

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter Portland SD 1J

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 12-054-032

I. BACKGROUND

On October 26, 2012, the Oregon Department of Education (Department) received a letter of complaint from the parent (Parent) of a child (Student) then attending school and residing in the Portland 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 November 2, 2012, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated. Thereafter, the parties agreed to suspend the complaint timeline pending mediation and, on November 30, 2012, the Department sent a letter extending the complaint timeline by three weeks. Mediation was unsuccessful and the District timely mailed its *Response* to the *Request for Response* on December 5, 2012. The Parent provided a *Reply*, received on December 12, 2012. The Department’s contract complaint investigator (complaint investigator) determined that an on-site investigation would be necessary in this case, and conducted a telephone interview with the Parent on December 18, 2012. However, due to unavailability of District staff during the District’s winter break which began on December 17, 2012, the complaint investigator was unable to meet with the District’s legal counsel until January 2, 2013. On January 7, 2013, the Department sent a letter extending the complaint timeline by an additional 14 days due to unavailability of District staff during the winter break, with the final order due by January 29, 2013. This order is timely.

As noted above, the complaint investigator interviewed the Parent by telephone on December 18, 2012 and interviewed the District’s legal counsel on January 2, 2013, after legal counsel obtained information from appropriate District staff. The District has continued to provide information to the complaint investigator, at the complaint investigator’s request – and the Parent has provided additional information in response to the additional information provided by the District. The complaint investigator reviewed and considered all of the documents 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 (2010). 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 October 27, 2011 to the filing of this complaint on October 26, 2012.² In the Department’s *Request for Response* issued

¹ OAR 581-015-2030; 34 CFR §§ 300.151-153 (2010)

² OAR 581-015-2030(5)

in this case on November 2, 2012, the Department determined that all but three of the allegations overlapped with the allegations made in the Parent's due process complaint. The due process matter has since been dismissed. However, the Department concludes that the allegations in the complaint other than the three areas of investigation identified in the *Request for Response* are allegations that are beyond the appropriate scope of complaint investigation because they are complaints regarding teachers' professionalism or ethics (allegations of falsification of records and failure to keep the Student safe) and such complaints may be filed with the Oregon Teacher Standards and Practices Commission (TSPC). Their online complaint form may be accessed at: <http://www.tspc.oregon.gov/forms/0045.pdf>.

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 the Student's education records to the Parent.</p> <p>Relevant Law: OAR 581-015-2300 and 34 CFR 300.501 and 34 CFR 300.405(a).</p>	<p><u>Not Substantiated</u></p> <p>The IDEA requires that a parent be permitted to inspect and review any education records related to their children that are collected, maintained, or used by the agency under the IDEA. The agency must comply with such a request without unnecessary delay and before any meeting regarding an IEP, or any hearing or resolution session, and in no case more than 45 days after the request has been made. The available evidence here does not demonstrate that the Parent made requests for the Student's education records in November and December 2011. Concerning additional requests made by the Parent, the Department finds that the District either timely provided the requested records, or finds that the documents requested are not education records. Thus, the Department does not sustain the allegation that the District failed to timely provide the Student's education records to the Parent.</p>
(2)	<p><u>Parent Participation – General</u></p> <p>The complaint alleges that the District violated the IDEA by refusing to allow the Parent to attend "transfer meetings" concerning the Student.</p> <p>Relevant Law: OAR 581-015-2190 and OAR 581-015-2195 and 34 CFR 300.322</p>	<p><u>Not Substantiated</u></p> <p>The District did not exclude the Parent from any meetings at which the team made a placement determination. OAR 538-015-2245 sets forth the requirement that Districts provide a continuum of placements to meet the needs of children with disabilities for special education and related services. In this case, the District properly made a placement decision in a properly noticed IEP meeting in which the Parent participated. The determination of which special class the Student would attend is not a placement decision, and the distinction between the</p>

		external and fragile behavior classroom does not implicate placement in this case, but only the location of the placement. The Department does not sustain this allegation.
(3)	<p><u>Evaluation and Reevaluation Requirements</u></p> <p>The complaint alleges that the District violated the IDEA by failing to test (evaluate) the Student for learning disabilities.</p> <p>Relevant Law: OAR 581-015-2105 and 34 CFR 300.301 and 34 CFR 300.303.</p>	<p><u>Not Substantiated</u></p> <p>The District followed the required procedure and the available documentation does not demonstrate that the Parent disagreed during the meeting on October 18, 2012 with the determination that it made sense to allow the Student additional time in a consistent classroom environment and to reconsider additional evaluations at the end of the semester. Additionally, although the Parent signed a consent to evaluate, on November 16, 2012, the Parent has not made the Student available for evaluation by the District. The Department does not sustain this allegation.</p>
	<p><u>Corrective Action:</u></p> <p>Generally, the complaint requests the following corrective action concerning the allegations being investigated in this case: "provide all records pertaining to child" and "test for learning disabilities."</p>	<p><u>No Corrective Action is Ordered</u></p>

III. FINDINGS OF FACT

1. The Student in this case is presently 10 years old and attended third grade in the District until November 30, 2012 when the Parent stopped sending the Student to school in the District.
2. The Student is eligible for special education as a Student with an Emotional Disturbance, Other Health Impairment and Communication Disorder.
3. The Student attended a special school (Pioneer) beginning mid-kindergarten until the first half of third grade (the 2011-2012 school year).
4. On January 3, 2012 the Student's placement changed to a special class which the Student began attending on January 3, 2012. By agreement between the Parent and the District, the Student remained in the third grade which the Student attended from the beginning the 2012-2013 school year until the removal of the Student from school on November 30, 2012. The Student began the school year in another special class.

5. The Student's current IEP, dated May 16, 2012, provides for a placement of "Special Class Externalizing Behavior Class."

Rights of Inspection and Review of Education Records

6. The Parent reports requesting student education records from the special school the Student attended from mid-kindergarten until December 2011, and provided two email messages dated from September 2011, which were sent to the administrator of the special class. These email messages request academic records, but do not clearly make a request for all of the Student's education records. Additionally, these email messages were sent more than one year preceding the filing of the complaint in this case.
7. Prior to the District's *Response* in this case the Parent clarified that the Parent requested records in November and December 2011 and again in June 2012. The Parent alleges that the Parent did not receive and to date has not received all of the records from the special school which the Student attended until December 2011. The Parent attached to the Parent's *Reply* two email messages dated September 12, 2011 sent to the administrator of the special class. As noted above, these email messages do request various academic records but do not clearly make a request for all of the Student's education records. The Parent's *Reply* states that the Parent confirmed in November and December 2011 that the Parent wanted the official cumulative file from the special school so the Parent could understand what the special school sent to the Student's upcoming new placement, a special class. The Parent's *Reply* does not include email or any evidence of other records requests from November and December 2011.
8. The District has no record of any request for the Student's education records in November and December 2011, and due to a lack of investigatory jurisdiction,³ the District was not required to address whether or not it responded to the documented requests that were made outside of the one year timeline of the filing of the complaint.
9. The administrator of the special school recalled only a verbal request for copies of incident reports concerning the Student when the Student still attended the special school. The Parent states that the Parent did not request incident reports because the Parent has copies of the incident reports.
10. The District's records reveal the following records-related requests from the Parent within one year preceding the filing of the complaint in this case:
 - a. a June 13, 2012 email request for information concerning the Student and copies of the Student's school work;
 - b. a June 16, 2012 email request for a copy of the file sent to the Student's special class from the special school;
 - c. a July 11, 2013 email request for a copy of the transfer file from the special school to the special class;
 - d. a July 18, 2012 email request for "everything" from the special school, including teacher and therapist notes; and

³ See OAR 581-015-2030(5)

- e. a September 26, 2012 email request for a copy of the Student's "ESL" file.

11. The District reports responding to the request in the following manner:

- a. The District responded to the first request noted above, made on June 13, 2012, by sending a copy of the Student's IEP progress notes to the Parent on July 10, 2012.
- b. The District stated it experienced difficulty obtaining copies of school work at this time, because the Student's teacher was on leave at the end of the school year. The District provided a packet of the Student's school work from the special school at an IEP meeting on August 28, 2012.
- c. For the requests made on June 16, 2012 and July 11, 2012, the District mailed a copy of the Student's cumulative file to the Parent on July 19, 2012. In the Parent's *Reply*, the Parent notes that the cumulative file received by the Parent in July 2012 contains suspension reports from 2009 and another elementary school but none of the suspension reports from the special school. From this, the Parent concludes that the special school lost the Student's file "for their convenience."
- d. District staff indicated that the special school does not maintain minor disciplinary documentation beyond the end of each school year.
- e. Concerning the July 18, 2012 request "for everything," the administrator of the special school reported to the District that there were no additional records but that the administrator would check with teachers and therapists upon the return of staff on August 29, 2012.
- f. The administrator obtained three pages of documents which include a progress report dated September 20, 2011 which is signed by the Parent, a letter to the Parent from District staff dated September 21, 2011, and a letter from the Parent to District staff dated September 22, 2011. A note on the progress report states it was delivered to the Parent on September 10, 2012 during a meeting, but the District staff person who made that note has no independent recollection of doing so, and the Parent states these three pages of documents were not received on September 10, 2012; otherwise, these three pages would have been received by the Parent as part of the District's *Response* in this case, dated December 5, 2012.
- g. In response to the fifth request noted above, made on September 26, 2012, a District principal spoke to the ESL teacher on September 27, 2012, and within that week provided the Parent with the Student's ESL records provided to the principal by the teacher.

12. In the Parent's *Reply*, the Parent notes that the ESL records received from the principal are only three pages and that the Parent previously received a significantly larger ESL file from the District (from the special class which the Student began attending on January 3, 2012).

13. The principal reported that they did not obtain these ESL records from the ESL File (rather than from the Cumulative Student file).

Parent Participation

14. Prior to the District's *Response* in this case the Parent clarified that the allegation that the District refused to allow the Parent to attend transfer meetings refers to meetings occurring

during the Student's transfer from the special school to the special class in late 2011 or early 2012.

15. The Parent attended, and at one of the meetings participated by telephone, the IEP meetings held concerning the Student's transition from the special school placement to the special class placement. These meetings occurred on October 12, 2011 (the meeting at which the decision to change the placement to a special class occurred, with the attendance at the special class to begin on January 3, 2012), May 16, 2012 (an annual IEP meeting), May 25, 2012 (the meeting in which the Parent participated by telephone and during which the team agreed to a placement of home instruction as in interim placement), May 30, 2012 (a meeting at which the team could not reach a consensus and, despite the disagreement of the Parent, continued the placement of home instruction to June 13, 2012 to be followed by a return to a placement of a special school), June 12, 2012 and August 28, 2012 (a meeting at which the team changed the Student's placement back to a special class, which by agreement would be a different special class than the special class previously attended by the Student).
16. At the time of the decision to change the Student's placement to a special class, at the October 12, 2011 meeting, the District had recently begun blending the "External" behavior classroom with the "Fragile" behavior classroom, based upon factors including the desire to keep Student closer to home. Thus, placement in the special class did not require a determination of whether the Student would be placed in an external or fragile behavior classroom. By the end of the 2011-2012 school year the District no longer considered placement in an external or fragile behavior classroom a distinction, but considered placement in either to be placement in a special class because all were behavior classrooms which served a variety of students. Some confusion may have existed in the District concerning this issue, and the Parent may have been told that there was a distinction between placement in an external or fragile behavior classroom, but there really was no longer a distinction made and all were considered a special class at the time.

Evaluation and Reevaluation Requirements

17. On September 26, 2012, the Parent sent an email to District staff which included a request that the District evaluate the Student for a possible learning disability. On October 3, 2012, the District issued a notice of a meeting on October 18, 2012, and states that the purpose of the meeting is to determine whether additional testing is needed and to review the Student's IEP. At the October 18, 2012 IEP meeting, the team considered a private evaluation obtained in April 2012 by the Parent. District staff proposed allowing more time in the Student's current classroom, which the Student began attending only about six weeks before the October 18, 2012 meeting (at the beginning of the 2012-2013 school year), to see how the Student progressed. The Parent noted that the Parent had consulted with a private speech pathologist, and District staff stated they would ask for the results when available. A Prior Written Notice (PWN) issued by the District on October 19, 2012 noted review of the Parent's private evaluation but did not otherwise specifically address the evaluation request. Another PWN issued by the District on October 29, 2012 (after filing of the complaint in this case on October 26, 2012) states that the team considered the Parent's request for an evaluation for a possible specific learning disability and that the team decided that the Student would benefit from additional instruction in a stable situation before conducting this evaluation, and that the team agreed to consider the evaluation request again at the end of the first semester. The PWN also states that the Student had several recent evaluations, including a psychological evaluation on May 10, 2012, a speech-language report dated May 15, 2012 and the Parent's "CDRC evaluation" report dated May 4, 2012 (from an April 17, 2012 evaluation of the Student). The PWN also states that the Student "started a new school this fall, moved to a different classroom

shortly after school started, and [the Student] is just now experiencing some stability in [the Student's] school program." The PWN also states that the Student "will not be adversely affected by waiting until the end of the semester to reconsider whether additional evaluation is needed because [the Student] is receiving intensive academic support through [the Student's] current IEP."

18. On November 16, 2012, the District agreed to complete an additional evaluation of the Student, and the Parent signed a parent consent form on that date. The Parent removed the Student from attendance at the District on November 30, 2012, and the Student has not been available for evaluation by the District.

IV. DISCUSSION

Review of Education Records

The complaint, as clarified by the Parent, alleges the District violated the IDEA by failing to provide to the Student's education records following requests made by the Parent in November and December 2011 and again in June 2012.

The Family Educational Rights and Privacy Act (FERPA) protects the privacy interests of educational records for parents and eligible students. FERPA defines an education record as a record that is directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.⁴ Parents have a right to access educational records under both FERPA and the IDEA. Under FERPA, a school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days following its receipt of a request.⁵ IDEA adds the additional requirements that education records be provided without unnecessary delay and before any IEP meeting or any Due Process or Resolution Session.⁶ Not all documents associated with a student are considered education records. The Supreme Court has made clear that parental access to "educational records" does not extend so far as to allow access to each and every individual piece of student work.⁷ Additionally, Oregon's archive rules direct school districts that some documents should be maintained for certain periods of time, these include Special Education and behavioral records.⁸

In this case, the available evidence does not demonstrate that the Parent made requests for the Student's education records in November and December 2011. Thus, the Department does not sustain the allegation that the District failed to timely provide the Student's education records following requests in November and December 2011.

Concerning the documented request made on June 13, 2012, the District timely provided progress reports to the Parent within 45 days of this request. Although the District did not provide a "packet" of the Student's school work to the Parent until August 28, 2012, the Department concludes that this school work is not included in the definition of education records, because this school work is not "maintained" by the District. Thus, the Department finds that the District did not violate the IDEA concerning the Parent's requests made on June 13, 2012.

⁴ 34 CFR § 99.3

⁵ *Id.*

⁶ 34CFR 300.613(a)

⁷ *K.C. and A.C. v. Fulton County School District*, 46 IDELR 39 (citing *Owasso Indep. Scho. Dist. No. 1-011 v. Falvo*, 534 U.S. 426, 2002).

⁸ OAR 166-400-0060 Student Education Records

Concerning the second and third documented requests, made on June 16, 2012 and July 11, 2012, both of which requested the cumulative file, the District timely provided the cumulative file to the Parent on July 19, 2012. Concerning the fourth documented request, made on July 18, 2012, for "everything" from the special school, the Department finds that copies of only three documents were not provided to the Parent which include a progress report dated September 20, 2011 (which is signed by the Parent), a letter to the Parent from District staff dated September 21, 2011, and a letter from the Parent to District staff dated September 22, 2011. The Department finds that none of these documents are education records, as defined above. Specifically, one of the documents is an informal progress tracking sheet and two of the documents are letters relating to that document. None of these are documents that the District would maintain nor are they items that would be placed in a cumulative file for the Student. As such, the District was under no FERPA or IDEA obligations with respect to the delivery of these documents for inspection or review purposes. Thus, the Department does not find any violation concerning these documents. Finally, concerning the last documented request, made on September 26, 2012, a District Principal obtained documents directly from the ESL teacher and timely provided those to the Parent (i.e. within the 45 day timeline). The fact that these ESL documents did not contain all ESL documents previously provided to the Parent by the District is explained by the fact that the Principal obtained the ESL records directly from the teacher, and demonstrates that the Parent had previously, timely received other ESL records concerning the Student. The Department does not sustain this allegation.

Parent Participation

The complaint, as clarified by the Parent, alleges that the District violated the IDEA when it refused to allow the Parent to attend transfer meetings occurring during the Student's transfer from the special school to the special class in late 2011 or early 2012. However, the available evidence clearly shows that the Parent attended and participated in no less than six IEP meetings from October 12, 2011 through August 28, 2012. The District did not exclude the Parent from any meetings at which the team made a placement determination. Thus illustrating the Parent did participate during that time. Oregon law speaks to placement in OAR 581-015-2245, which sets forth the requirement that Districts provide a continuum of placements to meet the needs of children with disabilities for special education and related services. Parents are entitled to participate in the determination of placement for their child along with a group of persons who are knowledgeable about the child, the meaning of the evaluation data, and the placement options.⁹ However, simply changing the location where a student receives services alone does not amount to a change in educational placement. Several factors are relevant in determining whether a change would amount to a change in the student's educational placement, including: (1) whether the child will be able to be educated with nondisabled children to the same extent, (2) whether the child will have the same opportunities to participate in nonacademic and extracurricular services, and (3) whether the new placement option is the same option on the continuum of alternative placements.¹⁰ In this case, the District properly made the placement decision in properly noticed IEP meetings in which the Parent participated. At the time of the meetings, the Student was attending a special school in the District specifically for students of a certain disability type. All of the classes in the school serve students with this particular disability thus they are all "special classes" and the same option on the continuum of placement. The determination of which special class the Student would attend at this meeting is therefore not a "placement decision," and the school's distinction between using its "B class" or its

⁹ See OAR 581-015-2250(1)(a)

¹⁰ *Savoy v. District of Columbia* (Civ. Action 11-145, February, 21, 2012)

"Fragile B" classroom does not implicate placement in this case, but rather the location of the placement itself.¹¹ The Department does not sustain this allegation.

Evaluation and Reevaluation Requirements

The complaint alleges that the District violated the IDEA by failing to evaluate the Student for learning disabilities. Upon receiving a request for evaluation, a District must consider the request and respond to the parent.¹² If refusing the request, the District must provide a prior written notice documenting its reasons.

The Student was eligible for three IDEA Disability categories when this request was made. As such, this request would be considered a request for reevaluation under Oregon Administrative Rules. Here, the District followed the required procedures for a reevaluation. The Parent's request was discussed at an IEP team meeting held on October 18, 2012, along with the input of the other IEP team members who thought the Student would be better served if the Student was allowed some time to settle into the classroom and benefit from academic instruction before conducting a new special education evaluation. The District also gave the Parent written notice of this decision.

Following the filing of this complaint, the Parent signed a consent to evaluate, on November 16, 2012. According to the District's 2012-2013 calendar, the District was not in session and did not have school the entire week of November 19, 2012 through November 23, 2012 (around the Thanksgiving holiday). The Student has not attended school in the District since November 30, 2012, so the only possible days to evaluate the Student were November 26, 2012 through November 29, 2012. The district has initiated the Specific Learning Disability evaluation requested by the Parent since the filing of the complaint, but as the Student is no longer attending school in the District, further evaluation efforts have been frustrated. Thus, the Department finds that the Parent has not made the Student available for evaluation by the District. The Department does not sustain this allegation.

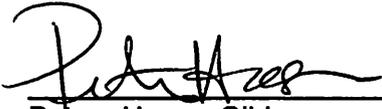
¹¹ See *OSEP Letter to Trigg*, November 30, 2007

¹² OAR 581-015-2310

CORRECTIVE ACTION¹³
In the Matter of Portland School District
Case No. 12-054-032

The Department does not order any Corrective Action resulting from this investigation.

Dated: January 28, 2013



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

Mailing Date: January 28, 2013

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

¹³ 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)).