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THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of Montana State Hospital, 2011-1, Alleged Violations of the Individuals With Disabilities Education Improvement Act (IDEA) and accompanying regulations and Montana special education law and regulations.

Dear Parties:

This is the Final Report pertaining to the above-referenced state special education complaint filed pursuant to Administrative Rule of Montana (ARM) 10.16.3662. Disability Rights Montana (Complainant), an organization representing the rights of persons with disabilities, alleges the Montana State Hospital (MSH), a state psychiatric facility, has systemically failed to provide a free and appropriate public education (FAPE) to qualifying patients who enter MSH for treatment, such as Patient 1 (****) and Patient 2 (****), in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, MCA and regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq.

Specifically, Complainant alleges:

- 1) MSH failed to meet Child Find and eligibility obligations, including failure to serve students through age 21, failed to presume eligibility for all resident patients who meet age requirements, and failed to timely obtain previous school records;
- 2) Contracted services, on an as-needed basis as opposed to employing a full time special education teacher, fail to provide FAPE to eligible students; and
- 3) MSH failed to provide adequate IEPs including transition services to IDEA eligible students.

A. Procedural History

1. On February 8, 2011, the Montana Office of Public Instruction (OPI) received a Complaint signed by Disability Rights Montana.
2. The OPI Early Assistance Program attempted to resolve the controversy pursuant to ARM 10.16.3660 but concluded that resolution was not possible.
3. Following an extension of the timeline, MSH provided documents on March 1, 2011 and a Written Response to the Complaint dated April 6, 2011. A second extension was granted to obtain supplemental documents, which were provided by the Anaconda Public Schools.
4. The investigation consisted of review of the complaint, response, accompanying documentation, and contacts with ****, MSH Assistant Administrator, Special Education Director ****, Anaconda Public Schools, Alexis Volkerts, DRM attorney, Charlie McCarthy, DRM advocacy specialist, counsel for the parties, and other DPHHS administrators.
5. The investigation also involved review of additional documents provided by MSH and the **** Public School District including monthly records identifying "possible special education students," forms, policies and procedures.

B. Legal Framework

The OPI is authorized to address violations of the IDEA and Montana special education laws through this special education procedure as described in 34 CFR §§ 300.151-153 and ARM 10.16.3661 and 10.16.3662. When the OPI finds a failure to provide appropriate services, 34 CFR § 300.151 specifies, in resolving a complaint and pursuant to its general supervisory authority under Part B of the Act, the OPI must address (1) the failure to provide appropriate services, including corrective action appropriate to address the needs of the child...and (2) appropriate future provisions of services for all children with disabilities.

"[A] person involuntarily committed" to MSH, a state mental health facility, "for a period of evaluation or treatment does not forfeit any legal right or suffer any legal disability" by reason of a commitment to MSH "except as it may be necessary to detain the person for treatment, evaluation, or care." Section 53-21-141(1), MCA. Patients who commit themselves voluntarily to treatment, likewise, do not forfeit any legal rights by the fact of their commitment. Thus, eligible patients maintain their right to special education services during their commitment to the Montana State Hospital.

Special educational services must be coordinated with the individual treatment plan and its' demanding psychiatric therapy and rehabilitation schedule in keeping with the primary purpose of the commitment. Initial care usually focuses on stabilizing an emergency situation in this acute psychiatric care setting. The average stay at the hospital is approximately 45 to 90 days. This gives MSH a short timeframe in which to identify and provide educational services.

To comply with the requirement of 34 CFR § 300.114 and § 20-7-411, MCA, to educate students in the least restrictive educational setting appropriate to the needs of the individual, an eligible MHS patient must receive special education services in a setting commensurate with his or her current capabilities, which would generally be on the MSH campus or at the Anaconda High School.

C. Findings of Fact

1. Complainant, Disability Rights Montana, is an organization charged with advocating for the rights of persons with disabilities and as such has standing to file this state administrative special education complaint pursuant to ARM 10.16.3662.
2. This investigation addresses actions that occurred within one year of the date of filing of the Complaint.
3. The Complaint is filed on behalf of patients at the Montana State Hospital (MSH) who were, are, or may be eligible to receive special education services toward obtaining a high school diploma.
4. Montana State Hospital is a mental health facility as defined in § 53-21-102, MCA. MSH's primary purpose is to provide care and treatment for persons with mental illness, provide intensive inpatient psychiatric services, and to stabilize persons with severe mental illnesses and to return them to the community as soon as possible with adequate supports. Section 53-21-601, MCA.
5. MSH is also a state-operated adult health care facility providing its residents appropriate special education services as defined in § 20-7-401, MCA.
6. Patients residing at MSH are 18 years of age or older except for juveniles charged as an adult as provided in Section 53-21-506, MCA.
7. Through September 30, 2011¹, a patient at MSH between the ages of 18 and 22 years of age who has not received a diploma from a high school must be given the opportunity to utilize special education services toward obtaining a high school diploma.
8. A General Education Degree (GED) is also offered at MSH but is not a substitute for special education services under the IDEA.
9. MSH is responsible for educational services and costs for students qualified under the IDEA pursuant to DPHHS and OPI Interagency Agreement mandated by the IDEA.
10. MSH and the **** School District have a current Agreement dated May 12, 2011, to provide Child Find and other special education services to eligible MSH patients.
11. Patient 1 was a resident of MSH in 2009-2010 and qualified for special education services.
12. Patient 2 was a resident of MSH and in 2010 was denied special education services because she had not been previously identified as eligible for special education services in her prior school.

¹ Senate Bill 73, Eff. 10/1/2011, will allow facilities such as MSH to limit provision of special education services to age 19.

D. Analysis and Conclusions

Issue 1: Child Find and IDEA Eligibility

MSH is obligated to establish and maintain a special education program for eligible students who desire to work toward receipt of a high school diploma. See §§ 20-7-401(4), -403, and -411, MCA, ARM 10.16.3142, and Memorandum of Understanding between OPI and DPHHS². A special education program means specially designed instruction to meet the unique needs of students with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings as well as instruction in physical education. 34 CFR § 300.39. Procedures must be in place to identify, locate and evaluate students with a disability who are in need of special education and related services. 34 CFR §300.111. The identification, location, and evaluation process is called "Child Find."

Complainant alleges MSH systemically failed to meet its' Child Find obligations to eligible students, including for Patients 1 and 2; failed to identify and serve eligible students through age 21; and failed to presume all residents who meet age requirements are eligible for special education services at MSH.

MSH responds that in 2009 and 2010, it established procedures for on-site screening and provision of special education services and contracted with the **** School District to do individualized assessments and other special education services as needed.³ The contract provides for a special education teacher for eligible patients, technical assistance, and IDEA-related reports. MSH asserts Patient 1 and Patient 2 were properly identified. Patient 1 was found eligible while Patient 2 was found not eligible.

a. Whether MSH failed to timely identify students for special education services.

The 2010 contract with the **** School District was in effect from March 1, 2010 to July 31, 2010. A new contract with the School District was not in place until May 1, 2011, despite that fact that MSH charts for July, 2010, and March, 2011, indicate several individuals were interested and potentially eligible but were offered only GED services or had special education services "pending."⁴ Other patients were denied services because they had not been previously identified as eligible for special education at their prior school. Reports for 2010 indicate that numerous age-eligible patients had not been asked about their interest in educational services.

² Memorandum of Understanding between OPI and DPHHS (2004) (extended on 5/9/11).

³ Memorandum of Understanding, **** School District #10 and Montana State Hospital effective March 1, 2010.

⁴ "MSH Possible Special Education Students" charts for May, June, and July, 2010 and March, 2011 reviewed as part of the investigation of this Complaint.

i. Failure to Differentiate GED from Special Education Services.

It is important for MSH to make a distinction for patients between general GED services which are offered to all patients, and MSH's obligation to make special education services available to IDEA-eligible students who choose to work toward a high school diploma. If eligible patients are offered only GED services they are unaware they have a right to FAPE pursuant to the IDEA. 20 USC §1400 et seq. MSH must ensure that patients are informed of the availability of special education services.

ii. Conditioning Special Education Services on Prior IDEA Identification.

The IDEA is clear that an interested child or young adult with a suspected disability must be evaluated for special education services. If an eligible patient at the state hospital expresses a desire to obtain education services, unless the patient has a recent IEP from a Montana school district, the patient must be evaluated for special education eligibility then timely offered services. MSH policy provides for completion of a Social Assessment form upon initial commitment to the hospital. The Social Assessment form was amended in December, 2010, to include a written determination of patient interest in formal education and whether there is a history of special education services.⁵ Complainant suggests that all residents between the ages of 18 and 22 should be asked initially upon admission, and regularly during their commitment as they progress in their treatment, whether they completed high school or whether they want to continue their education. MSH reports that educational services are now offered at the initial assessment and at each of the 30-, 60-, and 90-day assessments. Prior to amendment of the Social Assessment form, the process was a less formal inquiry which could miss interested students.

The amended Social Assessment form states only that "[I]f a patient indicates they would like MSH to send for their school records, the patient will sign an informed consent *so that they may or may not qualify once their school records are reviewed*' and records are sent to the contracted school district who will *evaluate the records to see if the patient qualifies.*"⁶ The MSH form, "Informed Consent for Release of Education Records," tells the interested patient that by signing the form they *"understand evaluation of my education records may determine that I am not eligible to continue my formal education."* In addition, monthly records submitted for all age-eligible patients list questionable reasoning for not providing services, such as patient *"would like his HS diploma but not here at MSH"* or patient *"not in Special Education and did not have an IEP"* and therefore did not receive special education services.

Patient 2 was denied eligibility for special education solely because she had not been identified as eligible by her prior school. MSH does not deny that this was the practice utilized for their patients. The 2011 "Possible Special Education Students" monthly charts indicate a number of patients who had not yet received a high school diploma, but listed no documentation on whether or not the patient was interested in educational services. A marked improvement was demonstrated for the 2011 chart wherein all listed patients had this information documented.

⁵ Montana State Hospital Social Assessment form, p.3.

⁶ Montana State Hospital "Process to Follow to Identify Patients Who May be Eligible for Special Education Services."

By the time patients enter MSH, presumably the majority will have been identified in a previous school. For those who have not been identified but are interested in education services, MSH is required to identify and evaluate them to determine IDEA eligibility if suspected of having a disability.⁷

The above procedures and practices do not fulfill the required Child Find obligations but demonstrate systemic **noncompliance** with 34 CFR §300.301 and ARM 10.16.3321. Likewise, Patient 2 was wrongly denied Child Find and evaluation services in **noncompliance** with the above provisions.

MSH must ensure regular offers for educational evaluation and services are extended to every age-eligible patient. It is understood that during assessment a patient is free to decline educational services if they have reached the age of majority. However, any declination must be based on a patient's receipt of complete information regarding their right to special education evaluation and services.⁸

The new Agreement between the contracting school district and MSH⁹ indicates the district will provide full Child Find services and assistance with evaluations for identified patients using appropriately trained staff. The responsibility remains with MSH to properly identify interested patients. This arrangement, if promptly and properly implemented and documented, is sufficient to meet IDEA compliance provided the services include assessment and evaluation of previously unidentified patients who are interested in accessing special education.¹⁰ MSH must maintain a current arrangement to provide services, contracted or otherwise, to ensure timely response to patient requests for educational services.

b. Whether a Presumption of IDEA Eligibility Should Be Applied To All Age-Eligible MSH Patients.

Complainant argues that eligibility should be presumed for any resident who meets the age requirements, regardless of whether they were previously IDEA-eligible in the community, claiming "the average [age] of MSH residents is in the early 20's, and nearly 100% of residents at MSH would qualify as having a disability which adversely interferes with progress in their education." MSH disagrees asserting "while admission for inpatient hospital care may indeed interfere with one's education, this does not mean that special education is required."

The OPI agrees with MSH. The IDEA requires a student must not only have a disability, but also that the student be in need of special education services, not just related services, such as medical or psychiatric services, to enable the child to benefit from an education. 34 CFR § 300.39. A presumption that all age-eligible MSH patients are also IDEA eligible would

⁷ IDEA eligibility is defined in ARM 10.16.3007.

⁸ Most patients have reached the age of majority. They are free to decline or accept services within the confines of the commitment.

⁹ Dated May 12, 2011.

¹⁰ 34 CFR §300.111 and 34 CFR §300.301

oversimplify the evaluation process and fail to meet the requirement for an individualized determination of eligibility as required by 34 CFR § 300.15.

c. Whether MSH failed to timely obtain previous school records thereby unnecessarily delaying Child Find and FAPE.

Complainants additionally argue that delay in requesting and obtaining records also delayed identification, evaluation, and FAPE to at least Patients 1 and 2 who were at the hospital in the Spring of 2010. Both parties acknowledge that admission to MSH is frequently brief, and some patients will be discharged before evaluation or assessment has been completed.

Montana law favors expedited transfer of records. Pursuant to §20-1-213, MCA, transfer of records must be accomplished by a prior school within five days of a request by MSH for records. MSH has a duty to actively seek records for interested patients. Complainant asserts MSH did not do so for Patients 1 and 2.

The contracted district reports they and MSH made repeated attempts to obtain school records for Patient 1 but initially the patient was not able to inform MSH of the last school attended. The district and MSH reportedly also made numerous attempts to obtain records of Patient 2 but the patient had frequently moved from district to district so it took an extended period of time to locate records. They report their attempts were ignored by the prior school and not provided before the patient was discharged. The patient returned later that year and MSH requested and received records. New mechanisms now available through the OPI AIM¹¹ data collection system should help expedite this process. However, a review of the documents shows that once the prior district had been identified, for Patient 1 there was a delay of over three months before the patient was found eligible.¹²

An evaluation must be completed within 60 days of receiving consent for evaluation for an individual suspected of having a disability. 34 CFR § 300.301. Timely receipt of prior special education records is the bottleneck through which all MSH patients were required to pass to receive special education services. Patient consent to evaluation should be obtained when the patient expresses interest in educational services. If records are not forthcoming, MSH must still proceed to evaluation within the established timelines for patients interested and suspected of having a qualifying disability.

Failure to have adequate procedures in place to timely obtain records, and failure to conduct initial evaluations and eligibility determinations for patients suspected of having a disability but with no prior special education records leaves MSH in **noncompliance** with 34 CFR§ 300.301. MSH must remedy its practice and procedures to comply with this provision in coordination with the patient's treatment plan. The OPI is available to provide technical assistance as needed.

¹¹ AIM is the OPI's Achievement In Montana data system for special education.

¹² ****Public School special education director **** 2/3/10 Ltr to previous school district; **** 5/10/10 Ltr to C. McCarthy, DRM.

d. Whether MSH Systemically Failed to Identify Age-Eligible Students With Disabilities.

Complainants assert the IDEA requires special education services through age 21 and MSH does not provide services through age 21 in violation of Child Find and FAPE. While the IDEA requires a free appropriate public education to be available to all children residing in the state between the ages of 3 and 21, inclusive,¹³ it provides an exception for 18 to 21 year olds "to the extent that application of the...regulation to 18 to 21 year-olds would be inconsistent with State law or practice... with respect to the provision of public education to children of those ages."¹⁴

State law creates an exception for 19 to 21 year-olds for school districts in Montana. Section 20-7-411, MCA, *requires* special education programs and services be provided for each child with a disability who is 6 years of age or older and under the age of 19 years of age. A school district has the *discretion* to decide if it will provide special education programs and services for a child with a disability who is 19 years of age or older and under 22 years of age. Section 20-7-411(4), MCA. State-operate mental health facilities such as MSH are not school districts and therefore the exception in § 20-7-411, MCA and 34 CFR § 300.102 has not been historically applied them. The general requirement to provide FAPE to all eligible individuals through age 21 has been applied to MSH and other state-operated mental health facility programs. 34 CFR § 300.101.

Documentation provided by MSH for the previous year indicates that it does identify for possible IDEA eligibility patients who are 18 to 21 years of age. MSH is found to be **in compliance** with § 20-7-411, MCA, 34 CFR § 300.102, and 34 CFR § 300.111.

As of October 1, 2011, MSH will be considered a "state-operated adult health care facility providing special education services to its residents."¹⁵ At that time, DPHHS/MSH will be permitted by law to determine whether MSH will continue to provide special education for patients with a disability ages 19 through 21 years of age.¹⁶ This statutory change remains within the exception in 34 CFR§ 300.102.

Issue 2. Whether MSH Should Be Required To Hire A Full-time Special Education Teacher to Meet FAPE Obligations.

Complainant argues that provision of FAPE at MSH through contract on an as-needed basis, as opposed to employment of a full time special education teacher, violates the IDEA and makes startup and cooperation of the program difficult.

¹³ 34 CFR§ 300.101

¹⁴ 34 CFR§ 300.102.

¹⁵ Senate Bill 73, 2011 Chpt. 44 amending §§ 20-7-401 and -411, MCA.

¹⁶ Id.

A “free appropriate public education” (FAPE) means special education and related services that: a) are provided at public expense under public supervision and direction and without charge; b) meet the accreditation standards of the board of public education, the special education requirements of the superintendent of public instruction, and the requirements of the IDEA; c) include preschool, elementary school, and high school education in Montana; and d) are provided in conformity with an individualized education program (IEP) that meets the requirements of the IDEA. §20-7-401(2), MCA.

Creation of an IEP is the responsibility of the IEP team which at MSH would include the patient, and if a minor, the minor’s parents. Some patients also have guardians who must be given notice and invited to attend IEP meetings. The regulations also provide for other mandatory and necessary IEP team members. 34 CFR §300.321.

In contrast to IEP team decisions, decisions regarding staffing IEP services are the responsibility of MSH administration. The IDEA and Montana law require all special education and related services to be provided under the direction of highly qualified personnel. 34 CFR §300.18, ARM 10.16.3136. The MSH administration must ensure that qualified personnel provide IEP services but the choice of hiring or contracting for staff remains with the administration. MSH is not required to hire a full-time staff person for special education services but must meet the services dictated in each patient’s IEP. MSH is found to be **in compliance** on this issue.

Issue 3. Whether MSH failed to provide a free appropriate public education including transition services to IDEA-eligible students, including Patient 1.

Complainant alleges the services provided to Patient 1 upon identification were inadequate because she received only three hours or less of math instruction at one hour a week, minimal transition services, and no other educational services before discharge.

The investigation reveals that a contracted special education teacher provided services 11 times between March 23, 2010 and May 11, 2010. Some of these earlier services were in preparation for a March 31, 2010 IEP meeting but the remainder were for direct instruction to the patient. The investigation revealed that this patient’s behavior interfered with her participation on several occasions causing hospital staff or the instructor to terminate the instructional sessions. The IEP correctly identified behavior as an issue and incorporated an “Individual Problem Plan” with behavior goals.

Patient 1’s IEP identifies the patient’s “present levels of academic achievement and functional performance” to be between a second and third grade ability level based on testing from the previous year. It contains goals for reading and math with services identified for reading, math, and social/emotional/behavioral areas. However, while the patient expressed interest in

earning a high school diploma, her IEP goals were set to “enable her to enroll in the MSH adult GED program.” There was no indication that MSH offered this patient an opportunity to earn credit toward a high school diploma. Furthermore, there is indication that the goal of obtaining a GED may have been inappropriate for Patient 1 due to her levels of achievement and functional performance.¹⁷ Given MSH’s practice of requiring a record of special education at a prior school and a specific request by a patient to work toward a diploma, MSH is found to be in **noncompliance** with the requirements of providing FAPE as defined in 34 CFR §300.17 and §20-7-401(2), MCA.

Complainant also alleges inadequate discharge planning. Transition services are required for students ages 16 and older. MSH is governed by DPHHS transition policies and procedures to provide continuity of services upon graduation in accordance with a student’s individual transition plan.¹⁸ 34 CFR §300.321. MSH notes that transition services are done in conjunction with the mandatory discharge plan for the patient. See §53-21-180, MCA. MSH argues psychiatric therapy and rehabilitation are an integral part of their treatment regimen and the rehabilitative activities serve the same function as non-academic elements of an IEP, such as transition services. In the case of Patient 1, an “Individual Problem Plan” was incorporated into the IEP to address behavior issues and teach coping skills. That plan provided sessions in Basic Skills, Mental Fitness, Life Fitness, and Steps Toward a Healthy Lifestyle, among others. Although Patient 1’s educational transition services could have been more fully developed, this does not rise to a denial of FAPE for Patient 1. MSH is in **compliance** with respect to this issue for Patient 1.

E. Disposition and Corrective Action

The Montana State Hospital is hereby ordered to take the following corrective actions and address all responses to the OPI Dispute Resolution/EAP Director, P.O. Box 202501, Helena, MT 59620-2501:

1. MSH shall make contact with Patient 1 to explore her interest in compensatory education in Montana and, if interested, what services might be feasible. MSH shall submit an explanation of those efforts and a plan as to how to accomplish compensatory services by no later than **July 1, 2011** for approval.
2. MSH shall make contact with Patient 2 to explore her interest in compensatory education and, if interested, what services might be feasible. MSH shall submit an explanation of those efforts and a plan as to how to accomplish compensatory services by no later than **July 1, 2011** for approval.
3. By no later than **August 1, 2011**, the District shall change applicable policies, procedures, and forms to be in conformity with the above areas of

¹⁷ Patient arrived at the hospital with 18 out of 24 credits already completed.

¹⁸ MOU between DPHHS and OPI calls for DPHHS to provide transition services. Page 2,#5.

noncompliance and submit them to the OPI for review including but not limited to:

- a. establishment of procedure for identifying eligible patients;
 - b. ensure student is fully informed of the special education choices available including differentiation between GED and the right to special education;
 - c. amendments to clarify patients will not be denied eligibility for special education because the patient has not been previously identified by a prior school district;
 - d. establish procedure to timely initiate records requests and evaluations;
 - e. create a consent for evaluation form, amendment of the Records Request form, or other measures to document and date student's consent to evaluate.
 - f. establish clear procedure through contracted services or otherwise for obtaining records;
 - g. establish procedures to coordinate a treatment plan with an IEP including but not limited to overlapping issues of behavior, secondary transition and discharge planning, and all other IEP service areas.
4. By no later than **August 1, 2011**, complete and submit sections I and parts 1,2,3(c), and 3(d) of Section II of the OPI Program Narrative Outline and Checklist. (see enclosure)
 5. By no later than **September 1, 2011**, and in coordination with contracting district, provide written assurance that staff have been trained in all changes to special education procedures.
 6. MSH shall submit complete updated monthly charts of "Possible Special Education Students" **monthly for the next six months** to OPI for review. For each interested but ineligible patient on a monthly chart, explain the reasons for that ineligibility (ie. evaluated but found ineligible, received diploma, or other).
 7. Through **November 30, 2011**, submit all IEPs to the OPI for review.¹⁹

Sincerely,

Ann Gilkey, Compliance Officer
OPI Chief Legal Counsel

c: Mary Gallagher, Dispute Resolution/EAP Director
Paulette Kohman, DPHHS Legal Affairs

¹⁹ Counsel for both agencies will address FERPA/HIPAA issues pertaining to this corrective action.