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Linda McCulloch
Superintendent

November 26, 2001

***** and *** *****
P. O. Box ***
***** , MT *****

*** ***** , Superintendent
***** Public Schools
P.O. Box ***
***** , MT *****

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **Final Report**

In the Matter of ****, 2001-06, Alleged Violations of the Individuals With Disabilities Education Act (IDEA).

Dear Mr. and Mrs. ***** and Superintendent *****:

Pursuant to A. R. M. §10.16.3662, this is the Final Report pertaining to the above-referenced special education compliance complaint (the "Complaint"). Mr. and Mrs. ***** (collectively referred to herein as the "Complainant") alleged in the Complaint that the ***** Public Schools (the "District") failed to provide the Complainant's child, **** (the "Student"), with a free appropriate public education ("FAPE") under the Individuals with Disabilities Act ("IDEA"). In particular, the Complainant alleged that the District (1) failed to consider the Student's rights under IDEA by applying their junior high retention policy to the Student; (2) failed to consider the Student's specific needs in the writing and implementation of his IEP; and (3) failed to seek resolution on the last IEP in which consensus was not reached.

A. Procedural History

1. The Complaint. The Montana Office of Public Instruction ("OPI") received a letter of complaint from Complainant dated August 14, 2001, on August 22, 2001

2. Early Assistance Program. Pursuant to A.R.M. §10.16.3660, the OPI's Early Assistance Program attempted to resolve the controversy. The director of the Early Assistance Program, Tim Harris, concluded resolution was not possible.

3. District's Written Response. On September 18, 2001, I notified the parties that the Early Assistance Program was unable to resolve the dispute and I called for the District's Written Response, which response was due on or about September 28, 2001. At the request of the District, I granted an extension of time for the submission of the Written Response until no later than October 5, 2001. I received the Written Response by e-mail on October 5, 2001.

The findings and conclusions contained in the Final Report are based on the Complaint and the District's Written Response and supporting documents. Both federal and state laws require that I review all relevant information and make an independent determination as to whether the District violated IDEA. 34 CFR §300.661(a)(3) and A.R.M. §10.16.3662(8). As part of my investigation hereunder, I engaged the services of Gary Garlock to review certain materials and interview the parties.

B. Legal Framework

Federal and state law requires that students with disabilities receive FAPE. 20 U.S.C §§ 1400-1487. Mont. Code Ann. §20-7-401, et seq. In general, FAPE means special education and related services that conform to the student's individualized education program. Special education, in turn, means specifically designed instruction, at no cost to the parent to meet the unique needs of the disabled child. The United States Supreme Court has interpreted IDEA to mean that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designated to provide educational benefit to the handicapped child." *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 202 (1982). The Supreme Court has not read IDEA to mean that a disabled child be provided with the best available special education or services or that the services maximize each child's potential. Therefore, under IDEA, the District must provide the "basic floor of opportunity" for the Student's education. Particular regulations promulgated to implement IDEA are referenced below.

C. Findings and Conclusions

1. The Student is a 15-year-old male. He was diagnosed with a learning disability in written language through the Child Study Team ("CST") process in October of 1998. The Student was medically diagnosed with ADHD and Depression and is currently taking medication for both. While in the ***** Public Schools, the Student qualified for special education under the category of "Learning Disabled." He was enrolled in the 7th grade at ***** Junior High for the 2000-01 school year. An IEP, written on April 12, 2000 for the 7th grade, was in place for the entire 2000-01 school year. There was an IEP meeting held on January 26, 2001, and on February 22, 2001, for the purpose of reviewing and revising the IEP. The parents did not sign the IEP.

2. The Student's CST report dated October 29, 1998, notes in the assessment summaries:

"Achievement", "WJR - Reading 3.2, Math 5.3, Written Language 2.8, Knowledge 5.8. [Student] was below grade level in reading and written language. He seems to have slow processing skills and retrieval of information is difficult." "[Student] will need help with his assignments or modify them so that there is not a lot of writing required by [Student]."

"Social", "[Student] gets along well with most other students. They are helpful to him and he is helpful to them. He struggles to stay on-task which often times alienates him from lessons being presented."

It was decided that Student met the criteria as a student with a learning disability in the area of written expression and was in need of special education services.

3. An IEP meeting was held on October 29, 1998, to develop the initial IEP, which addressed primarily written language skills. On September 2, 1999, an addendum was added to Student's IEP as a result of Complainant's concern for work and workload in 6th grade. This addendum lists specific responsibilities for the Student, the Complainant and the District. School psychologist raised concern over possible depression as reflected in notes of IEP review meeting.

4. The annual review of the Student's IEP held on October 26, 1999, indicates from staff comments that he "has not made progress on his previous goals. He is very

resistive to assistance". The Team checked the box "Does the student's behavior impede his/her learning or that of others" with a yes. The goals and objectives only address written language. The IEP lists counseling as a related service.

5. The District held an IEP review meeting on January 4, 2000, to discuss problems that were occurring at school and at home. A new IEP was written and approved by the IEP Team on February 3, 2000 and would terminate on May 26, 2000. This IEP contains extensive goals and objectives on written language, includes attachments addressing accommodations and modifications, and lists counseling topics for related services. Also attached to this IEP is a sheet labeled "Behavior Intervention Plan".

6. An IEP meeting was held on April 12, 2000 for the purpose of developing an IEP for the 7th grade. The IEP notes state "[Student] has made some gains in recent months of school". The IEP notes also reflect that the "team wants [Student] to have a fresh start in junior high. We want him to have a resource study hall everyday and check out with the resource teacher at the end of each school day". The IEP written for 7th grade does not contain specific accommodations and modifications. This IEP does not have goals or objectives listed for the related service of counseling. There is no Behavior Intervention Plan attached nor are their behavioral goals and objectives listed.

7. On January 26, 2001, the District held an IEP meeting because the Student was failing classes and not completing schoolwork. This IEP, under Strengths: By school staff, states, "[Student] is a very capable person. He is good at hands on activities. He has good attendance at school and he is not a behavior problem". The IEP Team again marked yes to the box that asks, "Does the students behavior impede his/ her learning or that of others"? Goals and objectives were written for Written Language, Behavior, and Study Skills. Modifications and accommodations were written in more detail than on the IEP of April 12, 2000. There were no goals and objectives written for the listed related services of counseling.

8. The January 26, 2001, IEP meeting was recessed at the request of the PLUK family support staff person and was reconvened on February 22, 2001. The Complainant ultimately did not sign or consent to this IEP.

D. Allegations and Disposition

The Complaint contains essentially three substantive allegations, each of which is addressed below. Some of the allegations contained in the Complaint are not, in fact, violations of IDEA. Those allegations not included below are denied as non-IDEA issues.

1. Allegation: The District failed to consider the Students rights under IDEA by applying the District's junior high retention policy.

Granted. Montana administrative rule provides that "A student with disabilities shall be promoted or retained according to local education agency's criteria unless waived in the student's IEP". A.R.M. §10.16.3345(4). Federal law provides that in determining the educational placement of a child with a disability the District must ensure that (a) "in selecting the LRE ["least restrictive environment], consideration is given to any potentially harmful effects on the child or on the quality of services that he or she needs" and (b) "A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications to the general curriculum. 37 CFR §300.552(d) and (e).

Although there were three administrators present at the IEP meeting on February 22, 2001, including the Special Education Director of the Stillwater/Sweet Grass County Special Education Cooperative, the District did not inform the IEP Team or the Complainant of the above-cited administrative rule concerning retention of students with disabilities. The notes of the IEP meeting on that date state, "Whether it is medical or not, he's choosing to behave this way. Mr. Demaniow said that he doesn't have the skills to be in 8th grade and retention is a very real possibility". In a letter to the Complainant dated March 28, 2001, the District informed the Complainant that the Student was failing four core subjects. This letter further states:

"This matter is of major concern for all of us. If [Student] continues to fail these classes, he will be retained in his current grade level. Up to this point, [Student] has not generated sufficient effort to be promoted to the 8th grade. A final decision will be made in April or May regarding retention in the 7th grade".

In that letter, the District failed to address the unsigned IEP or request an IEP meeting to discuss the Student's rights under IDEA regarding retention. The District violated IDEA and failed to provide FAPE by not addressing the Student's needs regarding his failing grades and by not requesting that the IEP Team address the question of retention individually as opposed to using a general district policy.

2. Allegation: The District failed to consider the Student's specific needs in the writing and implementation of his IEP.

Granted. In the IEP dated April 12, 2000, which was developed for the 7th grade, the IEP is marked yes for the question: "Does the student's behavior impede his/her learning or that of others"? Federal law provides that the "IEP team also shall . . . [in] the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior". 34 CFR §300.346(a)(2)(i).

The Student's IEP for the 7th grade contains no behavior intervention plan; it contains no goals or objectives addressing his behavior. Although counseling is listed as a needed related service, the IEP contains no goals or objectives for this service. The modifications and accommodations listed on this IEP are general with no explanations on how they would be implemented.

The IEP of April 12, 2000 clearly did not adequately address the needs of the Student as indicated by the fact that he was failing most of his classes, as indicated in the notes of the IEP meeting held on February 22, 2001. Thus, the District violated IDEA and neglected to provide FAPE.

3. Allegation: The District failed to conclude or seek resolution of the last IEP in which consensus was not reached.

Granted. The January 26, 2001 IEP meeting was convened because the Student was not succeeding in the 7th grade. This IEP contained written language, behavioral and study skill goals and continued to identify counseling as a related service. The January 2001 meeting concluded without the Complainant's consent or signature, although the IEP team thought that there was agreement on the Complainant's part. The record lacks any evidence that the District thereafter attempted to secure the

Complainant's signature on that IEP. There is also no evidence that the District attempted to reconvene an IEP meeting to resolve the IEP issues.

Montana administrative rule provides the following:

"Written parental consent for initial and annual placement of a student with disabilities in special education and related services shall be obtained by the local education agency prior to the placement." A.R.M. §10.16.3505 (2).

"When parental consent for annual placement has not been obtained and has not been specifically refused, the local education agency shall informally attempt to obtain consent from the parent." A.R.M. §10.16.3505 (2)(c).

"If parental consent cannot be obtained within a reasonable time, the local educational agency shall send written notice to the parent requesting approval and stating that the student with disabilities shall be provided special education and related services according to the student's individualized education program (IEP) as developed by the local educational agency 15 days from the date of notice." A.R.M. §10.16.3505 (2)(c)(i).

"If no response from the parent is obtained, the local educational agency shall provide the student special education and related services according to the student's IEP without parental consent subject to the parent's right to an impartial due process hearing under A. R. M. 10.16.3507 through 10.16.3523." A.R.M. §10.16.3505 (2)(c)(ii).

The District violated IDEA and failed to provide FAPE because they did not pursue the implementation of the new IEP as required by law.

E. Order

The relationship between the Complainant and the District is strained and non-communicative. It appears that the District misunderstands the complexities of the Student's disability as evidenced by ineffective IEPs with little or no progress toward the goals demonstrated by the Student. That said, the Complainant has not communicated well with the District when they had concerns with the IEP's.

Therefore, I order the following pursuant to 34 CFR §300.660(b) and A.R.M. §10.16.3662(9):

1. Provision of FAPE. Pursuant to IDEA and the associated Montana law, the District shall provide FAPE to the Student. Mont. Code Ann. §20-7-141(1) and A.R.M. §10.16.3122. The District shall do so directly to the Student by offering FAPE through its special education program. If the District cannot provide FAPE directly to the Student at the District, the District shall do so by arranging for the attendance of the Student in another school district within the state of Montana, pursuant to Mont. Code Ann. §20-7-421.

The District shall develop an IEP for the Student pursuant to 34 CFR §300.342, et seq. and the corresponding Montana law. The District shall comply, in particular, with the IDEA provisions concerning parent participation and consent. The OPI shall provide a trained professional to facilitate the development of the IEP for the Student.

If the District arranges for the attendance of the Student in another district, the District shall do so upon the consent of the Complainant through the IEP process.

The District shall contact the Complainant no later than Wednesday, November 14, 2001, to arrange for the scheduling of an IEP meeting. No later than November 21, 2001, the District shall send to the Compliance Officer a letter outlining the status of the Student's special education.

2. Training. Prior to March 2002, the District shall provide training to all appropriate District personnel on issues germane to the Complaint. Such training shall include, but not be limited to, the promotion or retention of students with disabilities, the development of behavior intervention plans, and IEP goals and objectives. At the written request of the District, OPI shall provide assistance with such training.

I shall retain jurisdiction over this matter to assist in the implementation of this order. Failure to implement this order may subject the District to the sanctions provided for in A.R.M. §10.16.3662(11).

Sincerely,

Jeffrey A. Weldon, Compliance Officer
Chief Legal Counsel

c: ***** *****, District's Attorney