



March 12, 2010

(Parent)

(Superintendent)

**THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION**

**FINAL REPORT:** In the Matter of \*\*\*, 2010-02, alleged violations of the Individuals With Disabilities Education Act (IDEA) and state law.

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

This is the Final Report regarding the state special education complaint In the Matter of \*\*\*, 2010-02 (“Complaint”) filed January 19, 2010, pursuant to ARM 10.16.3662. \*\*\* (“Complainant” or “parent”), alleges that \*\*\* School District (“the District”) denied her the opportunity to advocate for her child to receive a free, appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act<sup>1</sup> (IDEA) and Montana special education laws and regulations.

Specifically, Complainant alleges the District erred when, after her written request for specific amendment to her child’s Individual Education Program ( IEP), the District refused to amend the IEP prior to an IEP meeting, refused to provide the parents with prior written notice under 34 C.F.R. 300.503, and refused to provide her with a current copy of her child's IEP which included the addendum she had submitted to the District.

**A. Procedural History**

1. The Complaint. On January 19, 2010, the Montana Office of Public Instruction (OPI) received a signed Complaint from Complainant. Four letters of correspondence between the parties were attached to the Complaint. On January 19, 2010, the OPI sent a Notice of Filing of Complaint to the District.
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 26, 2010, the OPI sent notice requiring the District to submit its written response to the Complaint by February 8, 2010. The District timely filed a Response on February 8, 2010.

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<sup>1</sup> 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.

4. Complainant's Reply. On February 10, 2010, the OPI provided opportunity for Complainant to reply to the District's Response. Complainant timely filed her Reply on February 19, 2010.

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 Complainant's Reply. 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.

## **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 19, 2010.
2. The parent has 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, Complainant's child was a middle school student in the District and received special education services.
4. By letter dated 11/24/09, Complainant made a request to the District to review and sign an attached "addendum" to her child's IEP, and attach the document as an amendment to the IEP or provide written reasons why the District would not agree to the parent's proposed amendment.
5. The 11/24/09 attached addendum alleged abuse by the District, requested evaluation and treatment be paid by the District, requested the proposed addendum be attached to the IEP as an addendum, and requested the District provide a copy of the student's current IEP.
6. By letter dated 12/04/09, the District informed Complainant that it would not sign the proposed IEP addendum and would require an IEP meeting to discuss amending the IEP.
7. By letter dated 12/8/09, Complainant reiterated her request for a current copy of the IEP and for written reasons why the District was refusing to accept her proposed addendum.
8. By letter dated 12/11/09, Complainant's counsel requested through the District's attorney that Complainant be provided with a current copy of the IEP and reasons why the District would not accept the proposed addendum among other requests related to the IEP meeting.
9. The District Response in this Investigation included an exhibit dated 11/20/09, signed by Complainant, and indicating that on 11/20/09 the District did provide Complainant

copies of her child's 2008 and 2009 IEPs, meeting notices, medical information, discipline records, CRT scores, report cards, and a current schedule for a total of 87 pages.

10. Complainant's Reply asserts that she has not received a current copy of the IEP that contains her parent addendum to the IEP. Complainant asserts the attachment is necessary to document the fact that they have requested an amendment to student's IEP and to document the contents of their proposed amendment.

#### **D. Analysis and Conclusions of Law**

**Allegation: Did the District violate state or federal special education provisions by refusing to amend the IEP without an IEP meeting, refusing to provide prior written notice prior to an IEP meeting, and refusing to provide a copy of an IEP that included the parent's proposed addendum prior to an IEP meeting?**

By letter dated 11/24/09, Complainant requested the District accept an addendum, sign it and attach it to the IEP, and return it to the parents. The District did not agree to the parent's addendum request nor did it agree to provide written reasons at that point. The District informed the parent an IEP meeting was needed to discuss the request. The District offered to schedule an IEP Team meeting.

#### **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 amended:  
"[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).

Here, one or more 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 parent's proposed changes to the IEP. Any changes agreed upon by the IEP Team must 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 all changes and an amendment would not be necessary. If Complainant disagrees with the IEP Team decisions, the parent maintains the right to request mediation and to file a due process complaint to resolve the dispute consistent with IDEA.

#### **Prior Written Notice**

Complainant argues that 34 CFR §300.503 requires the District to provide her with prior written notice of the District's position through a written position statement before an IEP Team meeting is held to discuss the parent's requests.

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, informed parental 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.*

However, 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 would come after IEP Team discussion on the matter. Complainant appears to confuse the prior written notice requirements with the requirements covering IEP Team meetings. A proposal or refusal to take certain action is generally decided at an IEP meeting. Then, before it is implemented, the District must issue specific prior written notice pursuant to 34 CFR §300.503 with respect to the action it will or will not take.

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

“*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)*

As such, Complainant's reliance on 34 CFR §300.503 is misplaced. An IEP Team meeting must be convened to address Complainant's requests. The District is then required to provide prior written notice to the parents before it takes the action, or refuses to act, as the case may be.

### **Copy of the Current IEP**

Complainant asserts a violation of IDEA because she has not received a copy of her child's current IEP that contains her proposed addendum. The record shows that on November 20, 2009, the District did provide her with a copy of the January 21, 2009 IEP which was the most recent IEP available approved by the IEP Team, i.e. the "current IEP." With regard to attachments to an IEP, an IEP Team is the proper entity to determine what materials are to be included as part of the IEP. Submission of a document to the District does not automatically make it a part of the IEP. Once the IEP Team meets to discuss the issues raised in the parent's request, the Team must decide whether or not to include the parent's 11/24/09 addendum. As it stands now, the IEP Team has not met to consider the parent request and, properly, no new documents have been made a part of the IEP.

Complainant indicates her underlying concern is that the request and a record of the request will be lost or excluded from consideration if not appended to the IEP. However, even if parental correspondence does not become a part of the formal "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.*

### **E. Disposition and Order**

The District did not err in refusing to make the requested IEP changes without first holding an IEP Team meeting. Prior written notice is not required until after an IEP Team meeting is held but is required before the action or refusal to act is implemented. Further, the official contents of an IEP are determined by the IEP Team. The current IEP at the time of filing this Complaint was the January 21, 2009 IEP and Complainant received a copy of this IEP. The District must retain parental submissions to the District that involve their child's special education plan. The IEP Team decides what submissions belong in the four corners of the IEP document after an IEP Team meeting to consider the requests.

For these reasons and as discussed above, the Complaint is DENIED and returned to the parties to move forward with an IEP meeting to discuss the parent's request.

Dated this 12<sup>th</sup> day of March, 2010.

/s/ Ann Gilkey

Ann Gilkey, Compliance Officer  
Chief Legal Counsel

c:           \*\*\* (Parents' attorney)  
              \*\*\* (District's attorney)