BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Portland Public School District 1J	))))	FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER (Redacted) Case No. 08-054-004

I. BACKGROUND

On January 22, 2008, the Oregon Department of Education (Department) received a written, signed complaint letter from the parent of a student in the Portland Public School District 1J (District) alleging violations of the Individuals with Disabilities Education Act (IDEA). The Department must investigate written complaints that allege IDEA violations and issue a final order within 60 days of receiving the complaint, unless exceptional circumstances require an extension.[1] The final order is within the sixty day timeline.

On February 8, 2008, the Department sent a *Request for Response* to the District identifying the specific allegation to be investigated. The District timely submitted its *Response* to the investigator and to the parent. The parent timely submitted additional materials to the investigator. The Department's complaint investigator reviewed all materials and determined that on-site interviews were not needed; but did interview the parent, the District's Legal Specialist and a supervisor from Family Life Center (The program) over the telephone. The Department's investigator reviewed and considered information from all of the documents and from the interviews in finding the facts enumerated below in Section III.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve the complaint under 34 CFR 300.151-300.153 and OAR 581-015-2030. The allegations and the Department's conclusions are set out in the chart below. The Department based it's conclusions on the Finding of Fact (Section III) and the Discussion (Section IV).

	Allegations	**Conclusions**
1.	**Disclosure of Educational Records:** The parent alleges that the District violated the confidentiality and the non-disclosure of personally identifiable information provisions of IDEA when a District employee disclosed the student's medical diagnosis and medical history to an after school childcare program	**Not Substantiated.** The Department cannot substantiate that the District employee disclosed personally identifiable information about the student's medical history and diagnosis from the student's record to an after school childcare administrator without parental consent.

1 OAR 581-015-2030(12)

	Allegations	Conclusions
	administrator without parent consent.	

III. FINDINGS OF FACT

Background Information

1. The student lives in the District and is eligible for special education as a student with a Vision Impairment, Other Health Impairment and Communication disorder. The student attends a District school.

2. The student's April 12, 2007 IEP includes:
   a. Licensed nurse care coordination per school health management plan[2], eight hours per year at the school site, provided by the Education Service District;
   b. Feeding consultation and training, four hours per year at the school site, provided by the District;
   c. A safe eating protocol, during all activities at the school site, provided by the District; and,
   d. Direct continuous care by a trained caregiver, per attached procedures, throughout the school day, at school and on field trips, provided by the District.

3. The Multnomah Education Service District (MESD) supervises the nurse who writes and monitors the health protocol for the student at the school site. The ESD trains the caregiver to support the medical needs during the school day. The MESD does not provide services for the after school program.

4. As required in the IEP, the District employs a trained caregiver to provide one-on-one direct continuous care to the student during the school day. The after school childcare program employs this same caregiver to work in the day care program after school but not as a one-on-one aide for the student.

5. From September 2007 to January 24, 2008, the student attended an after school childcare program located on school property but managed by a non-profit organization. The program provides before and after school childcare for preschool and school age children in schools throughout the metropolitan area. Parents make arrangements for their children to attend this childcare program and parents pay for the service. The program contracts with the District to use district buildings to provide the childcare.

6. The District has a standard contract which it uses to define its relationship with agencies that are using District buildings to provide before and after school childcare programs for students (Providers). The contract outlines the responsibility the Provider has regarding confidentiality and The Family Educational Rights and Privacy Act FERPA re-disclosure. The contract reads as follows:

[2] The health management plan outlines steps staff should take if the student has a seizure.

a. *"25. Confidentiality. This provision is required by statute. As required by the 20 USC 1232(g) Family Educational Rights and Privacy Act, "FERPA"), and ORS 326.565, Provider shall not disclose any information or records regarding students or their families that Provider may learn or obtain in the course and scope of its performance of this Contract.*
b. *"26. FERPA Re-disclosure. The parties recognize that FERPA imposes strict penalties for improper disclosure or re-disclosure of confidential student information, including but not limited to denial of access to personally identifiable information ("PII") from educational records for at least five years (34 CFR 99.33(e)). Therefore, consistent with FERPA's requirements, PII obtained by Provider in the performance of this Contract may not be re-disclosed to third parties without the written consent of the student's parent/guardian and must be used only for the purposes identified in this Contract."*

7. The District has a policy which outlines its practice about the release of personally identifiable information. Policy 2.50.021 – Administrative Directive (AD) delineates the following:
   a. *"Personally identifiable information shall not be released without signed and dated consent of the eligible student or student's parent(s) except in the following cases:*
      i. *The disclosure is to other school officials, including teachers, within the district who have a legitimate educational interest. As used in this section, those having a 'legitimate educational' means:*
         1) *Selected personnel of agencies contracting with the district for services to students, and their families, but only if the contract specifically limits the use of records and information and requires that the confidentiality be maintained according to federal and state law pertaining to confidentiality of student education records."*

8. The District gives notice to parents every year, via the District Parent and Student Handbook, that "The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age ("eligible students") certain rights with respect to the student's education records". These rights include the following:

   "The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent. One exception, which permits disclosure without consent, is disclosure to school officials with legitimate educational interests. School officials include, but are not necessarily limited to: persons employed by the school as administrators, supervisors, instructors, or support staff members (including health or medical staff and law enforcement unit personnel); persons serving on the School Board; persons or companies with whom the school has contracted to perform special tasks (such as attorneys, auditors, medical consultants, or therapists) or that perform tasks on behalf of the school (such as the school based threat assessment team); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in

performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. Upon request, the school discloses education records without consent to officials of another school district in which a student seeks or intends to enroll."

9. On or about January 15, 2008, the MESD supervisor contacted a District employee and asked if the after school childcare staff working with the student had sufficient training to support the student in the after school childcare setting. The MESD supervisor expressed concern about the nursing services the student was receiving in the after school program.[3]

10. On January 15, 2008, the District employee contacted the Regional Supervisor of the non-profit childcare program by phone to ask if the staff at the after school childcare program were able to accommodate the student's health needs.

11. The Regional Supervisor told the District employee that the childcare program had hired the same caregiver the District had hired to work with students during the day for the childcare program.

12. Later the same day, the Regional Supervisor sent the District employee an email which described the medical details of the student. In this email, the Regional Supervisor wrote that the student had seizure medication.

13. The Regional Supervisor from the childcare program told the District employee that the parent had provided some information on the student to the childcare staff and the childcare program felt prepared to meet the student's needs. The supervisor of the childcare program stated that the parent had not noted any specific medical needs on the student's registration form, nor had the parents provided any medication for the child.[4]

14. The parent stated that the student has never had a seizure at school, and that the student has been seizure free for the last two years.

IV. DISCUSSION

The parent alleges that a District employee disclosed a student's medical diagnosis and medical history to an after school childcare program administrator without parent consent in violation of the confidentiality and nondisclosure of personally identifiable provisions of IDEA.

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[3] Facts provided in statement numbers 10 through 14 are based on investigator's interview with District's legal specialist.

[4] The parent told the investigator that she remembered giving the day care staff information about her child's eating protocol, but was not sure that she had written down any information about the student's seizure.

1. Prior Consent to Disclose Information

Oregon law provides that each school district must keep confidential any record maintained on a child with a disability and must protect the confidentiality of personally identifiable information at all stages of collection, storage, disclosure or destruction. [5] Schools must obtain a signed and dated written consent from the parents or eligible students before disclosing personally identifiable information from a student's record, [6] unless the disclosure falls under one of the exceptions to consent.[7] Education records are "those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution."[8]

2. School Official with Legitimate Education Interest – Exception to Prior Consent to Disclose Information

OAR 581-021-0340 authorizes school districts to disclose personally identifiable information to other school officials and teachers of other educational agencies or institutions without prior consent from parents or eligible student. OAR 581-021-0250 requires school districts to adopt a policy regarding student education records, which should include "[a] statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information under OAR 581-021-0340(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest."

School districts may expand their definition of "school officials" to include contractors or agencies with whom the district has contracted to perform tasks that have a legitimate educational interest. Schools can disclose information from education records to contractors for services that it would provide for itself using its own employees. The contractor must be under the direct control of the agency or institution with respect to the use and maintenance of information from educational records. For a school district to make nonconsensual disclosure to contractors, the school district must specifically include contractors in its criteria for determining school officials in its annual notification of FERPA rights. The school district also must inform the contractor of the necessity of complying with the FERPA prohibiting re-disclosure of any personally identifiable information it receives.[9]

3. District's Response

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[5] OAR 581-021-0265. Confidentiality of Student Education Records
[6] OAR 581-021-0330 Prior Consent to Disclose Information is based on the nondisclosure regulations of IDEA at 34 CFR 300.622 and (FERPA) at 34 CFR 99.30.
[7] OAR 581-015-0340 Exceptions to Prior Consent
[8] OAR 581-021-0220(6) Definitions – Education Records
[9] Letter to Clark County (NV) School District (FPCO June 28, 2006) see http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/clarkcty062803.html/

In its Response, the District does not dispute that the District employee did not obtain prior written consent before communicating with the Regional Supervisor of the after school program. The District stated that the District employee made the phone call in response to an earlier phone conversation with the MESD Supervisor who had expressed concerns about the nursing services the student was receiving in the after school program.

The District denied that the disclosure by the District Manager to the Regional Supervisor constitutes a violation of the IDEA. The District stated that any disclosure by the MESD Supervisor or the District employee was based on personal knowledge and not the educational record, and therefore, not protected by FERPA.[10] The District's policy designates the personnel of agencies that contract with the District to provide services to students and families as "school officials with legitimate interests." The District also stated that the District's contract with the after school childcare provider includes the specific language required by FERPA notifying the agency that it must limit its use of records and information. The District stated that this expanded definition of contractors "as school officials with a legitimate educational interest" authorizes the District employee to communicate regarding educational matters with the Regional Supervisor of the childcare program without obtaining parental consent.

Based on the facts provided, it appears that the contractual relationship between the school district and the after care childcare program does not meet the requirements necessary to classify the personnel of the childcare agency as "school officials with a legitimate educational interest." While the District provides substantial assistance to the after school childcare program such as including information on this childcare program on its website and providing training to the childcare agency's staff in behavioral management techniques and school safety, the contractual agreement between the school district and the childcare agency is a rental agreement to lease space on the school campus. Based on the documents provided by the District, there is no indication that the agency is under the direct control of the District with respect to the use and maintenance of information from educational records. The Department finds that the disclosure of the District employee to the Regional Supervisor would not be authorized under an extended definition of contractor as "a school official with a legitimate interest."

Based on the lack of detail in the statements recounting what was said by the MESD supervisor, the District employee and the Regional Supervisor of the after school program, the Department cannot determine what if any personally identifiable information from the Student's record was disclosed by the District employee. Even if the Department were to infer that the District employee had communicated some personally identifiable information, the Department does not have sufficient information to determine whether the District employee relied on the education record or personal knowledge and observation.

Under OAR 581-021-0265, a school district has a duty to keep confidential any record maintained on a child with a disability. A school district must protect the confidentiality of

[10] Letter to Anonymous, 107 LRP 48036 (FPCO 2007)

personally identifiable information at every stage of the record management process: (1) collection; (2) storage; (3) disclosure and destruction.[11] Due to the close working relationship between the school district and the after school childcare program, it is even more critical to institute proper procedures for disclosing personally identifiable information by obtaining prior written parent consent before disclosing personally identifiable information about a student to an outside party.

I. CORRECTIVE ACTION

Based on the facts provided, the Department did not find violation of the IDEA, and no corrective action is ordered.

Dated this 24 day of March, 2008

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Nancy J. Latini, Ph.D.
Assistant Superintendent
Office of Student Learning & Partnerships

APPEAL RIGHTS: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which you reside. Judicial review is pursuant to the provisions of ORS 183.484.

[11] OAR 581-021-0250