



January 4, 2011

[Complainant]

[Superintendent of District]

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** on In the Matter of **, 2010-10, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

Dear *** and Superintendent ***:

This is the Final Report pertaining to the above-referenced state special education complaint ("Complaint") filed pursuant to Admin. R. Mont. 10.16.3662. *** ("Complainant"), parent of ** ("the Student"), alleges that *** School District ("District") failed to provide a free and appropriate public education (FAPE) under the Individual's with Disabilities Education Act (IDEA) and Montana special education laws. Specifically, Complainant alleges:

1. The District failed to review the Student's Individualized Education Program (IEP) plan during the 2009-2010 school year.
2. The District failed to implement the modifications and accommodations according to the Student's IEP during the 2009-2010 school year.
3. The District failed to review other students' IEPs during the 2009-2010 school year.

A. Procedural History

1. On November 5, 2010, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainant dated November 2, 2010.
2. The OPI's Early Assistance Program provided a copy of the Complaint to the District and attempted to resolve the controversy pursuant to Admin. R. Mont. 10.16.3660. The Director of the Early Assistance Program concluded that resolution was not possible.
3. The District provided written responses to the complaint on November 29, 2010.
4. An investigation was conducted by an independent investigator hired by the OPI.
- /
- /
- /
- /

B. Legal Framework

The OPI is authorized to address violations of the Individuals with Disabilities Education Act (IDEA) and Montana special education laws as described in 34 CFR §§ 300.151-153 and ARM 10.16.3661.

IDEA regulation 34 CFR § 300.153 (c) states that “[t]he complaint must allege a violation occurring not more than one year prior to the date that the complaint is received in accordance with 34 CFR § 300.151. The complaint was received on November 5, 2010. Thus, this investigation covers only events occurring between November 6, 2009 and November 5, 2010.

The findings and conclusions contained in the Final Report are based on the Complaint, the District’s Response and supplements, interviews and discussions with the parties, and review of District files.

C. Findings of Fact

1. The Complainant has standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3661.
2. The Student currently attends school in the District.
3. The Student is currently eligible for and receives special education services.
4. The Student attended the District during the 2009-2010 school year and received special education services.
5. The most current IEP for the Student is dated October 14, 2010.
6. The previous IEP for the Student is dated April 28, 2009.
7. The April 28, 2009 IEP calls for resource room assistance in math three times a week. The IEP contains 21 accommodations and modifications that are generally related to behavior, physical arrangement, test-taking, lesson preparations, and organization.
8. The District failed to perform an annual review of the Student’s IEP and failed to implement the accommodations and modifications in the Student’s IEP during the 2009-2010 school year.
9. To date, no IEP meeting has been held to address the Student’s behavior and no functional behavior assessment or behavior support plan have been implemented.
10. The District had no procedures in place to verify that regular education teachers were informed of their responsibilities according to the Student’s IEP and to ensure that the adaptations and modifications were being implemented.
11. No IEP progress reports were developed or sent to the Complainant or any other parent of eligible students during the 2009-2010 school year.
12. Most of the other eligible students’ IEPs were not reviewed during the 2009-2010 school year.

D. Analysis and Conclusions of Law

1. Did the District fail to annually review the Student's IEP during the 2009-2010 school year?

IDEA regulation 34 CFR § 300.324 (b) requires that each district ensure the IEP team: Reviews the child's IEP periodically, **but not less than annually**, to determine whether the annual goals for the child are being achieved; and

- (ii) Revises the IEP, as appropriate, to address---
 - (A) Any lack of expected progress toward the annual goals ..., and in the general education curriculum, if appropriate;
 - (B) The results of any reevaluation...
 - (C) Information about the child provided to, or by the parents, as described under § 300.305(a)(2);
 - (D) The child's anticipated needs;
 - (E) or other matters.

(emphasis added)

The IDEA clearly requires that IEPs be reviewed at least on an annual basis. The review must address any lack of progress towards annual IEP goals and in the general curriculum. 34 CFR § 300.324 (b). IEPs must be in place at the beginning of the school year pursuant to 34 CFR §300.323. The District acknowledges this Student's April 28, 2009 IEP was not reviewed or revised until October 14, 2010 - nearly six months after it was due. The District is in violation of this IDEA provision.

Progress reports are required to inform parents and district personnel on a student's progress towards accomplishing the annual goals. 34 CFR § 300.320(a)(3). The District acknowledges that the IEP team failed to develop or provide IEP progress reports to the Complainant during the 2009-2010 school year. The District's failure to provide any progress reports to Complainant is a serious impediment to the provision of a free and appropriate public education and has direct affect on the parent's right to be an informed participant in the IEP process.

As a result of these failures, the District is found to be in **noncompliance** with regard to Issue 1. To correct noncompliance, the District must address both the procedural errors discussed above and the possible failure to provide appropriate services as discussed in Issue 2 below. 34 C.F.R. § 300.151(b).

Complainant asserts the Student experienced further social and educational setbacks during the 2009-2010 school year as a result of the District's inaction. Compensatory services may be necessary "when there is a 'material' failure of the IEP; that is, there is some educational harm that was caused by the noncompliance." *Van Duyn v. Baker School District 5J*, 502 F. 3d 811, 822 (9th Circuit), 47 IDELR 182. A review of a student's progress reports is one method to determine if there was education harm experienced by the Student. Given that there were no progress reports for the 2009-2010 school year, this is not an option.

Therefore, the Student's IEP team is directed to review existing data, decide whether new assessments are needed to determine if educational harm has occurred as a result of the noncompliance, and make a determination as to the amount of compensatory services needed, if any, to bring the Student to a position comparable to where the Student would have been if the District had complied with the IDEA as required. The IEP Team shall include either the Cooperative Director or an IEP Facilitator from the OPI to assist with the determination of any necessary compensatory services and behavioral supports.

2. Did the District fail to implement the accommodations and modifications in the Student's April 28, 2009 IEP?

The Complainant alleges that the Student's IEP accommodations and modifications were not implemented during the 2009-2010 school year. Complainant attributes her child's faltering grades to the District's failure to implement the required accommodations and modifications, specifically in the regular education classroom where she spends the majority of her day. The April 28, 2009 IEP called for 21 different accommodations and modifications for this student. The District claims all accommodations and modifications were implemented as provided for in the IEP. Staff members report there was a brief discussion at the beginning of the 2009-2010 school year about the Student's IEP, but "nothing in writing." Staff also report they did not have access to the IEP.

Each district is responsible to ensure that the child's IEP is accessible to each regular and special education teacher as well as to related services providers and others who are responsible for its implementation. 34 CFR § 300.323(d)(2)(ii). Each district is likewise responsible to ensure that each teacher and provider is informed of his or her specific responsibilities including specific accommodations, modifications, and supports that each teacher must provide for the child in accordance with the IEP.

The Complaint addresses implementation issues during the 2009-2010 school year. Short of being able to directly observe accommodations and modifications being implemented, the only way to determine whether they were implemented is indirectly. That is, are there sufficient indications that would lead one to independently infer that they had been implemented?

Here we address the following factors to deduce whether implementation occurred. First, did the District provide some form of documentation verifying the accommodations and modifications were implemented? Second, did the District have procedures in place that were routinely followed to ensure that the Student's IEP and all other IEPs were implemented as written? These procedures could include formally notifying teachers of their responsibilities under the IEP by providing a list of the accommodations and modifications for the Student or a copy of the IEP itself. Third, did the District have supervisory procedures in place to directly observe staff implementing the Student's IEP? And fourth, did the District produce regular IEP progress reports? If sufficient progress was occurring, the inference would be that the accommodations/modifications were implemented and effective.

When we consider the first factor above, the District reports it has no documentation of the IEP being implemented. Regarding the second factor above, the District reports it had no procedure in place to ensure the Student's regular education teacher was informed of her responsibilities under the IEP. The teacher reports that a brief meeting was held at the beginning of the 2009-2010 school year to discuss the Student. The teacher did not receive anything in writing or have access to the IEP. Regarding the third factor, supervision, the District reports that no procedures were in place to directly observe staff implementing the IEP. With respect to the fourth factor, the IEP progress reports, the District developed no reports during the 2009-2010 school year and thus failed to provide them to any parents of special education students. No one met or recorded whether this Student or other students progressed toward meeting their IEP goals. Based on interviews and the paucity of evidence showing the Student's accommodations and modifications were implemented according to the Student's IEP, the District is found to be in **noncompliance** on this issue.

It should also be pointed out the staff continually attributed at least some of the difficulties experienced by the Student to the Student's behavior. However, the Student's most recent IEP does not address the notion that behavior is interfering with learning. With respect to a child whose behavior impedes the child's learning or that of others, the IDEA requires the IEP team to consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. 34 CFR § 300.324(a)(2). The IEP Team must address the behavior of this Student that impedes the ability to learn in the educational setting. The team must identify behavioral needs on the IEP and create and implement positive behavioral supports where appropriate as ordered in this Final Report.

3. Did the District systemically fail to annually review the IEPs of other eligible students during the 2009-2010 school year?

Complainant alleges that the District failed to annually review the IEPs of other eligible students, including another child of hers, during the 2009-2010 school year. The District acknowledges its failure to review IEPs for other students during the 2009-2010 school-year. While the District has begun to review some of the lapsed IEPs, others still have not been reviewed-some since 2008. As discussed above, the District must ensure that each IEP is reviewed and revised as appropriate, at least on an annual basis. The review must address any lack of progress towards annual IEP goals and the general curriculum. 34 CFR § 300.324 (b).

The following chart provides the IEP timelines of current District students with IEPs excluding Complainant's child as Student 1:

/
/
/
/
/
/
/
/

Student	2009-2010 IEP	2010-2011 IEP
Student 2	4/23/2009	5/21/2010
Student 3	5/12/2009	5/4/2010
Student 4	4/28/2009	11/22/2010
Student 5	NONE (BUT ELIGIBLE)	3/5/2010
Student 6	4/30/2009	NONE
Student 7	6/29/2009	NONE
Student 8	5/1/2008	NONE
Student 9	10/29/2008	NONE
Student 10*	NOT IN SCHOOL	NONE

*A key will be provided to the District to ensure identification of each student referenced herein.

A review of eligible students' records for the 2009-2010 school year shows that seven out of the nine IEPs for Students 2 through 10 were not reviewed annually - with several not having been reviewed for over two years. Based on this evidence, the District is found to be in **noncompliance** with regard to this issue. The District must correct this systemic violation by promptly completing all remaining overdue IEP reviews.

While the District reports that all special education and related services were provided in accordance with the lapsed IEPs, under the circumstances it is appropriate that each IEP Team assess the need for extended school year services or compensatory services that may be needed to bring the students to a position comparable to where the students would have been if the District had complied with the IDEA as required. Student 5 was eligible for special education services in the 2009-2010 school year but was provided with no IEP and received no special education services until March of 2010. The District must immediately address the need for compensatory services for this student.

It should be pointed out that as a result of the District's failure to annually review IEPs, parents were denied the opportunity to provide consent to the continuation of IEP services as required by ARM 10.16.3505. The opportunity to provide consent to an IEP and regular IEP progress reports are important components of parent participation. Thus, the District must take affirmative steps as part of a corrective action to ensure that parents are given the opportunity and information needed to be effective participants in the IEP process.

E. Disposition and Corrective Action Plan

The District is hereby ORDERED to take the following actions:

1. By no later than **January 18, 2011**, the District shall convene the Student's IEP team and review existing data to determine if any additional assessments

- are needed to address the need for compensatory services for [Student 1].
2. By **January 18, 2011**, the District shall develop a timeline to complete all remaining annual IEP reviews for Students 6 through 10. These must be completed by February 28, 2011, at the latest, and the District shall submit the completion timeline to the OPI for approval.
 3. By **January 31, 2011**, the District shall collect all relevant data on [Student 1] and determine what compensatory services, along with frequency and duration, are needed, if any, and provide documentation of the decision to the OPI.
 4. The IEP team shall review the existing data regarding [Student 1's] behavior and address the need for a Functional Behavior Assessment, if appropriate.
 5. By **January 31, 2011**, [Student 1's] IEP Team shall collect all relevant data regarding behavior and determine if a Behavior Intervention Plan or other methods, including positive behavioral supports, are required to address behavior and provide documentation of this decision to the OPI.
 6. The District shall have either the Cooperative Director or an IEP Facilitator participate in the Student's next IEP meeting to assist the IEP team to determine any compensatory services and behavioral interventions.
 7. By **February 28 2011**, the District shall evaluate the need, create timelines, and begin any necessary Extended School Year services or compensatory services sufficient to bring each student who had an overdue IEP to a position comparable to where the Student would have been if the District had complied with the IDEA, and shall so inform the OPI of its actions.
 8. By **January 31, 2011**, the District shall develop written procedures to ensure that all IEPs are reviewed annually and submit them to the OPI for approval.
 9. By **January 31, 2011**, the District shall develop written procedures to ensure that IEP progress reports are developed and sent to parents as required. The procedures must be submitted to the OPI for approval.
 10. By **January 31, 2011**, the District shall develop written procedures that ensure teachers are informed of their responsibilities, have access to their students' IEPs, and the students' IEPs are implemented as written. The procedures must be submitted to the OPI for approval.

11. The District shall provide the OPI with **bi-monthly** reports through the end of December, 2011, to ensure the District has reached and maintained systemic compliance with all required annual IEP reviews.

DATED this 4th day of January, 2011.

/s/ Ann Gilkey

Ann Gilkey, Compliance Officer
Chief Legal Counsel

c: Mary Gallagher