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Linda McCulloch
Superintendent

January 31, 2003

***** , Superintendent
***** Public Schools

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** -- In the Matter of ***** 2002-04, Alleged Violations of the Individuals With Disabilities Education Act (IDEA)

Dear ***** and Superintendent *****:

This is the Final Report pertaining to the above-referenced special education compliance complaint (the "Complaint") compiled and submitted pursuant to Admin. R. Mont. 10.16.3662. ***** (the "Complainant") alleges that the ***** Public Schools (the "District") did not implement the Complainant's child's, ***** (the "Student"), Individualized Education Program ("IEP") "properly and in a timely manner." In particular the Complainant alleges that the District violated the Student's IEP by (1) not having an aide with the Student at all times; (2) failing to provide training to the aides; and (3) not providing the Student with thirty minutes of occupational therapy per week. The Complainant also alleges that the District failed to following the Positive Behavioral Plan designed in ***** , Montana, which failure resulted in negative responses and detention for the Student's behavior instead of positive interventions. Finally, the Complainant alleges that the Student is failing to maintain progress that has been achieved by the Student in the past due to a lack of awareness of the Student's disability and the Student is becoming very frustrated.

A. Procedural History

1. The Complaint. On November 18, 2002, the Montana Office of Public Instruction ("OPI") received a Complaint signed by Complainant and dated November 2, 2002. I notified the District of the filing of the Complaint by letter dated November 21, 2002.

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2. Early Assistance Program. The OPI's Early Assistance Program attempted to resolve the controversy pursuant to Admin. R. Mont. 10.16.3660. The director of the Early Assistance Program, Tim Harris, concluded resolution was not possible.

3. District's Written Response. On December 9, 2002, 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 December 19, 2002. At the request of the District, I granted an extension of time for the submission of the Written Response until no later than December 23, 2002. I received the District's Written Response on December 23, 2002.

4. Complainant's Additional Information. On January 14, 2003, I received additional written information from the Complainant in response to the District's Written Response and pursuant to Admin. R. Mont. 10.16.3662(7). The due date of this Final Report is hereby extended pursuant to Admin. R. Mont. 10.16.3662(8).

The findings and conclusions contained in the Final Report are based on the Complaint, the District's Written Response and supporting documents, and the Complainant's additional submissions. Both federal and state law 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 Admin. R. Mont. 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

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the Student's education. Particular regulations promulgated to implement IDEA are referenced below.

C. Findings and Conclusions

1. The Student is a 10-year-old male and was enrolled in the District for the 2002-03 school year. In February 2002 and through a Child Study Team ("CST"), the Student was diagnosed as Other Health Impaired due to a medical diagnosis of Atypical Autistic Disorder. Prior to January 16, 2003, the Student was receiving special education and related services under an IEP written on February 15, 2002, in *****, Montana, and accepted by the District on March 18, 2002.

2. The Student's CST report dated February 15, 2002, notes in the assessment summaries: Speech and Language, Testing in Adrian Michigan on 2/11/00, articulation no errors, hearing normal, test of Language Development – P3 all subtest scores fall within average range. Peabody Picture Vocabulary Test is above average, there is no discrepancy regarding vocabulary and language skills. The Student demonstrates behavioral and social difficulties – he would benefit from improved overall communication skills.

Medical: Dr. *****, Psychiatrist diagnosis of Pervasive Developmental Disorder of non-specific type. Dr. ***** identified diagnostic Impression Axis I, Atypical Autistic Disorder.

Classroom Based Assessment: Reported that Student does very well academically when he chooses to do the work. Is able to do all work, at times refuses to do his work or acts like he can't do it. The issues are behavior. His behavior can change – lots of ups and downs.

O. T.: The Student shows significant sensory difficulties as seen by scores on Sensory Profile. Visual Perceptual scores were in the low average range. O. T. services are recommended for sensory processing and handwriting concerns.

The CST determined that the Student met criteria as a student with "Other Health Impairment" and is in need of special education services.

3. On February 15, 2002, the ***** district held an IEP meeting to address the Student's special education needs. This IEP addressed goals in the areas of Social /Behavioral skills, Communication skills, written expression and sensory motor skills.

4. A CST/IEP meeting was held March 18, 2002, by the team at the District to accept both the CST and the IEP document as written by the ***** district.

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5. On October 2, 2002, a CST meeting requested by the Complainant was held to discuss (a) the "Positive Behavior Plan, written by **** ***** and used while student was attending ***** elementary school" and (b) "Training and access to resources for Students support team (teachers, aides, and specialists) on an ongoing basis." The parties' discussion at this meeting centered on *****'s behavior report and training for staff. Many suggestions were considered but no changes were made to the Student's IEP.

6. On October 24, 2002, a "Significant Change to IEP" meeting was held at the District to add a keyboarding program taught by the special dedication teacher for one half hour each day.

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 the implementation of the IEP under IDEA. Those allegations not included below are denied as non – IDEA issues.

1. Allegation: The District Did Not As Written In The IEP Have An Aide With The Student At All Times.

Granted. The IEP written on February 15, 2002, provides that seven and one-half (7 1/2) hours of aide time per week will be provided to the Student. The District stated in the meeting on March 18, 2002,

Student will have 2 personal aides. One for the morning until 11:45 and then another will take over until 3:10. School does not have funding to hire a new 1 on 1 aide.

In the notes from the same meeting on March 18, 2002, it states that: "[District staff] shared with the team that 2 aides will stay with the Student throughout the day. [Names of aides]."

Additionally, in the section of the IEP describing the types of accommodations, modifications, supplementary aids or other forms of support necessary for the Student to be involved in and progress in the general curriculum it states, "The Student demonstrates significant disruptive and noncompliant behavior which warrants the need for a classroom aide to assist with behavior management so that the Student can be successful in the regular educational setting."

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Because of the past practice of the ***** district and the statements of commitment made by the District to have an aide with the Student full time, the District erred in removing the aide from the music class, and failed to implement the IEP as written. During our investigation, Superintendent *****, when made aware of the situation with the music class, directed the principal to place the aide back in the music class. This situation is rectified and warrants no further action.

2. Allegation: The District Failed To Provide O.T. Services 30 Minutes Per Week Until The Last Week In October.

Granted. Federal law provides that the District has an affirmative duty to provide special education and related services to a child with a disability in accordance with the child's IEP and to make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. 34 CFR 300.350(a). From August 21, 2002, until October 28, 2002, the Student was denied occupational therapy ("OT") services provided for in his IEP due to the unavailability of the therapist hired by the ***** Education Cooperative, of which the District is a member and through which the District provides special education services. Ten weeks of thirty-minute therapy sessions were not provided to the Student as required. This denial of services constitutes a violation of IDEA and compensatory services must be provided by the District to correct the violation.

3. Allegation: The Student's IEP States That His Behavior Impedes Learning. Although *****, In ***** Designed A Positive Behavior Plan, It Has Not Been Followed. As A Result The Student Has Been Receiving Negative Responses And Detention For His Behavior Instead Of Positive Interventions.

Granted. The ***** Plan is a report with recommendations and has not been implemented as a part of the current IEP. However, there are short-term objectives written to address the Student's behavior. The objective states: "Teacher, aide and the Student will utilize the 3 step process to clarify the problem and to determine the appropriate behavior." It appears that a process similar to the 3 step process is being implemented by staff, however, it is being inconsistently applied by various staff with some staff recording data and others not recording data. The IEP states, "that the parents will be regularly informed of progress toward annual goals through quarterly report cards and daily journal." Again, journal entries appear to be

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inconsistent and quarterly reports were not present in the confidential file and the Complainant claims that they have not been provided to them.

Federal regulations specify the requirements for measuring student progress and reporting that progress to parents. 34 CFR 300.347 (7)(i)(ii)(A)(B). Adequate documentation of the District's compliance to this part of the regulations has not been substantiated regarding the implementation of the 3-step process. The District must develop a system of documenting consistently the implementation of the objectives written and to record the data pertaining to the use of the 3-step process. The District must provide the information regarding progress on the objectives to parents as indicated on the IEP.

E. Order

I order the following pursuant to 34 CFR §300.660(b) and Admin. R. Mont. 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 Admin. R. Mont. 10.16.3122. The District shall do so directly to the Student by offering FAPE through its special education program.

The District shall develop an IEP for the Student pursuant to 34 CFR §300.342, et seq. and the corresponding Montana law. No later than February 28, 2003, the District shall convene an IEP team to develop an appropriate IEP for the Student. The IEP team shall consider in particular the appropriateness of a positive behavior intervention plan, related services, and the amount of time an aide is needed for the Student to receive FAPE. To assist the District in the development of an appropriate IEP, the OPI shall provide, at no cost to the District or the Complainant, the professional services of Dale Anderson. Mr. Anderson is a highly experienced special education expert. Mr. Anderson shall coordinate the IEP development process, facilitate any IEP meetings, and assist the parties in redeveloping the relationship necessary to understand, articulate, memorialize and implement the special education services the Student needs and deserves.

2. Compensatory Occupational Therapy. The District shall provide the Student with sufficient occupational therapy to compensate for the ten weeks of thirty-minute therapy sessions denied the Student between August 21, 2002, and October 28, 2002. This compensatory therapy

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shall be in addition to the therapy he is due under the IEP developed now. The delivery, timing, and other details of the additional therapy shall be considered by the Student's IEP team and shall be upon the consent of the Complainant.

3. Training. Prior to the end of the current school year, 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 development of behavior intervention plans, and IEP goals and objectives. At the written request of the District, OPI shall provide assistance with such training.

4. Reporting. The District shall provide to me written verification no later than March 5, 2003, that an appropriate IEP has been developed and implemented for the benefit of the Student. The District shall also provide to me written verification no later than July 15, 2003, that appropriate training has been conducted pursuant to this order.

While I understand the Complainant's frustration with feeling that her child's educational needs are not being met, I strongly encourage the Complainant to work in good faith with Mr. Anderson and the District to develop an appropriate IEP. I believe that the District can provide FAPE to your child. I also want to commend the District in taking steps during our investigation and before the issuance of this Final Report to alter its practices and meet its obligations to the Student. It is evident to me that the District wishes to "do the right thing" and serve this Student as appropriate.

I shall retain jurisdiction over this matter to assist in the implementation of this order, if necessary. Failure to implement this order may subject the District to the sanctions provided for in Admin. R. Mont. 10.16.3662(11).

Sincerely,

Jeffrey A. Weldon, Compliance Officer
Chief Legal Counsel

cc:

Dale Anderson

*****, Attorney at Law

Gary Garlock, Complaint Investigator

Tim Harris, OPI Early Assistance Program