevaluation—it should ensure parent participation. In retrospect, the District could have rescheduled the meeting to ensure the Parent could attend. However, here, for several reasons, OSPI does not find fault with the District's actions. First, the District proposed three different dates and times to meet. Second, the Parent herself indicated several times that she wanted the reevaluation initiated as soon as possible; thus, it was reasonable that when the Parent suggested a meeting date two weeks after the District's proposed September 30, 2020 meeting time, the District would not want to delay. Third, the District encouraged the Parent to participate in the meeting and via email. Fourth, the Parent provided detailed input regarding areas she wanted assessed and suggested specific assessment tools, which resulted in the District modifying the reevaluation plan to include new assessments in three of the four areas suggested by the Parent (auditory, cognitive, and speech). Thus, despite not attending the actual meeting, the Parent participated in and had input into the reevaluation plan. Overall, while ideally the Parent would have attended this meeting, OSPI finds no violation of the IDEA or state special education regulations, given that the Parent was afforded the opportunity to participate in and did participate in planning the reevaluation.

Issue Two: Progress Reporting – The Parent alleged the District failed to monitor and report the Student's progress on June 18, 2020. IEPs must include a statement indicating how a student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals. OSPI understands that progress reporting may look different for spring 2020, given the school facility closures, and in recognition of the fact that IEPs may not have been implemented as written. Regardless of the format, districts should have monitored and reported progress information for students. Here, both the Student's June 2019 and May 2020 IEPs required progress reporting at the trimester.

On May 13, 2020, the Student's IEP team met and developed his annual IEP. The IEP present levels noted the Student's baseline was at the March 2020 data collection level (prior to the COVID-19 school facility closures) because updated present levels for each goal could not be obtained due to COVID-19. On May 19, 2020, the Parent was provided a progress report based on the Student's June 2019 IEP and included for all goals: "05/13/2020 Goal did not receive focus after March 13, 2020 due to school closure per the Governor's stay-at-home order in response to the Covid-19 pandemic. No further data was taken for this goal, thus, no further progress noted."

On June 18, 2020, the District provided the Parent with a progress report based on the Student's recently developed May 2020 IEP goals. For both goals, the IEP noted the Student's new IEP had only been in place for a month and that the Student remained at baseline level. The progress report also described what the Student worked on during the school facility closures:

- Reading (fluency): "[Student] has attended core phonics classes focusing on spelling patterns, as well as completing work on the general education learning grid."
- Written Expression (6 sentence response): "[Student] has participated in a small writing group as well as completing work on the general education learning grid. [Student] has participated at each session of our Zoom writing. We have worked on 3 and 4 sentence responses to reading using text

evidence. We have also worked on taking notes from nonfiction sources and writing a report with text features.”

The Student’s May 2020 progress reporting did not provide any information about the Student’s progress during the closures. The June 2020 progress reporting, while it provided some information about the Student’s progress in writing, did not provide any information about his progress in reading. This, coupled with the fact that there was progress data information available to the District—for example, the Parent stated the Student submitted weekly “reading fluency tests,” was pulled out of his online classes by the special education teacher to work on and be scored on reading fluency, and completed all his assignments on the District’s learning grid—makes the progress reporting insufficient. While OSPI acknowledges that learning in spring 2020 and thus progress reporting would look different; here, the Student’s progress reports provided no information about his progress on his reading goal, despite data that the District could have used for progress reporting. Thus, OSPI finds a violation. The District will be required to provide OSPI with the Student’s 2020-2021 progress reports for review and monitoring.

Issue Three: Record Request – The Parent alleged the District failed to respond to her August 10, 2020 request for the Student’s educational 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 respond in no more than 45 calendar days after the request has been made.

Educational records, as defined by the Family Education Rights and Privacy Act (FERPA), include records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution. This includes, but is not limited to grades, transcripts, class lists, student course schedules, health records, student discipline files, and special education files. This could also include test answer sheets containing student information and data, or staff notes that are maintained as part of student education files.

Records that do not relate directly to the student and are not maintained by the district are not considered educational records, and thus parents do not have a right—under FERPA—to the records. For example, test protocols or question booklets with no personally identifiable information are not considered educational records. Further, educational records do not include records of instructional, supervisory, administrative personnel, and educational personnel ancillary to those persons if those records are in the sole possession of the maker of the records, and are not accessible or revealed to any other individual except a temporary substitute of the record maker. This includes “raw data or notes” that are “sole possession records”—meaning “memory-jogger,” such as information that a school official may use as a reference tool, and thus, is generally maintained by the school official unbeknownst to other individuals.

Here, the Parent made multiple requests and clarifying requests for records in different emails to different District staff in August and September 2020. OSPI opened the complaint investigation with respect to the request the Parent made on August 10, 2020 for Student educational records. Upon investigation, the August 10, 2020 request included requests made on August 8 and 10,

2020. Additionally, the Parent made subsequent requests for records in September 2020, some of which clarified the earlier requests and some of which requested new documents.⁴ OSPI will discuss the September 2020 requests to the extent they clarify the August 2020 requests.

Summer School Assessment: On August 8, 2020, the Parent emailed the teacher from summer school a request that was later clarified as a request for the "initial assessment scores [the Student] took on June 27th for summer school." The District provided the "pre-assessment" the Student took to the Parent on August 13, 2020. This was within the 45 days and OSPI finds no violation.

Notes: On August 8 and 10, 2020, the Parent requested notes concerning the Student, and on September 7, 2020, specified that she wanted IEP meeting notes. There is no indication the District provided the Parent with IEP meeting notes. In her reply, the Parent listed records that she stated she "know are in existence but have not received," including notes from IEP meetings or meetings between staff. There is no definitive evidence that meeting notes exist and were not produced to the Parent. There is no requirement to take notes at an IEP meeting, although IEP teams can and often do. Additionally, if individual staff took notes (the Parent in her reply stated she had not received "notes...from teachers"), the notes may not be maintained as part of the Student's record and possibly fall under the sole possession exception. Thus, OSPI cannot substantiate a violation. Regardless, OSPI recommends the District review the Student's educational record and provide the Parent meeting notes if they do exist or provide the Parent an explanation as to why meeting notes were not provided—i.e., because they do not exist.

Reports Concerning the Student: The Parent, on August 8 and 10, 2020, requested "reports" concerning the Student, although did not specify any particular report. On August 10, 2020, the District provided the Parent with the Student's Kindergarten through third grade report cards.

The Parent's email requesting the reports also included requests for other records, such as notes and "other documents" concerning the Student, and the District replied that "we do not keep anything in a student's cumulative file like you are requesting. We keep just the final report cards and the copies of the state testing scores (in addition to the enrollment paperwork and immunization form)." On September 23, 2020—46 calendar days from the Parent's request on August 8, 2020—the District provided the Parent the Student's "cumulative file," which included his academic record (grade year, teachers), enrollment forms, immunization and health forms, report cards, and a standardized test.

The Parent, in her reply, stated the District's record production was insufficient because she only received "4 report cards and 1 test that was administered during [Student's] 2018 evaluation." The

⁴ OSPI notes the Parent's September 7, 2020 request included several records that appear to be copied from a generic list as there is no indication in any of the documentation in this complaint that these requested records relate to the Student: "PALS program checklist and notes (if your child has ever been enrolled in PALS)," "Behavioral Pathways and Student Support (SST referrals, notes, follow-ups and tracking logs," "BGT meeting notes," and 504 meeting notes. Thus, these records will not specifically be addressed in this decision. However, if there are records in this list that apply to the Student, OSPI recommends the District provide them to the Parent.

Parent stated the Student's 2018 initial evaluation for special education "evaluation summary shows the multitude of tests performed, yet I have never been provided the results." But the Student is in fourth grade this school year (2020-2021), meaning he would only have four report cards total (Kindergarten through third grade). Additionally, the standardized test provided appears to be a District-wide standardized test conducted in December 2018. It was not part of the Student's initial evaluation for special education, which was conducted in June 2018. The Student's cumulative file included only general education records, not special education records. So, this part of the District's record is not insufficient in the way the Parent describes; however, because records should be provided *no more than 45 calendar days* from the request, this is a violation. As the District has provided the Student's cumulative file to the Parent, no corrective action is necessary on this point.

Assessments, Scores, Other Documentation: On August 8 and 10, 2020, the Parent requested "other documentation," "all records...and papers," and "assessments/score," including "any and all information you have" for the Student from the special education department. On August 10 and 11, 2020, the District provided the Student's 2018 initial evaluation for special education eligibility. On September 7, 2020, the Parent clarified she wanted teacher report forms; teacher observation forms; reading, writing, and math assessments; all testing and evaluations; and correspondence. On September 25, 2020, the District provided the Parent a link to the online "drop box" wherein it placed responsive records and stated this gave the Parent access to all the Student's special education records. The District also informed the Parent she could make an appointment to review test protocols. On October 16, 2020, the District updated the drop box to include writing samples from the 2019-2020 school year (undated) and documents dated between 2017-2019. Some of the documents were labeled "reading fluency" or "IEP Goal Data Reading Decoding/Fluency" and all appeared to be related to reading and writing.

While the District may have originally interpreted the Parent's request as just relating to the evaluation and IEP, the records provided on October 16, 2020 indicated there were other responsive records in the Student's educational file that were not provided in August 2020 or on September 25, 2020. September 25, 2020 was 48 calendar days after August 8, 2020, meaning the October 16, 2020 records were well outside the 45-calendar day requirement. Thus, OSPI finds a violation, as the District did not provide the records in a timely manner.

Further, the Parent maintains that she has not received all records, including:

- Scores and notes from a "learning path" meeting on April 2, 2020 with special education teacher;
- Documentation or assessments from the LAP program;
- "Fluency testing;"
- "Grading 2019/2020 assignments;"
- Emails from teachers;

While OSPI suspects that some of these records may not be maintained as part of the Student's educational record (e.g., districts do not usually maintain every piece of graded work a student completes in the educational file and emails from teachers are not necessarily maintained as part of a student's educational file), if records requested related to the "learning path" meeting, documentation from the LAP, and fluency testing exist, these should be provided to the Parent.

The District will be required to meet with the Parent to review what records the Parent has already received in response to her request and what records the Parent and District believe are still outstanding.

CORRECTIVE ACTIONS

By or before **December 11, 2020, January 8, 2021, January 15, 2021, March 26, 2021, and June 25, 2021**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Progress Reporting: The District will be required to provide OSPI with the Student's 2020-2021 progress reports for review and monitoring. By or before **December 11, 2020, March 26, 2021, and June 25, 2021** (approximately one week after the end of the trimester), the District will provide OSPI with copies of the Student's progress reporting and documentation confirming the progress reporting was sent to the Parent. OSPI will review and provide feedback and further reporting deadlines, if necessary.

Records: By or before **December 31, 2020**, the District will schedule a meeting with the Parent to discuss the Parent's request for records. OSPI recommends this meeting occur in-person or via Zoom (or other video conferencing platform), and that the assistant director of special education and District public records officer attend, along with any other necessary District staff.

At the meeting, the group will review the records that have already been provided to the Parent and develop, with the Parent, a list of records the Parent has not been provided. The list should include the following:

- The record not yet provided;
- Whether this record is part of the Student's educational record;
- Whether the record exists, but is not part of the Student's educational record, and thus subject to production under the Parent's Washington Public Records Act request (e.g., emails);
- A reasonable timeline for when records under the Public Records Act will be produced; and,
- Whether the record cannot be produced and the explanation why (e.g., a record does not exist).

By **January 8, 2021**, the District will provide OSPI with documentation from the meeting, including: 1) scheduling emails or invitations; 2) a sign-in sheet or screen shot of Zoom participants; and, 3) the list of records that need to be provided to the Parent, including the explanations.

Any remaining Student educational records that exist and need to be produced will be provided to the Parent by **January 15, 2021**. The District will provide OSPI a copy of the records produced and confirmation they were provided to the Parent on **January 15, 2021**.

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.

Dated this ___ day of December, 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.)