

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Gresham-Barlow SD 10J

)
)
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 12-054-024

I. BACKGROUND

On August 31, 2012, the Oregon Department of Education (Department) received a letter of complaint from the parents of a child attending school and residing in the Gresham-Barlow School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The parent provided a copy of the complaint to the District.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.¹ On September 7, 2012, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated. On September 21, 2012, the District timely submitted its *Response* to the *Request for Response*. On September 26, 2012, the District submitted a *revised Response*, correcting and clarifying some of the previous *Response*. Under federal and state law, the Department must investigate written complaints that allege IDEA violations that occurred within the twelve months prior to the Department's receipt of the complaint and issue a final order within 60 days of receiving the complaint. The timeline may be extended if the District and the parent agree to extend the timeline to participate in mediation or if exceptional circumstances require an extension.² This order is timely.

The Department's contract complaint investigator determined that an on-site investigation would be necessary in this case. On October 1, 2012, the complaint investigator interviewed the parents. On October 2, 2012, the complaint investigator interviewed District staff, including an elementary school principal, a regular education teacher, a counselor, two student support services program directors, a resource methods teacher, a school psychologist, and the Executive Director of Student Services (Special Education Director). The Department's investigator reviewed and considered all of the documents and interviews in reaching the findings of fact and conclusions of law contained in this order.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under OAR 581-015-2030 and 34 CFR §§ 300.151-153). The parent's allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact in Section III and the Discussion in Section IV. This complaint covers the one year period from August 31, 2011, to the filing of this complaint on September 1, 2012.³

¹ OAR 581-015-2030; 34 CFR §§ 300.151-153

² OAR 581-015-2030(12)

³ OAR 581-015-2030(5)

No.	Allegations	Conclusions
(1)	<p><u>Rights of Inspection and Review of Education Records</u></p> <p>The complaint alleges that the District violated the IDEA by failing to provide access to the student's education records after a request to do so on or about June 1, 2012. The complaint also alleges that the District has denied access to the student's "special education testing records and/or test protocol booklets which were used to determine [the student's] eligibility for special education under IDEA at the eligibility meeting held on November 1, 2011" (OAR 581-015-2300 and 34 CFR 300.613-619).</p>	<p><u>Substantiated</u></p> <p>The District did not schedule a time for the parent to review education records until September 21, 2012. This was more than 45 days after the first clear request for access to these records was made by the parent on June 26, 2012.</p>
(2)	<p><u>Parent Participation – General</u></p> <p>The complaint alleges that the District violated the IDEA by failing to allow meaningful parent participation during an eligibility-related meeting held on June 15, 2012, by limiting the topics of discussion, by failing to answer particular questions posed by the parent and by limiting the meeting to one hour (OAR 581-015-2190 and OAR 581-015-2195 and 34 CFR 300.322).</p>	<p><u>Not Substantiated</u></p> <p>The Department has not found any indication that the parents were not allowed meaningful, informed participation at the June 15, 2012 meeting, a meeting scheduled to answer specific questions posed by the parent in various email communications several months after a determination that the student is not eligible for special education.</p>
(3)	<p><u>Evaluation and Reevaluation Requirements</u></p> <p>The complaint alleges that the District violated the IDEA by failing to timely evaluate the student following the parent's request for evaluation by conducting evaluations of the student on October 17, 2011, October 19, 2011 and October 21, 2011, and having an eligibility meeting on November 1, 2011.</p>	<p><u>Not Substantiated</u></p> <p>Districts must complete evaluations within 60 school days of receiving parental consent for evaluation. By the Department's calculations, based on calendars provided by the District during the on-site investigation, 59 school days passed between the May 24, 2011 parental consent and the eligibility meeting. The Department does not substantiate the allegation that the evaluations and the eligibility meeting were not timely completed.</p>

(1)	<p><u>Requested Corrective Action:</u></p> <p>The complaint requests the following corrective action: access to student's education records and staff training concerning the complaint allegations.</p>	<p>See Corrective Action</p>
-----	---	------------------------------

III. FINDINGS OF FACT

Background:

1. The student in this case is presently 11 years old and is enrolled in a home school cooperative, beginning with the 2012-2013 school year. The student last attended school in the District as a fifth grade regular education student during the 2011-2012 school year.
2. The District completed evaluations of the student in October 2011.
3. On November 1, 2011, the evaluation team, including one of the parents, determined at an eligibility meeting held on November 1, 2011 that the student is not eligible for special education as a student with a Specific Learning Disability (SLD) and/or Other Health Impairment (OHI).

Access to Student Education Records

4. On May 14, 2012, six months after the November 1, 2011 eligibility meeting and determination that the student was not eligible for special education in the eligibility categories of Specific Learning Disability (SLD) and Other Health Impaired (OHI), the parent asked several questions in an email concerning the students "test results from November 2011." The parent expressed concern that the student's last report card "showed declines in many areas."
5. Following additional email and letter communication with additional questions posed by the parent, District staff scheduled a meeting for June 6, 2012, to allow District staff to answer the parent's questions. The District rescheduled this meeting to June 15, 2012, to avoid holding the meeting during student instructional time.
6. In an email sent on June 14, 2012, District staff indicated to the parent that the purpose of the meeting "is not to determine special education eligibility or develop an IEP." District staff also stated in this email that they were "hopeful that an hour will be sufficient time for us to meet and address your concerns."
7. In a June 1, 2012 email, the parent asked that the District "please have all files, work samples, tests, etc. available for review in the event our review and discussion leads to other aspects of [the student's] testing." In another email dated June 14, 2012, the parent asked District staff to "please make sure to have all of [the student's] special education tests available. Likewise, it is probably important for the examiners to have the testing manuals available in case they need to find out the answer from the manual, or tell me the question [the student] was asked for a test item. I also have requested information for [the student's] DIBELS/reading screens and have requested you provide access to those reading passages which show [the student's]

errors." The parent acknowledged that the meeting had been scheduled for one hour but stated it "will be very important to not have our time limited * * *."

8. During the June 15, 2012 meeting, attended by both parents and a parent advocate, District staff sought to answer the questions previously posed by one of the parents. The meeting minutes state that the parent sought a better understanding of the student's learning difficulties and how to best help the student, and that the parent feels the student has additional needs.
9. At the advocate's request, the School Psychologist discussed cognitive assessment questions from the student's October, 2011 evaluations. The school psychologist provided the physical "WISC-IV" testing protocol to allow the parent and advocate to view the cover, but when the parent advocate attempted to view the rest of the protocol, including the questions and the psychologist's notes on the back of the testing booklet, and when the parent advocate began to take notes, the school psychologist asked for return of the protocol.
10. The meeting minutes state that the parent and the parent advocate asked to "stay at school and look at protocols", presumably after the meeting, but District staff (a Principal and the School Psychologist) stated that special education staff would need to be present. During the on-site investigation, the School Psychologist stated that the close review of the testing protocol and notes was not allowed at the June 15, 2012 meeting due to the belief that close review of the testing protocol and notes were beyond the stated purpose of the meeting, which was to answer specific questions previously posed by one of the parents. The School Psychologist also recalled telling the parent they had a right to view the testing protocol and notes, but simply could not do it at the June 15, 2012 meeting.
11. A June 21, 2012 email from the parent states that during the June 15, 2012 meeting the School Psychologist "very clearly stated we did not request to specifically look at that document [the WISC-IV protocol] so we would have to contact Support Services to arrange viewing of this document." The meeting minutes include on the last page a statement of "Additional Questions", which includes the request to see the WISC-IV protocol. The School Psychologist offered to set up a meeting to allow review of the student's WISC-IV testing protocol and notes at a later time, with special education staff present because of security concerns concerning the WISC-IV testing protocols, which are copyrighted. The School Psychologist did not hear directly from the parents to set up this meeting.
12. On June 22, 2012, one of the parents met with a District Program Director to view the student's education records. However, the day before the Program Director told the parent that the testing protocols would not be available to view because they are copyrighted and are sole possession documents that are not education records. During the on-site investigation, this particular Program Director confirmed the belief that the testing protocols and notes written thereon are sole possession documents and are not student education records, and noted that all other education records of the student were available but the parent declined to view them.
13. In a June 26, 2012 email to the Special Education Director, the parent stated that "I would like to view, not copy, all tests [the student] was given as part of [the student's] evaluation for qualification for special services, including working notes, observations and any other bit of information on [the student]. I have no interest in copying test questions or answers."
14. On June 27, 2012, the Special Education Director wrote a letter to one of the parents which included a discussion "in regards to your request to have access to testing protocols and psychologist's personal notes taken during the testing." This letter states that "psychological and academic evaluation protocols are not considered education records. They are considered

sole possession documents” and the letter concludes that “access to test protocols is limited to the individual who administered the assessment. This includes any notes the test administrator takes during the testing session to help her in writing her evaluation summary. Everything that is allowable to be shared with the parent from the testing situation is provided in the evaluation summary, which the school psychologist writes and provides to the parent during the eligibility meeting.”

15. During the on-site investigation, the Special Education Director explained that she believed the parent wanted copies of the testing protocols and notes, as opposed to just the opportunity to view these items. Later email communication, dated August 29, 2012, indicates that the Special Education Director still believed that the parents wanted to copy the testing protocols, as opposed to just viewing the testing protocols.
16. Email communication provided in the response, reveals that the District’s confusion was finally resolved on August 29, 2012, when the parent stated they “want to VIEW everything around the testing done on [the student], including protocols and notes from those who administered the tests”, and the Special Education Director’s August 30, 2012 email repeating the June 26, 2012 request, stating that “Given your clarification that you only want to view the protocol showing your son’s responses rather than actually getting a copy of it or writing down the items in the protocol, we can go in a different direction.” The Special Education Director then scheduled a meeting for the parent to meet with the School Psychologist who did the testing to review the testing protocols and discuss the student’s responses, including the notes that the School Psychologist wrote on the protocols.
17. On September 21, 2012, following several email communications, one of the parents met with the School Psychologist and two Program Directors, and all reviewed the testing protocols and the notes thereon. At this time, the parent reviewed all requested testing protocols, including the notes handwritten thereon.

Parent Participation

18. The June 15, 2012 meeting is detailed in finding #3, above.

Evaluation and Reevaluation Requirements

19. On April 6, 2011, more than one year preceding the filing of the complaint in this case, the District’s “Student’s Assistance Team” (SAT) referred the student to the District’s “Student Study Team (SST) to determine whether an evaluation for special education should be completed.
20. The District completed the evaluations in October of 2011 and held the eligibility meeting on November 1, 2011. The November 1, 2011 eligibility meeting occurred 59 school days after the May 24, 2011 consent to evaluation.

IV. DISCUSSION

Student Education Records

The parent first alleges that the District violated the IDEA by failing to provide access to the student’s “education records,” specifically the WISC-IV testing protocols and the examiner’s notes

written thereon, after a request to view these items was made by the parent on or about June 1, 2012.

The Department first observes the threshold issue is whether the Department may investigate and issue findings concerning this allegation of failure to provide access to the student's education records based on a request made six months after the determination that the student is not eligible for special education at an eligibility meeting held on November 1, 2011. Indeed, the parent began requesting the testing protocols and notes seven months later, in June of 2012, related to the October, 2011 evaluations.

However, under OAR 581-015-2030, the Department is authorized to investigate and issue findings related to alleged violations of the IDEA or regulations under that Act which occur not more than one year before the date the complaint is received by the Department. The protections of the IDEA apply both to students determined eligible for special education as a student with a disability, and in some circumstances a student suspected of being eligible for special education as a student with a disability.

The Department concludes that the Department possesses the authority to investigate and issue findings under the circumstances of this case because the records request, although somewhat attenuated, relates to the October 2011 IDEA educational evaluations and the November 1, 2011 IDEA eligibility meeting, all designed to determine whether the student should qualify under the IDEA or should be considered a student with a disability requiring special education services, under the authority of the IDEA.

OAR 581-015-2300 provides the basis for parental access to IDEA records and states that

(1) For purposes of ensuring the safeguards required for education records of children with disabilities, including early intervention and early childhood special education records, the Department adopts by reference the provisions of FERPA, 34 CFR 99.1 to 99.38, the IDEA, 34 CFR 300.610 to 34 CFR 300.627 and 34 CFR 303.401 through 303.411.

(a) For children with disabilities under age three, references to a "student" in these rules means an infant or toddler with a disability.

(b) For children with disabilities under age three, "student records" means EI records.

(2) This provision includes all education records with respect to:

(a) The identification, evaluation, and educational placement of the child; and

(b) The provision of a free appropriate public education to the child.

(3) The program, district, agency, or contractor must comply with a parent's request to inspect and review records without unnecessary delay and within the following timelines:

(a) For children under age three, before any meeting regarding an IFSP, or any hearing pursuant to 303.430(d) and 303.435 through 303.340, and in no case more than 10 days after the request has been made.

(b) For children over the age of three, before any meeting regarding an IEP/IFSP, or any due process hearing, or resolution session related to a due process hearing, and in no case more than 45 days after the request has been made.

Further, the IDEA specifically requires that parents must be permitted the right to *inspect* and *review* their children's education records and personally identifiable information collected, maintained, or used by the agency.⁴ Education records are defined in both IDEA and the Family Educational Rights and Privacy Act (FERPA) as "records that are directly related to a student [and] maintained by an educational agency or institution..."⁵ The student's testing protocol/booklet and

⁴ 34 CFR 300.613

⁵ 34 CFR § 99.3 and 34 CFR 300.611(b)

the testing notes for the student which were written on the protocol are at issue here, and these items concern the evaluation of the student as related to the IDEA and directly relate to the student. They were maintained by the District and used for eligibility and evaluation purposes. As such, they are education records for the student and covered under IDEA's provisions for parental access rights.⁶ Test protocols constitute education records under the IDEA and FERPA when they are intermingled with personally identifiable information.⁷ If a test booklet contains information directly related to a student, then it is an educational record. The US Department of Education's Office of Special Education Programs has noted that when copyright law conflicts with IDEA's requirements to provide copies of records (or as seen here test booklets) to parents, districts should seek other ways to allow for inspection or contact the copyright holder in order to determine if a summary of the assessment may be provided instead of a copy.⁸ A sole possession record is not an education record under FERPA. These records are defined as records made by instructional or administrative personnel, kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute.⁹

The documents provided by the District in support of its *Response* to the Department's *Request for Response* reveal reasonable confusion about precisely what was being requested by the parent in this case. The District first thought the parent was requesting only a copyrighted test booklet and general test items and protocols. The fact that the parent advocate began taking notes while looking at the testing protocol during the initial meeting, and did not explain what they were noting, reasonably raised District staff's concerns for the integrity of test materials and the copyrighted WISC-IV testing protocol, as did the limited amount of time scheduled for the June 15, 2012 meeting. Generally, federal copyright law protects against the distribution of copies of copyrighted documents, such as a test protocol. By contrast, the IDEA and FERPA generally do not require distribution of materials, but rather access to them, so copyright law typically should not be implicated under these regulations¹⁰. Additionally, both IDEA and FERPA require districts to respond to reasonable requests for explanations and interpretations of education records. Such an explanation could entail a review and interpretation of an answer sheet for maintained educational records¹¹. The meeting notes indicate that there was a "request to see WISC-IV protocol" an additional question from the parent. This request did not indicate a specific request to see any education records related to the student individually or the student's actual responses to the WISC-IV. However, in a subsequent email dated June 26, 2012, the parent clearly stated that, "...I would like to view, not copy, all tests the student was given as part of student's evaluation for qualification for special services, including working notes, observations, and any other bit of information on my [child]." This is sufficient to reasonably notify the District of a request for student education records as related to the IDEA. The District maintains the responsibility of providing parents with the ability to view and access education records under both FERPA and the IDEA.¹² Again, on August 30, 2012, the parent requested and clarified in email to the District that the parent did not want to copy the testing protocols and notes generally, but simply wanted access to the protocol and notes as related to the student's responses during the evaluation, this time the parent used capital letters in the email to stress that only a request to "VIEW everything around the testing done to student..." was being made. After this series of correspondence, the District scheduled a time for the access of education records to occur so that the parent could review and inspect the education records related to the student evaluations. This review occurred on September 21, 2012, about 87 days from the parent's first request for access to these records. The parent ultimately received access to

⁶ 34 CFR 300.613(a)

⁷ OSEP Letter to Price, October 12, 2010

⁸ *id*

⁹ Letter to Thomas, FPCO 1986 and Letter to Dempsey FPCP 2009

¹⁰ OSEP Letter to Shuster, August 7, 2007

¹¹ 34 CFR 300.613

¹² OSEP Letter to Anderson, March 7, 2008

all of the requested documents; however, the records were not provided within the required 45 days.¹³ Although there was some confusion among District staff about what precisely the parent wanted, the District remains responsible for providing parents with access to education records and clarifying the requests if necessary in order to determine if an appropriate request is being made.

OAR 581-015-2300 requires that, in no case must records be provided more than forty-five days after the request. Under the particular circumstances of this case, the Department substantiates the allegation that the District violated the IDEA by failing to provide access to the student's education records within 45 days after the request was made.

Parent Participation

The complaint alleges that the District failed to allow meaningful parent participation during the June 15, 2012 meeting which was held to further discuss the October, 2011 evaluations and how to further help the student. It is important to note that this meeting was not considered an IEP meeting nor set to determine special education eligibility. Instead, the meeting was held to answer parent questions and concerns. As such, there are no specific state or federal IDEA requirements for parent participation for this particular kind of meeting.

This notwithstanding, the Department still could not find any indication that the parents were not allowed meaningful, informed participation at the June 15, 2012 meeting, a meeting scheduled to answer specific questions posed by the parent in various email communications several months after a determination that the student is not eligible for special education.

The meeting minutes from the June 15, 2012 meeting reflect full participation of parents in an hour-long meeting held specifically at the parent's request. Additionally, the parent was allowed to record this meeting, because parent "found it very difficult to participate without recording." The fact that the time of the meeting was limited and the failure to address all areas of inquiry raised by the parent at that time does not mean that the parent was not allowed the opportunity to fully participate in the meeting. The District was willing to schedule additional opportunities for discussions with District staff, and the School Psychologist was clear that the parents could view the testing protocols at a future meeting. Therefore, the Department does not substantiate this allegation. Timeliness of District response to request for access to records is addressed in the preceding discussion of student education records.

Evaluation and Reevaluation Requirements

The complaint alleges that the District violated the IDEA by failing to timely evaluate the student following the parent's request for evaluation by conducting evaluations of the student on October 17, 2011, October 19, 2011 and October 21, 2011, and having an eligibility meeting on November 1, 2011.

OAR 581-015-2110 requires evaluations to be completed within 60 school days from written parent consent to the date of the meeting to consider eligibility. Oregon defines school days as any day, including partial days that children are in attendance at school for instructional purposes. The term "school day" has the same meaning for all children in school, including those with and without disabilities.¹⁴

¹³ OAR 581-015-2300 and 34 CFR 300.613

¹⁴ OAR 581-015-2000(6)(b)

Whether this allegation is addressing the delay between the October, 2011 evaluations and the November 1, 2011 eligibility meeting, or the time between the May 24, 2011 parental consent for evaluation and the November 1, 2011 eligibility meeting, OAR 581-015-2110(5)a) provides for both and notes that the evaluation must be completed within 60 school days of the written parent consent. By the Department's calculations, based on calendars provided by the District during the on-site investigation, 59 school days passed between the May 24, 2011 parental consent and the eligibility meeting. The Department does not substantiate the allegation that the evaluations and the eligibility meeting were not timely completed.

CORRECTIVE ACTION¹⁵
In the Matter of Gresham-Barlow School District
 Case No. 12-054-024

Corrective Action Background:

Access to student education records is one of the procedural safeguards in IDEA found at 34 CFR §300.613 and referenced in OAR 581-015-2300 and the Notice of Procedural Safeguards. (See below.)¹⁶

The District's response included policies and procedures that properly identify requirements related to access and timelines for student education records.

Actions	Submissions ¹⁷	Due By
District personnel at all levels who are responsible for responding to requests for student education records will review the District's policy and procedures for	Evidence of this completed review, including: a. Copy of information and date reviewed;	November 30, 2012

¹⁵ The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed (OAR 581-015-2030(13)). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order (OAR 581-015-2030(15)). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction (OAR 581-015-2030(17) & (18)).

¹⁶ **Sec. 300.613 Access rights.**

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Sec. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510 and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes--

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

¹⁷ Corrective action submissions and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone — (503) 947-5722; e-mail: raeann.ray@state.or.us; fax number (503) 378-5156.

<p>responding to parent requests for access to records within this timeline, as explained in this final order.</p>	<p>b. Names/positions of staff; and c. Description, procedure, or flowchart identifying how these policies and procedures will operate through the year including, but not limited to, times of staff changes, absences, or non-business days.</p>	
--	--	--

Dated: October 30, 2012



Petrea Hagen Gilden
Interim Assistant Superintendent
Office of Student Learning & Partnerships

Mailing Date: October 30, 2012

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.

Additionally, the Department of Education will not reconsider Complaints after a Final Order had been issued pursuant to OAR 581-015-2030(14)(b).