

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-60

PROCEDURAL HISTORY

On August 19, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the West Valley School District No. 208 (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On August 20, 2019, 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 September 9, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On September 10, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the Parent. OSPI received this information on September 11, 2019 and forwarded it to the District on September 12, 2019.

On September 10, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. OSPI received this information on September 10, 2019 and forwarded it to the Parent on September 12, 2019.

On October 2, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. OSPI received this information on October 8 and 9, 2019, and forwarded it to the Parent on October 8 and 10, 2019.

On October 10, 2019, OSPI determined that additional information/documentation would be helpful to the investigation and contacted the District. OSPI received this information on October 10, 2019 and forwarded it to the Parent on October 11, 2019.

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

SCOPE OF INVESTIGATION

This decision references events which occurred prior to the investigation time period, which began on August 20, 2018. 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 time period.

ISSUE

1. Did the District violate the Family Educational Rights and Privacy Act (FERPA) by disclosing the Student's personally identifiable information without the Parent's signed written consent when it referred the Student to Catholic Charities in May and/or June of 2019?¹

LEGAL STANDARDS

Family Educational Rights and Privacy Act of 1974 (FERPA): FERPA generally prohibits the disclosure of "personally identifiable information **derived** from [students'] education records." *Letter to Walker*, Family Policy Compliance Office (September 2002) (emphasis added); *see also* 33 CFR § 99.30(a). "Thus, information that an official obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This remains applicable even if education records exist which contain that information, unless the official had an official role in making a determination that generated a protected education record." *FERPA: Guidance for Eligible Students*, Family Policy Compliance Office (February 2011).

FERPA: Personally Identifiable Information (PII): PII includes, but is not limited to: the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. 34 CFR Sec. 99.3.

FERPA: Education Records: The term "education records" means 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). 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)(B); WAC 392-172A-

¹ OSPI's opening letters also included the following issue: Whether the District followed proper referral procedures when it determined to not evaluate the Student for special education eligibility under the IDEA in May of 2019. As outlined in OSPI's opening letters, this issue was put into abeyance pending the resolution of a due process hearing request that the Parent made on this same issue. See also WAC 392-172A-05035 ("If a written complaint is received that is also the subject of a due process hearing...OSPI must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing"). To the extent that they were not relevant to the FERPA issue that is the subject of the instance decision, facts relating to the referral and evaluation procedures in May 2019 were not included in this decision.

05180(2); *see also* IDEA, 64 Fed. Reg. 12,641 (March 12, 1999) ("FERPA exempts from the definition of 'education records'...those records considered to be 'sole possession records,' [such as raw data or notes]. 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").

FERPA: Directory Information: "Directory information" means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended. 34 CFR § 99.3.

FERPA: Disclosure of Directory Information: An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of: (1) The types of personally identifiable information that the agency or institution has designated as directory information; (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information. 34 CFR § 99.37(a)(1)-(3). "FERPA does not require a school to notify eligible students individually of the types of information it has designated as directory information. Rather, the school may provide this notice by any means likely to inform eligible students of the types of information it has designated as directory information." *FERPA: Guidance for Eligible Students*, Family Policy Compliance Office (February 2011).

FERPA: Disclosure of PII to School Officials with a Legitimate Educational Interest: A school district may disclose PII from an education record of a student without the consent required by 34 CFR § 99.30 if the disclosure is to other school officials, including teachers, within the school district whom the school district has determined to have legitimate educational interests in the relevant PII. 34 CFR § 99.31(a)(1)(i)(A); *see also* WAC 392-172A-05195 ("The [school district or] agency is not required to keep a record of access by parents, and authorized employees with a legitimate educational interest in the records.")

FERPA: When is a Contractor a School Official: "A contractor...or other party to whom [a school district] has outsourced institutional services or functions may be considered a school official...provided that the outside party: (1) performs an institutional service or function for which the agency or institution would otherwise use employees; (2) is under the direct control of the agency or institution with respect to the use and maintenance of education records; and (3) is

subject to the requirements of 34 CFR § 99.33(a)² governing the use and redisclosure of [PII] from education records. 34 CFR § 99.31(a)(1)(i)(B)(1)-(3).

Evidentiary Weight: According to the Office of Special Education and Rehabilitative Services, “it would not be inconsistent with the IDEA...for a State to use a ‘preponderance of the evidence’ standard in making independent determinations as to whether a public agency violated a requirement of Part B of the IDEA.” *Letter to Reilly*, 64 IDELR 219 (OSERS 2014). Merriam-Webster’s Dictionary of Law defines the phrase “preponderance of the evidence” as “the standard of proof...in which [a] party [wishing to establish a factual premise] must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.” MERRIAM-WEBSTER’S DICTIONARY OF LAW 377 (1996).

FINDINGS OF FACT

1. At the start of the 2018-2019 school year, the Student was in the 5th grade and attended a District middle school.
2. In November 2018, the District and Catholic Charities entered into a contract.³ Under this contract, certain Catholic Charities therapists⁴ were to conduct mental health assessments and provide counseling services for referred students. The contract read, in part:
Scope of Services
...
Service provider will complete independent paperwork and billing.
...
Service Provider and District will communicate regarding shared students/clients with appropriate Authorizations to Disclose to ensure coordinated care.
...
Access, Retention, and Records...The Service Provider agrees to create and retain records supporting the services rendered or supplies delivered for a period of three years after either the completion date of the contract or the conclusion of any claim, litigation, or exception relating to the contract taken by the District or third party.
3. The District’s response included a blank ‘Counseling Services Referral Form – [District]’ (counseling referral form). (See attached **Exhibit A**.) The counseling referral form has Catholic

² 34 CFR § 99.33(a)(1)-(2) reads: An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

³ The contract is dated November 2018—a Catholic Charities representative signed it on November 13, 2018 and a District representative signed it on November 25, 2018.

⁴ Only one Catholic Charities therapist is referenced in the factual record of this complaint decision. That individual is referred to as the ‘mental health counselor.’

Charities letterhead on it. According to the mental health counselor's supervisor (Catholic Charities supervisor), Catholic Charities began using this form "on or around April 12, 2019."

4. On May 20, 2019, the District's contracted tele-school psychologist emailed the school psychologist and the school psychologist paraprofessional, stating, in part:

The [special services assessment coordinator] stopped by on Friday afternoon to talk with [mental health counselor] but he was in appointments. [Special services assessment coordinator] asked me to send mental health referral paperwork for [Student] to the middle school for completion. I got the referral form from [mental health counselor] and filled in the top part but that's about all I could do. [School psychologist paraprofessional] could you put the referral form in district mail to [school psychologist]? [School psychologist], can you figure out who needs to complete the referral form?

5. Later on May 20, 2019, the contracted tele-school psychologist emailed the school counselor and the special services assessment coordinator, stating, "[School counselor], I wanted to give you a heads up that [special services assessment coordinator] asked me to send over a mental health counselor referral form for [Student]. I'm putting it in District mail to you today."⁵

Later that same day, the special services assessment coordinator responded, stating, "I...wanted to follow up on an idea we had at [Student's] referral meeting...referring him to [mental health counselor] (from Catholic Charities)."

The school counselor replied, stating, "I filled out the paperwork today for [Student] and faxed it to Catholic Charities."

6. In its response to this complaint, the District stated:

[School counselor] did refer the Student for possible mental health counseling to [mental health counselor, who works for Catholic Charities]. Obviously, [school counselor] did this in an attempt to provide helpful services to the Student. While [school counselor] does not have perfect memory of this referral, he does not believe that he filled out any form in making this referral. Rather, he simply talked with [mental health counselor] at school and provided him with the student's name and birth.

...

The District has a contract with Catholic Charities. The contract includes provisions for [mental health counselor] to be provided with space in the school and to provide student counseling and mental health services...As such, and in accordance with FERPA and District policy, the Catholic Charities' therapists thus become 'school officials' for purposes of the student records...Catholic Charities has agreed to treat student record information as confidential.

...

Furthermore, the information that was released to [mental health counselor] was directory information for which parental consent was not required.

⁵ The contracted tele-school psychologist worked at a District junior high school, whereas the school counselor worked at a District middle school.

7. The District's student records policy reads, in part:

A school official [includes] a person or company with whom the district has contracted to perform a special task (such as an attorney, hearing officer, auditor, medical consultant, or therapist).

...

The District has designated the following as directory information (The district may select from the following list, but is not required to include all or any of the following types of information: the student's name, photograph, address, telephone number, date and place of birth, dates of attendance, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, diplomas and awards received and the most recent previous school attended.)⁶

The District's student records policy does state that certain, other categories of information will not be treated as 'directory information'—for example, the actual residential addresses of participants in the state Address Confidentiality Program; social security numbers; and "student identification numbers (with authentication factors such as a secret password or personal identification number)."

According to the District, the student records policy is: published on the District's website; reviewed annually and publicized on the board agenda; and provided to parents upon request.

8. The District's school handbook read, in part:

The District may disclose appropriately designated 'directory information' without written consent unless you have advised the District to the contrary in accordance with District procedures. The primary purpose of 'directory information' is to allow the District to include this type of information from your child's educational records in certain school publications. Examples include: a playbill, showing your student's role in a drama production; the annual yearbook; the school website; honor roll or other recognition lists; [etc...]

'Directory information,' which is information that is generally not considered harmful or an invasion of privacy released can also be disclosed outside organizations without parents' prior written consent. Outside organizations include but not are not limited to companies that manufacture class rings or publish yearbooks.

If you do not want the district to disclose 'directory information' from your child's education records without your prior written consent you must notify the district in writing by September 1 of each school year. The District has designated the following information as directory information: student's name; participation in officially recognized activities and sports; address; telephone listing; weight and height of members of athletic teams; electronic email address; photograph; degrees, honors, and awards; date and place of birth; major field of study; dates of attendance; grade level; and the most recent education agency or institution attended.

⁶ The District's student records policy does not signify which of these 'types of information' that the District has decided constitute 'directory information.'

According to the District, the school handbook is: published on the District's website; and reviewed with students at the start of each school year.

9. In a due process hearing, the special services assessment coordinator was asked to review the emails from May 20, 2019 concerning referring the Student to Catholic Charities. That portion of her testimony read, in part:

Q. When you went to talk to [mental health counselor] what was your goal?

A. My goal was I knew that Student was having difficulty. I knew that there was concern about Student. I felt like it would make sense to refer him for possible services through our contracted employee. And that was all a general education process...it does not involve special education issues. It was just...I thought it would be a good idea...At that point we didn't really have a referral process ironed out between the District and the [mental health counselor]. So in 'paperwork' I wasn't referring to a specific form or consent or anything like that. This was, like I said, we were just barely starting this contract. I just wanted to...bring Student to [mental health counselor's] attention. So that's what I was referring to [with] 'paperwork.'

Later in that same hearing, the District's attorney testified as follows:

So we—counsel did confer and—what the District has learned, and what I've shared with counsel, is that the District has no record of the [May 20, 2019 fax to Catholic Charities] in its possession. What we've learned was that [at] some point there was a referral, a hard copy referral sent via interschool mail to [mental health counselor], and a copy, a separate copy of that referral was not retained by [school counselor], who sent it. And we, so we do not, the District, at least, does not have a copy of that record in its possession.

10. In the investigation of this complaint, OSPI's investigator asked the contracted tele-school psychologist the following questions and received the following answers:

Question: The record in special education citizen complaint 19-60 contains two emails written by you that I am trying to get a better understanding of.

The first is dated May 20, 2019 and reads, in part: "[Special services assessment coordinator] asked me to send over a mental health counselor referral form for [Student]. I'm putting it in district mail to you today."

The second is also dated May 20, 2019 and it reads, in part: "I got the referral form from [the mental health counselor] and filled in the top part but that's about all I could do."

My question: was this "referral form from [mental health counselor] the model form document found in the District's response that is titled, 'Counseling Services Referral Form – [District]?"

Answer: I do not recall if the Counseling Services Referral Form-[District] is the form I completed.

Question: If it was not, can you share with me anything you remember about the contents of this form or paperwork?...What needed to be filled in on the form—for example, did the form include a space to place the "reason for the referral"?

Answer: I remember writing a student's first name and last initial on the paperwork. I do not remember writing anything else on the form.

11. In the investigation of this complaint, OSPI's investigator asked the special services assessment coordinator the following questions and received the following answers:

Question: A couple emails exist showing that, on or about May 20, 2019, you requested that a certain "mental health counselor referral form" be completed for Student and sent to Catholic Charities. As part of the investigation in SECC 19-60, the Parent provided due process testimony wherein you appear to testify that, as of May 2019, "[the district] didn't really have a referral process ironed out...with [the mental health counselor]...so in [referring to] 'paperwork' I wasn't referring to a specific form."

So, to confirm: you did not utilize or refer to the model form document titled 'Counseling Services Referral Form – [District]' for the Student on or about May 20, 2019?

Answer: That is correct. I was not referencing any specific form or paperwork.

Question: Do you know when did the District and Catholic Charities started using the model form document titled 'Counseling Services Referral Form – [District]'?

Answer: No, I do not know the date when the district and Catholic Charities began using this form.

Question: If it was just 'general paperwork' that was used in the referral on or about May 20, 2019—and not a specific form document, do you recall anything about the contents of that 'general paperwork'?

Answer: I did not complete any paperwork, form, or document. I do not know anything about the contents of any 'general paperwork'.

Question: For background purposes/understanding the record: why was the Student referred to Catholic Charities for potential mental health services? ...What did school staff observe that prompted them to make the referral?

Answer: The student in question was demonstrating behavioral issues at school. He had been referred to the office for things like stealing, being disrespectful toward staff, being disruptive in class, bus conduct, and misusing school property. His mother was seeking help for him through either special education or 504. It was also known to school staff that this student experienced many stressors at home and had been seen for private outside counseling in the past. It was my opinion that he might benefit from mental health services. Given his behavior and his mother's concerns, I attempted to get his name to the mental health counselor.

In its investigation of this complaint, OSPI's investigator also asked the special services assessment coordinator what her basis of knowledge was for knowing why the Student needed to be referred to Catholic Charities. She replied: "I was invited to attend both the manifestation determination review meeting and the referral meeting. In preparation I reviewed the student's records in Skyward including his discipline history. I also attended these meetings where these issues were discussed."

12. In the investigation of this complaint, OSPI's investigator asked the mental health counselor several questions. The mental health counselor's supervisor (Catholic Charities supervisor)

directed the mental health counselor “to not respond” to these questions.⁷ Instead, the Catholic Charities supervisor answered some of the questions asked by OSPI’s investigator⁸:

Question: Concerning the referral process generally: regardless of whether a specific form is used, when making a referral to Catholic Charities, is it common practice to tell Catholic Charities the reason a particular student is being referred?

Answer: Yes

Question For example, would Catholic Charities be equipped to help a student if it didn’t know the reason that student was being referred to it for potential mental health services?

Answer: No

Question: The District’s response states that “the information that was released to [Catholic Charities] was directory information for which parental consent was not required.” It seems to me that the mere relay of directory information would not make for an effective referral; I would think an effective referral would require the disclosure of the reason the student was being referred to Catholic Charities. Can you provide any insight on this?

Answer: The referral form includes a section to outline the reason for referral.

Question: Re: Provision 1(c) of Catholic Charities’ contract with the District: What is Catholic Charities’ understanding of the following language: the “independent paperwork” phrase found in the following sentence: “Service provider will complete independent paperwork and billing”?

Answer: Independent paperwork refers to any and all internal required documentation related to active client charts. Billing refers to all billing related to services covered by medicaid and private insurance.

Question: Re: Provision 1(e): What is the Catholic Charities’ understanding of the following language: the “Authorizations to Disclose” phrase found in the following sentence: “Service provider and District will communicate regarding shared student/clients with appropriate Authorizations to Disclose to ensure coordinated care”?

Answer: Any and all information pertaining to Protected Health Information under HIPAA can only be shared with a valid Release of Information.

Question: Re: Paragraph 20, ‘Access Retention and Records.’ This section says, in part, that the Service Provider (Catholic Charities) must “create and retain records supporting the services rendered...for a period of three years.” Did Catholic Charities do this? (If so, it seems like Catholic Charities should potentially have a copy of the fax that was sent from the school counselor to Catholic Charities on or about May 20, 2019.)

⁷ For several questions, the Catholic Charities supervisor objected with language similar to this: “Any and all information pertaining to any individual enrolled or previously enrolled in counseling services, [including the Student], can only be shared or obtained with a valid Release of Information.”

⁸ Beyond the questions that the Catholic Charities supervisor refused to answer, several questions could only be answered by the mental health counselor—in other words, the Catholic Charities supervisor lacked the requisite knowledge to be able to answer several of the questions originally directed to the mental health counselor.

Answer: This pertains only to records for individuals who are actively enrolled or have been enrolled in counseling services with Catholic Charities.

Question: As either a matter of regular procedure, or in specific, isolated incidences, did Catholic Charities ever disclose information it obtained through servicing District students to outside parties (meaning not the District and not another employee of Catholic Charities)?

Answer: No

Question: If this ever did occur, can you provide some more information on this?

Answer: Any and all information pertaining to any individual enrolled or previously enrolled in counseling services can only be shared or obtained with a valid Release of Information.

13. In the investigation of this complaint, OSPI's investigator asked the school counselor the following questions and received the following answers:

Question: The District's response states, "[The school counselor] does not have a perfect memory of this referral [but] he does not believe that he filled out any form in making this referral. Rather, he simply talked with [the mental health counselor] at school and provided him with the student's name and date of birth." However, there is an email from you ([the school counselor]) to [the special services assessment coordinator], dated May 21, 2019, that reads: "I filled out the paperwork today for [Student] and faxed it to Catholic Charities." As part of the investigation, the Parent also provided what I believe is due process hearing testimony wherein the school district's attorneys acknowledge that you did in fact sent a hardcopy of some type of referral paperwork on or about May 21, 2019.

This email and the testimony strongly suggest that something was faxed to Catholic Charities on or about that date. The fact that the District's response includes a model form document for referrals to Catholic Charities makes me think it was possible that it was this model form that was faxed to Catholic Charities.

Anyways, rereading your May 21, 2019 email to [the special services assessment coordinator], are you able to provide any further insight into what you faxed to Catholic Charities concerning the Student on May 21, 2019?

Answer: I'm sorry I just don't have a very good memory of this. I don't even recall what form was used. I believe I did fax a form to Catholic Charities and I'm quite certain all I put on it was the student's name, birth date and, perhaps, contact information.

Question: If you are of the opinion that the email and the due process hearing transcript are inaccurate, and that you only had a conversation with [the mental health counselor] on or about May 21, 2019, what do you remember about this conversation, if anything?

Answer: I don't remember anything about a conversation with [the mental health counselor] on or about May 21, 2019. I certainly do on occasion talk with him about students that have been referred and I may have done this but I cannot remember.

Question: Concerning the referral process generally: regardless of whether a specific form is used, when making a referral to Catholic Charities, is it common practice to tell Catholic Charities the reason a particular student is being referred?

Answer: We do usually give Catholic Charities information regarding the reasons for the referral, but this is not always done right away. Sometimes, we will initiate the referral process by only providing Catholic Charities with the name and contact information. A lot of the times the reasons for the referral is shared in oral conversations with the Catholic Charities therapist.

Question: [School counselor], to inform your response to this question, the District's response states that "the information that was released to [Catholic Charities] was directory information for which parental consent was not required." As a general matter, "directory information" is basic information on a student, such as name, address, telephone number, etc.

It seems to me that the mere relay of directory information would not make for an effective referral; I would think an effective referral would require the disclosure of the reason the student was being referred to Catholic Charities. Can you provide any insight on this?

Answer: Please see my answer above.

Question: Did you work with the Student as a counselor in the spring of 2019?

Answer: I met with the student on a few occasions but I did not engage in any continual or in-depth counseling.

14. In the investigation of this complaint, OSPI's investigator asked any "district representative" to answer numerous questions. OSPI received the following answers:

Question: Concerning the referral process generally: regardless of whether a specific form is used, when making a referral to Catholic Charities, is it common practice to tell Catholic Charities the reason a particular student is being referred? For example, how would Catholic Charities be equipped to help a student if it didn't know the reason that student was being referred to it for potential mental health services?

The District's response states that "the information that was released to [Catholic Charities] was directory information for which parental consent was not required." It seems to me that the mere relay of directory information would not make for an effective referral; I would think an effective referral would require the disclosure of the reason the student was being referred to Catholic Charities. Can you provide any insight on this?

Answer: Yes, we certainly do need, at some point, to inform Catholic Charities of the reasons for the referral. However, oftentimes the initial referral can be started by providing limited information such as the student's name and contact information. Catholic Charities may then contact the parent or obtain other information from school personnel. It is not uncommon to provide Catholic Charities with the reason for the referral orally based on what the staff has learned about the student through observations and/or discussions with the student or parent.

Question: Did [the school counselor] serve as a counselor for the Student in the spring of 2019? If not, did he work with the Student in some other capacity?

Answer: [The school counselor] is the middle school counselor for all students grades 5 and 6, the student's grade. In addition, [the school counselor] did meet with the student on several occasions but did not engage in any in-depth counseling.

Question: As of May and June of 2019, did the District employ—directly—mental health counselors?

Answer: No, the District did not employ mental health counselors per se. The District does, however, employ school counselors who perform some of the similar functions.

Question: If the District did not directly employ mental health counselors in May and June of 2019, had the District had not entered into a contract with Catholic Charities to provide services for the same in May and June of 2019, would the District have directly hired mental health counselors? Contracted with a different service provider?

Answer: I do not know. This would be a Superintendent and School Board decision. I do know, however, that we as a district identified a need for expanded student counseling services so I believe we would have addressed this in some manner.

Question: Before the District entered into the contract with Catholic Charities, did it directly employ mental health counselors? Did it have a contract with a different mental health counseling provider during that time period?

Answer: No. The District did not directly employ mental health counselors nor did it have a contract with a different mental health counseling agency. However, it is likely that some of our school counselors or school psychologist have also been licensed mental health counselors.

Question: Were there other professional roles/titles in the Student's school that provided mental health counseling in May and June of 2019, but who might not have the exact title of 'mental health counselor'—i.e., school psychologists, general school counselors, sped teachers, etc.?

Answer: Yes. Many of these individuals have a background and training in child development and adolescent mental health issues and certainly do address and try to help with student behavioral issues.

Question: Provision 1(c): What is the District's understanding of the following language in its contract with Catholic Charities: the "independent paperwork" phrase found in the following sentence: "Service provider will complete independent paperwork and billing"?

Answer: It is our understanding that if Catholic Charities required paperwork, for example case notes, the counselor would keep those. Catholic Charities is also responsible for any third party billing that might take place. The district pays approximately half of the counselor's salary to Catholic Charities and Catholic Charities is responsible for generating their own funds to pay for the other half of the counselor's salary through third party billing or other fund raising.

Question: Provision 1(e): What is the District's understanding of the following language: the "Authorizations to Disclose" phrase found in the following sentence: "Service provider and District will communicate regarding shared student/clients with appropriate Authorizations to Disclose to ensure coordinated care"?

Answer: Whenever there is a need to share protected confidential information, such as medical records, appropriate authorizations will be obtained.

Question: Paragraph 20, 'Access Retention and Records.' This section says, in part, that the Service Provider (Catholic Charities) must "create and retain records supporting the services rendered...for a period of three years." As a matter of course, did the District regularly request that it be provided with a copy of the paperwork documenting the services Catholic Charities rendered to its students?

Answer: I don't think the District regularly requests this paperwork but would do so if there was a need to know.

Question: If a student was referred to Catholic Charities for mental health services, what paperwork, if any, was maintained by the District relating to this fact?

Answer: The district has not yet developed a formal process for recording referrals to the contracted mental health counselors from Catholic Charities. Any records that do exist would be those kept by the individual staff members themselves. Sometimes the referral is oral so that no paperwork is generated.

15. Based on the documentation and District staff responses in this complaint, the Student never received counseling services from Catholic Charities.

CONCLUSIONS

May 20, 2019 Referral – The District asserts that the Student information that was shared with Catholic Charities on May 20, 2019 represented directory information. Under FERPA, directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

Here, the record is contradictory on what exactly was shared with Catholic Charities on May 20, 2019. Some portions of the record support the notion that only 'directory information' was shared; other portions of the record support the notion that more substantive information was shared.

OSPI uses a preponderance of the evidence standard in making factual determinations in special education citizen complaint decisions. Preponderance of the evidence means a party wishing to establish a factual premise "must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not."

Here, OSPI finds that it is more probable that the May 20, 2019 referral included information on the Student that was more substantial than mere directory information. For example, many of the 'facts' supporting a finding that only 'directory information' was shared are after-the-fact, personal recollections. For example:

- The District's response read, in part: "[The school counselor] does not believe that he filled out any form in making this referral. Rather, he simply talked with [the mental health counselor]...and provided him with the student's name and birth."
- The contracted tele-school psychologist stated: "I remember writing a student's first name and last initial on the paperwork. I do not remember writing anything else on the form."

- The school counselor stated: "I don't even recall what form was used. I believe I did fax a form to Catholic Charities and I'm quite certain all I put on it was the student's name, birth date and, perhaps, contact information."
- The District stated that generally: "We certainly do need, at some point, to inform Catholic Charities of the reasons for the referral. However, oftentimes the initial referral can be started by providing limited information such as the student's name and contact information. Catholic Charities may then contact the parent or obtain other information from school personnel."
- The school counselor stated: "We do usually give Catholic Charities information regarding the reasons for the referral, but this is not always done right away. Sometimes, we will initiate the referral process by only providing Catholic Charities with the name and contact information."

Many of the facts supporting a finding that more substantive information was shared, though, are based on documentary evidence. And this documentary evidence shows the following: beginning April 12, 2019, Catholic Charities used a particular counseling referral form; this counseling referral form included a space where the referring party was to detail the "reasons for [the] referral"; and emails and due process testimony both show that, on May 20, 2019, some form of mental health referral paperwork was shared with Catholic Charities. Furthermore, multiple District personnel—and the Catholic Charities supervisor, testified that, in order to make an effective referral to Catholic Charities, the referring party needs to detail why that party is referring a particular student for mental health assessment and counseling. Therefore, OSPI concludes that it is more probable than not that the May 20, 2019 referral included information on the Student that was more substantial than mere directory information—specifically, the May 20, 2019 referral most likely included the reason the referral was being made.

This type of information clearly meets FERPA's definition of personally identifiable information (PII). PII includes, in part, the following: the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name. Here, *in addition to the reason for the referral*, the special services assessment coordinator stated that the paperwork sent to Catholic Charities included the Student's first name and last initial. The school counselor stated that he was quite certain he "put on [the paperwork] the student's name, birth date and, perhaps, contact information."⁹ Therefore, OSPI concludes that the referral paperwork sent to Catholic Charities on May 20, 2019 included PII on the Student.¹⁰

⁹ The counseling referral form itself, which is very possibly the form that was used, includes blank spaces where the following information on referred students is to be entered: name; date of birth; parent/guardian name; address; phone number; work or cell.

¹⁰ FERPA only prohibits the disclosure of PII that is derived from a student's education records. So, the next step in the analysis would be to: determine whether the PII that was shared with Catholic Charities on May 20, 2019 was derived from the Student's education records. This particular analytical step, though, is rendered unnecessary because of a resolution of the following issue: on May 20, 2019, did Catholic Charities constitute a school official for the purposes of FERPA? See below.

A school district may disclose PII from an education record of a student without parental consent if the disclosure is to a school official with a legitimate educational interest in the relevant PII. A contractor whom a school district has outsourced institutional services or functions may be considered a school official, provided that the contractor: (1) performs an institutional service or function for which the agency or institution would otherwise use employees; (2) is under the direct control of the agency or institution with respect to the use and maintenance of education records; and (3) is subject to the requirements of 34 CFR § 99.33(a)¹¹ governing the use and redisclosure of PII from education records.

Here, the District and Catholic Charities entered into a contract in November 2018. Under that contract, certain Catholic Charities therapists were to conduct mental health assessments and provide counseling services for referred students. Based on that contract, as well as the institutional services traditionally provided by the District, Catholic Charities qualified as a school official for the purposes of FERPA:

Legal Requirements For Contractor To Be Considered School Official For Purposes Of FERPA	Facts Showing Each Legal Requirement Has Been Met By District's Relationship With Catholic Charities
The contractor performs an institutional service or function for which the agency or institution would otherwise use employees.	During the relevant time period, the District did not directly employ anyone as an exclusive 'mental health counselor.' However, the District did employ psychologists and counselors whose job functions were, in part, to provide mental health counseling to students.
The contractor is under the direct control of the agency or institution with respect to the use and maintenance of education records.	The contract between the District and Catholic Charities required Catholic Charities to "create and retain records supporting the services rendered...for a period of three years." The District stated that, while it does not "regularly request this paperwork," it "would do so if there was a need to know." <i>See also immediately below, Legal Requirement 3.</i>
The contractor is subject to the requirements of 34 CFR § 99.33(a) governing the use and redisclosure of PII from education records. 34 CFR § 99.33(a)(1)-(2) reads: An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any	The contract between the District and Catholic Charities read, in part: "Service Provider and District will communicate regarding shared students/clients with appropriate Authorizations to Disclose to ensure coordinated care." The District stated that its understanding of this language was as follows: "Whenever there is a need to share protected confidential information, such as medical

¹¹ 34 CFR § 99.33(a)(1)-(2) reads: An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

<p>other party without the prior consent of the parent or eligible student. The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.)</p>	<p>records, appropriate authorizations will be obtained." Catholic Charities stated that its understanding of this language was as follows: "Any and all information pertaining to Protected health Information under HIPAA can only be shared with a valid Release of Information."</p> <p>In its investigation of this complaint, OSPI asked Catholic Charities if, "as either a matter of regular procedure, or in specific, isolated incidences, did Catholic Charities ever disclose information it obtained through servicing District students to outside parties (meaning not the District and not another employee of Catholic Charities)? In response, Catholic Charities stated: "No, any and all information pertaining to any individual enrolled or previously enrolled in counseling services can only be shared or obtained with a valid Release of Information."</p>
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As detailed in the chart above, on May 20, 2019, Catholic Charities was a school official for the purposes of FERPA, and so there was no FERPA violation when the school counselor faxed Catholic Charities paperwork detailing that the Student was having behavioral challenges at school and was in possible need of a mental health assessment and counseling services.

CORRECTIVE ACTIONS

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

RECOMMENDATIONS

Directory Information and the District's Policies – As discussed above, OSPI concluded that directory information was not disclosed on May 20, 2019; rather, PII was disclosed on May 20, 2019. Therefore, OSPI did not have to analyze the circumstances under which it is permissible for a district to disclose directory information. However, OSPI does note the following:

A district may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of: (1) The types of personally identifiable information that the agency or institution has designated as directory information; (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about

the student designated as directory information. FERPA does not require a school to notify eligible students individually of the types of information it has designated as directory information. Rather, the school may provide this notice by any means likely to inform eligible students of the types of information it has designated as directory information.

Here, the District's school handbook contains the information required by (2) and (3), above; the District's school handbook, though, does not appear to contain the information required by (1), above. The school handbook does state that directory information is "information that is generally not considered harmful." The school handbook also lists some common "examples" of directory information. However, the school handbook does not state whether the "examples" included in the handbook represent an exhaustive list of the type of information the District has designated as directory information.

The District's student records policy, on the other hand, does not appear to include the information required by (2) and (3), above. In regard to (1) above, the District's student records policy lists some types of information that the District "may select" as constituting directory information. However, the student records policy does not state which of these types the District has actually selected as constituting directory information. For example, the student records policy read, in part:

The District has designated the following as directory information (The district **may select from the following list, but is not required to include all or any of the following types of information:** the student's name, photograph, address, telephone number, date and place of birth, dates of attendance, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, diplomas and awards received and the most recent previous school attended.)

(emphasis added). But there is nothing in the student records policy that indicates which of the listed information categories the District has selected as constituting directory information.^{12 13}

In light of the foregoing, OSPI recommends that the District update its student records policy to specify which of the listed information categories the District has selected as constituting directory information.

OSPI also recommends that both the school handbook and the student records policy contain all three pieces of information required concerning the specification of 'directory information': 1) the type of information the District has selected as constituting directory information; 2) notification

¹² The response OSPI received from the District as part of this investigation had all the listed categories highlighted, but OSPI confirmed that the official, published version of the District's student records policy does not include highlighting, signifying which of the listed categories the District has selected as constituting directory information.

¹³ The District's student records policy does clearly state that certain categories of information will not be treated as constituting 'directory information'—for example, the actual residential addresses of participants in the state Address Confidentiality Program; social security numbers; and "student identification numbers (with authentication factors such as a secret password or personal identification number)."

of a parent or eligible student's right to refuse the District's designations; and, 3) the date by which the parent or eligible student must inform the District if they wish to exercise such a refusal.

In other words, OSPI recommends that the District add requirement (1) to its school handbook and requirements (1), (2), and (3) to its student record policy.

Dated this ____ day of October, 2019.

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
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THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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