



March 12, 2010

(Parent)

(Superintendent)

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

FINAL REPORT: In the Matter of ***, 2010-01, alleged violations of the Individuals With Disabilities Education Act (IDEA) and state special education law.

Dear*** and Superintendent *** :

This is the Final Report regarding the state special education complaint, In the Matter of ***, 2010-01, (“Complaint”) filed January 12, 2010 pursuant to ARM 10.16.3662. *** (“Complainants” or “parents” and referring to *** as “Complainant”) allege that *** School District (“the District”) denied them an opportunity to advocate for their son to receive a free, appropriate public education (FAPE) and failed to provide a current copy of their son’s Individual Education Program (IEP) in violation of the Individuals with Disabilities Education Act¹ (IDEA) and Montana special education laws and regulations.

Specifically, Complainants allege:

- a. the District erred when, after parents requested a specific amendment to the IEP, the District refused to make the amendment without an IEP meeting and refused to provide the parents with prior written notice of the District’s position in violation of 34 C.F.R. §300.503; and
- b. the District erred when it refused to provide the parents with a current copy of their child’s IEP in retaliation for filing a complaint against the District and erred when it required Complainants to sign a “false document” stating they were the ones requesting an IEP meeting.

A. Procedural History

1. The Complaint. On January 12, 2010, the Montana Office of Public Instruction (OPI) received a signed Complaint from Complainants through their attorney. The Complaint referenced numerous exhibits which were attached to the Complaint. The OPI issued a Notice of Filing of Complaint to the District.

¹ The most recent version of the Act is entitled: Individuals with Disabilities Education Improvement Act of 2004 published at 20 U.S.C. §1400 et seq. It is referenced herein as the IDEA.

2. Early Assistance Program. The OPI's Early Assistance Program attempted to resolve the controversy pursuant to ARM 10.16.3660. The Director of the Early Assistance Program concluded that resolution was not possible.
3. District's Written Response. On January 19, 2010, the OPI sent notice to the parties requiring the District to file a written response to the Complaint. On January 29, the District submitted an unopposed request for extension in which to file its written response. The Compliance Officer granted an extension to February 8, 2010. The District's Response was timely received on or before February 8, 2010 by the District's attorney. Additional materials were submitted upon request.
4. Complainants' Reply. On February 9, 2010, the OPI requested Complainants Reply to the District's written Response. Complainants timely filed their Reply on February 22, 2010 and provided additional information upon request.

The Findings and Conclusions contained in this Final Report are based on the Complaint and supporting documents, the District's Written Response and submissions, and Complainants' Reply and submissions. As required by federal and state law, all relevant information was reviewed and an independent determination was made as to whether the District violated the IDEA or state law.

B. Legal Framework

The OPI is authorized to address alleged violations of the Individuals with Disabilities Education Act and Montana special education laws through this special education state complaint process as delineated in 34 CFR §§300.151-153 and ARM 10.16.3662.

This report addresses two sets of issues raised by Complainants. It does not address the allegations of abuse in the special education classroom which were provided as background information in the Complaint.

C. Findings of Fact

1. This Office has jurisdiction to investigate these alleged violations of the IDEA and state special education law occurring within one year prior to the filing date of January 12, 2010.
2. The parents have standing to file this Complaint under the state special education complaint process at ARM 10.16.3661.
3. At all times relevant to this Complaint, Complainants' child was a middle school student in the District and received District special education services.
4. By letter dated 11/19/09, Complainants made a request to the District to approve an "addendum" to their IEP or provide written reasons why they would not accept it.
5. The 11/19/09 proposed addendum alleged abuse by the District, requested evaluation and treatment be paid by the District, requested the addendum be attached to the IEP as a "parent addendum," and requested the District provide a copy of their child's current IEP.

6. By letter dated 12/04/09, the District informed Complainants that it would not sign the proposed amendment to the IEP and would require an IEP meeting to discuss it.
7. Complainants and their attorney made several further requests for a written response regarding the District's opposition to the proposed amendment, for a current copy of the IEP, and other requests related to the IEP meeting.
8. The District's Response provided a document dated 11/06/09, signed by Complainant, stating the District did provide copies of the student's IEP and numerous other documents from his file to Complainant.
9. Complainants' Reply and supplement assert that the IEP in the District's files contained "at least two pages of information that was not in the copy of the IEP that was provided to the [parents]" and subsequently clarify there were three pages not provided to them when the IEP copies were produced.
10. The District supplemented their Response by indicating that the three pages were not part of the then current IEP. Two pages of handwritten notes were recorded during a November 20, 2009 conference with the parents. The third page was a typewritten document prepared by Complainant and read aloud at the beginning of the 11/20/09 conference with the District. The 11/20/09 conference between the District and the parents was not considered by either party to be an IEP meeting.
11. The District's Response supplement also included a copy of the 2009 IEP with amendments, IEP Invitations, the 2010 IEP, "Confidential" documents including Complainants' 11/20/09 letter, their 12/7/09 letter, their 2/11/10 letter, the 11/20/09 conference notes, and the 11/6/09 two- page signed release listing the documents copied for Complainants.

D. Analysis and Conclusions of Law

Issue I: Did the District violate state or federal special education provisions by refusing to amend the student's IEP without an IEP meeting and refusing to provide a written position regarding the parents' proposed amendment prior to an IEP meeting?

By letter dated 11/19/09, the parents requested the District accept an addendum, sign and attach it to the IEP, and return a copy to the parents. The addendum alleged abuse by the District and requested evaluation and counseling be paid for by the District. The District did not agree with the parents' request and informed them an IEP meeting was needed to discuss the request. The parents have declined to meet with the District and claim the District should first provide them with prior written notice before any IEP meeting on the issue. They also claim they were forced to sign a false document saying they were the ones calling for an IEP meeting. The District issued several notices in an attempt to hold an IEP meeting to discuss the matter with the full IEP Team.

Changes to IEP

The law provides two methods for changing an IEP between annual reviews:

1. AGREEMENT, 34 CFR §300.324(a)(4)(i) provides for *agreement* between the parties as one method by which an IEP may be changed:
"[i]n making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and [the local education agency] may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP. See 20 USC §614(d)(3)(D).
2. AMENDMENT, 34 CFR §300.324 (a)(6) provides for *amendment* to an IEP as follows:
"[c]hanges to the IEP may be made either by the entire IEP Team or, as provided in paragraph (a)(4), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated. See 20 USC §614(d)(3)(F).

In this case, one or more IEP Team members did not agree with the proposed changes and no agreement could be reached pursuant to 34 CFR §300.324 (a)(4)(i). As such, the IEP could not be changed by agreement. The IEP Team is therefore required to meet and consider the parents' proposed changes to the IEP. Any changes agreed upon by the IEP Team should then be added as amendments to the IEP. If the annual IEP meeting is at hand, the IEP may simply be re-written to include the changes and an amendment would not be necessary. If the parents disagree with the decision, they maintain the right to request mediation and to file a due process complaint to resolve the dispute consistent with the IDEA.

Prior Written Notice

Complainants also argue that 34 CFR §300.503 requires the District to provide them with prior written notice of the District's position with regard to their proposed addendum before the IEP meeting is held.

34 CFR §300.503, Prior Notice by the Public Agency, provides as follows:

- (a) *Notice.* Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—
 - (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
 - (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

As an initial matter, it should be noted that the IDEA encourages significant parent participation in the IEP Team meeting. "[P]arents have the right to bring questions, concerns, and preliminary recommendations to the IEP Team meeting as part of a full discussion of the child's needs and the services to be provided to meet those needs." *Federal Register, Vol. 71, No. 156, Monday, August 14, 2006, p. 46678.*

At the time this Complaint was filed, the facts show that the District had neither proposed nor refused to initiate or change the identification, evaluation, or educational placement of the child or

the provision of FAPE to the child. Any such proposal or refusal would come after IEP Team discussion on the matter. Complainants confuse the prior written notice requirements with the requirements covering IEP Team meetings. A proposal or refusal to take certain action is generally agreed upon at an IEP meeting. Then, before it is implemented, the District must issue specific prior written notice pursuant to 34 CFR §300.503 with regard to the actions it will or will not take.

Department of Education Comments in the Federal Register support this interpretation of prior written notice as follows:

“Comment...Another commenter stated that prior written notice should be provided in advance of an IEP Team meeting, not at the IEP Team meeting, so that parents could prepare for the meeting. The commenter suggested adding language to the regulations requiring that the notice be given a reasonable time before an IEP Team meeting.

*Discussion: The commenter confuses the Act’s prior written notice requirements with the requirements governing IEP Team meetings. Section 300.503(a), consistent with section 615(b)(3) of the Act, requires prior written notice whenever a public agency proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, or educational placement of a child, or the provision of FAPE to a child. A public agency meets the requirements in § 300.503 so long as the prior written notice is provided a reasonable time before the public agency implements the proposal (or refusal) described in the notice. A public agency is not required to convene an IEP Team meeting before it proposes a change in the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. The proposal, however, triggers the obligation to convene an IEP Team meeting. **Providing prior written notice in advance of meetings could suggest, in some circumstances, that the public agency’s proposal was improperly arrived at before the meeting and without parent input...**”*

Federal Register, Vol. 71, No. 156, August 14, 2006, p.46691.(emphasis added)

Complainants’ reliance on 34 CFR §300.503 is misplaced. An IEP Team meeting must be held to address the parents’ requests. The District is then required to provide prior written notice to the parents before it takes action or refuses to act as the case may be. The Complaint is therefore denied as to this issue.

Issue 2: Did the District violate state and federal special education provisions by refusing to provide the parents with a current copy of their child's IEP and by requiring them to sign a false document requesting an IEP meeting? Did the District wrongly refuse to provide Complainants with other IEP documents?

The parents claim that the District has not given them a complete copy of their child’s current IEP and made them go through extra hoops to gain access to their child’s special education file. The District countered that they provided a copy of the current IEP to the parents on 11/6/09 along with numerous other documents as requested.

Current IEP

This student’s annual IEP meeting is generally in January. The 2009 IEP meeting was held January 22, 2009. In November, 2009, the parents made a request for copies of various documents from their son’s special education files. Two District documents signed by Complainant and dated November 6, 2009 indicate the then-current IEP was provided to Complainants along with other documents for a total of 290 pages and a cost of \$29.00. District records indicate that copies of

IEPs from 1998 to 2009 were provided to Complainant on November 6, 2009. No further IEP meeting had been held up to the time of the filing of the Complaint.

Some of the confusion in this matter appears to center around what is meant by a “current IEP.” An IEP, or Individualized Education Program, is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 CFR §§300.320 through 300.324 and includes specific statements of the student’s present levels of academic achievement, measurable goals, statements on the student’s progress, special education and related services to be provided to the student, among other specific requirements. *34 CFR §300.320*.

The current IEP is the document that resulted from the most recent IEP meeting including any amendments. It is the official record of the special education program to be provided to the student. The record shows that the parents were provided with a current copy of the IEP. Districts have a legal obligation to implement the special education services delineated in the current IEP. Parents have procedural rights enabling them to ensure that the services listed in the IEP are indeed provided to their child. *Procedural Safeguards, 34 CFR §300 Subpart E*. Procedural safeguards under 34 CFR §300.324(a)(6) require the [district] to, upon request of the parent, provide the parent with a revised copy of the IEP with the amendments incorporated. *Federal Register, Vol. 71, No. 156, Monday, August 14, 2006, p. 46679*.

Attachments to an IEP

Every document produced or discussed with regard to a child is not necessarily adopted as part of a child’s IEP. The IEP Team makes the decision as to what documents will be included in the IEP. Here, the letters sent by the parents to the District regarding allegations of abuse and requests for evaluation and counseling were not part of the then-current 1/22/09 IEP or previous amendments. There had been no IEP meeting for the requests to be discussed. The fact that the parents sent the letters to the District does not automatically make them part of the IEP. The IEP Team is the proper entity to determine what materials are appropriate to include as part of the formal IEP. At the next IEP meeting, the IEP Team must decide what documents are appropriate to include as part of the formal IEP.

There appears to be an underlying concern that the parents’ documents will be lost or excluded from consideration if not appended to an IEP. However, even if parental correspondence is not made part of the “four corners of the IEP,” special education correspondence from a parent is generally to remain part of a student’s special education file. *34 CFR §300.611(b), 20 USC §1232g*. Certainly parents are entitled to raise issues of concern such as those raised here and have them considered by the IEP Team.

“False document”

Parents also complain that the District required them to sign a document that contained a false representation that Complainants were the party that had requested the IEP meeting. However, it is clear from the record that the parents were the party who sought to initiate a change to the IEP. As discussed above, since there was no agreement, an IEP Team meeting was necessary to discuss the parents’ requested changes. The District’s procedure requiring parents to sign a document initiating an IEP meeting served to begin the process that will eventually consider the parents’ requests. This is an acceptable method to initiate an IEP meeting. In actuality, the procedure is also an assurance to

parents that there is a record of their request to the IEP Team to consider their proposed changes to the IEP.

Districts are required to keep accurate records of the activities surrounding each student's IEP. 34 CFR §300.613 requires a district to permit a parent to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under the Act. The right to inspect and review records includes the right to a response from the district to reasonable requests for explanations and interpretations of the records; the right to request that the district 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 the right to have a representative of the parents inspect and review the records. In keeping with 34 CFR §300.613, the parents were entitled to request and receive an explanation from the District as to why they needed to sign the form they perceived to be false.² However, in this case, the method utilized by the District to initiate an IEP meeting was proper because parents were the ones who sought to change the IEP.

Other Documents

During this investigation, parents stated that at least three pages of the applicable IEP were not included in the documents provided to them. The pages involve a conference with school personnel and the parents held November, 20, 2009. The District created two pages of notes at the conference. A standard IEP Notes form was used with the term "IEP" crossed out and replaced with "conference" notes presumably indicating that the those present did not consider this to be an IEP meeting. These notes explained that an "IEP meeting will be re-convened to "review Assessment and Plan and Amend the IEP." The District verified that this was not an IEP meeting.

The third page in question was an unsigned letter from Complainants to the District entitled "November 20, 2009 meeting." The letter reiterated allegations of abuse at the school and indicated the parents had requested counseling be paid by the District and made part of his IEP. The District indicates that Complainant read the letter aloud at the beginning of the 11/20/09 conference and copies of the notes and the letter were provided to Complainant and the family support specialist that attended the meeting with the parent as well as to the Special Education Director. The District argues the current IEP was provided on 11/6/09 and the documents allegedly withheld were not in existence when copies were requested and made. Even the parents' 12/7/09 follow-up letter continued to ask for a copy of "the current IEP." As discussed earlier, "current IEP" means the legal document created out of the last IEP meeting and its amendments. The 11/20/09 documents were not part of the student's current IEP and cannot be considered to be wrongly withheld.

² § 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 § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 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))

Finally, for this investigation the District filed documents labeled as confidential which included Complainants' letters to the District and the November conference notes, among others. It is not clear if Complainants initially had access to the confidential file or if they even requested to review the child's file. The District asserts it offered, several times, to sit with the parents and go through the file. Given that these confidential documents are collected, maintained, or used by the District under the IDEA and are related to the child's receipt of FAPE, the parents do have a right to access them pursuant to 34 CFR §300.613.

While the IDEA does not require parents to fish for or guess the correct term before they can obtain a special education document, neither does it contemplate that submission of a document to the District automatically makes it part of an IEP. It does contemplate that parents will avail themselves of the Access Rights provided for in 34 CFR §300.613. The IEP process is an interactive process with set procedures and legally binding consequences. With controversies such as these, the better course is for parties to seek to keep the lines of communication open and for parents to review special education files periodically to determine their content.

Given that Complainants were provided with a current copy of the requested IEP and were not required to sign a false document as discussed above, Issue 2 of the Complaint is therefore denied.

E. Disposition and Order

For the reasons discussed above, the Complaint is DENIED and returned to the parties to move forward with an IEP Team meeting to discuss the issues raised by the parents.

Dated this 12th day of March, 2010.

/s/ Ann Gilkey
Ann Gilkey
Compliance Officer

c: *** (Complainants' Attorney)
*** (District's Attorney)