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Linda McCulloch
Superintendent

January 31, 2003

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** -- In the Matter of ****, 2002-05, 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") 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"). The Complainant alleged that the District denied the services required by the Student's Individualized Education Program ("IEP") during a recent teachers' strike in the District. In particular, Complainant alleged that the District (1) allowed the Student's IEP to expire and (2) failed to provide speech therapy as required by the Student's IEP.

A. Procedural History

1. The Complaint. On November 27, 2002, the Montana Office of Public Instruction ("OPI") received a Complaint signed by Complainant and dated November 26, 2002. I notified the District of the filing of the Complaint by letter dated November 27, 2002.

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.

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3. District's Written Response. On December 20, 2002, I notified the parties that the Early Assistance Program was unable to resolve the dispute. I called for the District's Written Response, which response was due on January 2, 2003. At the request of the District, I granted an extension of time for the submission of the District's Written Response until no later than January 6, 2003. The District did not use the full extension of time; the District mailed its Written Response on January 2, 2003, and I received the Written Response on January 6, 2003. I notified the Complainant of her right to submit additional information thereafter; however, to date, I have not received additional information from the Complainant and I presume she chose not to submit additional information. 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 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 Admin. R. Mont. 10.16.3662(8).

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).

C. Findings and Conclusions

1. The Student is a twelve-year-old male enrolled in the 6th grade at ***** Elementary School in the District for the current school year. The Student qualifies for special education services under the disability category of Speech Impaired.

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2. On November 12, 2001, the Complainant approved an IEP for the Student that expired on November 12, 2002 (the "2001 IEP"). The 2001 IEP required that the District provide to the Student articulation therapy by a speech clinician for .7 hours (42 minutes) each week. The 2001 IEP required no other special education services or accommodations.

3. The District's teachers went on strike on Thursday, November 7, 2002. The strike lasted fourteen school days and ended early on Wednesday, November 27, 2002. The District's elementary schools were closed two of the fourteen days, specifically Thursday and Friday, November 7 and 8.

4. The District's records indicate that the Student was absent from school from Monday, November 11 through and including Tuesday, November 26, 2002. The District's records do not indicate that he was absent thereafter until December 3, 2002, so I conclude he returned to school on Wednesday, November 27, 2002, the day after the strike ended.

5. The District informed the Complainant that speech services would not be provided to the Student during the strike. The District did not provide the required speech therapy to the Student during the strike. The Student missed 2.1 hours (126 minutes) of speech therapy in violation of his 2001 IEP. After the strike, the District made arrangements with a local health facility to provide the speech therapy not provided to the Student during the strike.

6. On December 13, 2002 (after his 2001 IEP expired and after the strike), the District held an IEP meeting for the Student. On the same day, the Complainant approved the IEP resulting from that meeting (the "2002 IEP"). The 2002 IEP requires that the District continue to provide .7 hours per week of articulation therapy. The 2002 IEP requires no other special education services or accommodations. The 2002 IEP notes,

****'s IEP was due November 12, 2002. However with the . . . strike, it was delayed and held in December 2002. [Complainant] returned [District staff's] call (of Dec 3rd) on Dec 9th asking if the IEP could be held on Friday Dec 13, 2002. The Principal . . . had a prior commitment and was unable to attend. [Complainant] was informed of this and agreed that the meeting be held on the 13th anyway.

7. In its Written Response, the District acknowledged that it violated its obligations to the Student "by allowing [the Student's] IEP to lapse by one month." However, the District acted in good faith and with reasonable speed to correct that violation upon the end of the strike.

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D. Allegations and Disposition

1. Allegation: The District Violated Its Obligations Under IDEA By Allowing His IEP To Lapse.

Granted. Montana administrative law requires the District to develop, implement, review, and revise IEPs pursuant to federal law. Admin. R. Mont. 10.16.3340(1). A basic tenet of IDEA is that each child protected by IDEA has an IEP in effect. 34 CFR 300.342. Without a doubt, the strike described above made it difficult, if not practically impossible, to meet this requirement. Key players in the IEP team, not the least of which the Student's teachers, were likely not available to hold an IEP team meeting. However, IDEA does not contain a waiver whereby the District is excused of its statutory and regulatory duties in this context during a strike. Therefore, the District neglected to meet its duties in this regard.

While this is technically a violation of IDEA, the District's subsequent actions indicate that this was an isolated incident associated with extraordinary circumstances. I find no endemic problem in this regard. Indeed, by arranging for and holding an IEP team meeting reasonably quickly after the strike ended, it appears that the District recognized its error and took all reasonable steps to correct it.

2. Allegation: The District Failed To Implement The Student's IEP By Denying Speech Therapy.

Granted. Once entered into, the District has the affirmative duty to implement the Student's IEP as written. 34 CFR 300.342. The IEP called for the provision of a specific amount of speech therapy. The District did not provide that therapy between November 7 and 26, 2002, because of the strike described above. A principal of the District and the District's director of special education notified the Complainant that the therapy services would be unavailable during the strike. The District notes that the Student was absent during the entire duration of the strike even though regular classroom services were available to him during all but two days of the strike. The District goes on to imply that absent an informal agreement to make up the therapy, the District would have no obligation to make up the therapy missed. That is not correct. In this instance, the services required of the District could have been provided outside the District by personnel other than District personnel. While it would have been practically impossible for the District to hold an IEP team meeting during the strike, it was not impossible, nor impractical, for

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the District to meet its obligations to provide speech therapy. Indeed, the District offered to make up the missed therapy through a medical facility outside the District but inside the Student's community.

E. Order

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

1. Compensatory Therapy. The District shall provide the Student with at least 2.1 hours (126 minutes) of speech therapy. I note that the District offered to provide an additional 3 hours of makeup therapy. The District has no obligation to provide more than 2.1 hours; however, if the District believes 3 additional hours is appropriate and Complainant agrees, the District may provide more than the required 2.1 hours. This compensatory therapy shall be in addition to the therapy he is due under the 2002 IEP and represents the therapy missed during the strike. The timing of the additional therapy shall be upon the consent of the Complainant. In addition, if the therapy is to be provided outside of the Student's school setting, the District shall provide transportation, at no cost to Complainant, to and from the additional therapy. This may be provided through contracted services with the Complainant or through other means. I note that the District has already agreed to provide this additional therapy and transportation. I commend the District in its effort to settle this matter in a reasonable and timely manner.

2. Reporting. The District shall provide to me written verification, signed and dated by both the District and the Complainant, of the satisfaction of this order.

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 A.R.M. §10.16.3662(11).

Sincerely,

Jeffrey A. Weldon, Compliance Officer
Chief Legal Counsel

c:

*****, District's Attorney

*****, District's Director of Special Education

Tim Harris, OPI Early Assistance Program