Montana
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August 31, 2011

*** ***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of ***, 2011-06, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

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

This is the Final Report pertaining to the above-referenced state special education complaint ("Complaint") filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. *** (Complainant 1) filed a complaint on behalf of her child, *** (Student 1) and *** (Complainant 2) filed on behalf of her son, *** (Student 2), both students in *** School District ("District"). Complainants also filed on behalf of other students at *** Public Schools ("District") and allege the District systemically violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq. when it:

1. Made unilateral changes to IEPs without following the IEP process; and
2. Failed to provide accurate information or implement procedural safeguards including prior written notice, parental consent, and meaningful parental participation.

A. Procedural History

1. On June 13, 2011, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainants.
2. Complainants waived the assistance of the Early Assistance Program and the Complaint proceeded to investigation.
3. The District provided a written Response to the Complaint on June 24, 2011.
4. On July 13, 2011, Complainants filed a Reply to the District's Response.
5. An appointed investigator conducted interviews with Complainants, counsel, and the special education director. The Students' educational records were reviewed, as well as all documents submitted by the District and Complainants.

B. Legal Framework

The OPI is obligated to address violations of the IDEA and Montana special education laws through the State Complaint procedure in 34 CFR §§ 300.151-153 and ARM 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 provision of services for all children with disabilities.

C. Findings of Fact

1. Complainants have standing to file this Complaint on behalf of their children and systemically, on behalf of other students in the District pursuant to the Montana special education administrative process in ARM 10.16.3661.
2. Complainants 1 and 2 have waived confidentiality as to each other in order to pursue this Complaint.
3. Student 1 is eligible for special education services under the category of cognitive delay. He attends high school in the District and had IEPs in place dated 12/21/2010 and 5/26/2011.
4. Student 2 is eligible for special education services under the categories of cognitive delay and speech/language impaired. He attends high school in the District and had IEPs in place dated 11/21/2010 and 5/21/2011.

Student 1

5. Student 1's IEP Team met on 12/21/10 and among other considerations decided to change his setting for the 2011-2012 school year to a self-contained classroom (special education setting) with assistance from classroom paraprofessionals to promote learning discreet skills to improve his independence. Student 1 had previously been in the regular education setting with a one-on-one paraprofessional assigned to him.
6. At the meeting, Complainant 1 disagreed with the proposed changes and the District agreed to allow the one-on-one paraprofessional to remain with him in the regular education setting through the end of the 2010-2011 school year, at which time the IEP Team would discuss the one-on-one paraprofessional, the self-contained setting, and his progress toward independence.
7. On January 31, 2011, Complainant 1 signed and returned approval of the 12/21/10 IEP with two exceptions for the coming school year: placement in the school's self-contained classroom setting, and eventual elimination of the one-on-one paraprofessional assigned to the student.
8. No IEP meeting was held to discuss the parent's exceptions. No Prior Written Notice was issued by the District indicating its intent to initiate or change the educational placement for the coming year.
9. On March 21, 2011, the District special education director sent a letter to Complainant 1 stating the current IEP provided for "educational and related services in a self-contained special education setting with the assistance from a classroom paraprofessional." The

letter concluded the Student "will not continue to have a one-on-one paraprofessional with him" in the coming school year and the May 2011 IEP meeting would discuss the educational goals including independence.

10. Complainant 1 objected to the District letter and eventually filed this Complaint.
11. At the end of the school year, Student 1's IEP Team met again May 26, 2011 and changed the IEP to include a graduation date and, due to Complainant 1's objections, agreed to continue the one-to-one paraprofessional and regular classroom setting for the remainder of the IEP's effective date through December, 2011. The May 26, 2011 IEP Notes did not address data regarding the one-on-one paraprofessional as contemplated by the last IEP. The IEP Notes did not state whether FAPE would continue to be provided if the parent's exceptions were permitted.

Student 2

12. A June 7, 2010 IEP for Student 2 stated he needed "... 100% assistance everywhere he goes throughout the school any part of the day" during the coming school year.
13. Student 2's IEP provided for a regular education setting for weekly art and music classes with paraprofessionals providing behavioral support and incidental instruction rather than a one-on-one assigned paraprofessional as in past IEPs. The remainder of instruction was to be in a special education setting.
14. The parent objected to the changes so the Team decided to complete ongoing evaluations by fall and use them "to make decisions on the one-on-one." The ongoing evaluations included a Functional Behavioral Assessment (FBA) and the parent was assigned to choose an evaluator for the FBA. The parent approved the IEP on June 7, 2010, with the exception: "with further looking into."
15. An IEP meeting was held November 12, 2010 and sought to address the proposed special education setting and removal of the one-on-one assigned paraprofessional.
16. The parent had not identified an evaluator so no changes were made to Student 2's placement or services but the District stressed the need for the parent to select an evaluator noting the FBA would be crucial to a decision on one-on-one paraprofessional.
17. The parent agreed to identify the FBA evaluator by Thanksgiving and the District agreed to continue with a "temporarily 1:1" until the Team could consider the FBA results.
18. The IEP Team did not ensure the FBA promptly moved forward once it determined an FBA was crucial for making a decision on the one-on-one professional.
19. A letter from the District dated March 2, 2011 advised the parent that the District would "no longer provide one-on-one service" but that "his current classroom setting has a special education monitor" (paraprofessional) who would provide the needed support.
20. The District letter further indicated that provision of the temporary paraprofessional was contingent upon the parent obtaining a FBA, and since that had not happened, the one-on-one paraprofessional would be withdrawn and Student 2 would be placed in the self-contained setting on March 7, 2011.
21. The March 2, 2011 letter contradicted the IEP Team decision to rely on the results of the FBA to establish the need for a one-on-one paraprofessional then make a decision between the two educational settings.
22. Complainant 2 objected to the letter and eventually an IEP meeting was held on May 18, 2011.

23. The IEP Notes documented the District's use of a "temporary paraprofessional" to meet Student 2's identified needs, but that District hiring procedures "will govern newly hired paraprofessional staff." The parent expressed concern about paraprofessionals and different schools.
24. On May 19, 2011, Complainant signed the IEP with exceptions noting parent "requests that [Student 2's] 1:1 paraprofessional is added to this IEP. She does not consent to not including this support."
25. No Prior Written Notice was issued to the parent and no determination has been made as to whether the proposed changes were necessary to provide FAPE to Student 2.

D. Analysis and Conclusions

Issue 1. IEP Process.

A. Whether the District failed to follow required IEP procedures when the director decided a one-to-one paraprofessional in a regular classroom setting would not be provided in the coming year although the IEP Team had agreed to meet by the end of the current school year to address the services to which the parent objected.

Student 1

Complainant 1 alleges the District violated special education regulations by making unilateral changes to students' IEPs without following the IEP process. The District argued it followed appropriate procedures.

On 12/21/2010, Student 1's IEP Team approved a specifically assigned one-on-one aide and regular education setting through May, 2011 and a change to a special education setting with paraprofessional assistance through December, 2011, the remainder of the IEP period with the goal of increasing independence. Complainant 1 disagreed with the Team decision at the IEP meeting and on January 31, 2011, signed the IEP with exceptions objecting to removal of the one-to-one aide and the change to a special education setting. The 12/21/2010 IEP Notes state data on the effectiveness of the one-on-one aide would be collected and the Team would meet in May, 2011 to determine the course to take regarding the disputed services.

However, on March 21, 2011, the special education director sent Complainant 1 a letter stating the IEP provided for a "self-contained" special education setting and no one-to-one aide would be provided during the next school year. While the IEP did state the student was to be placed in a special education setting, the director decided the student would not have a one-to-one aide, a conclusion that contradicted the IEP plan to delay the decision until review of the data in May, 2011.

IEPs must be implemented as written and may not be unilaterally amended by District personnel. 34 CFR § 300.324(a)(4) and (6). Because the IEP Team had not met to make a final determination as to the aide and educational setting, the unilateral action by the director

to change the one-to-one aide for the coming year was a procedural **violation of 34 CFR § 300.324**. Complainant 1 challenged the District's letter and the Team met in May, 2011, before services to Student 1 were changed. The District and Complainant 1 were able to resolve the matter to the satisfaction of Complainant 1. As such, we find this to be a procedural violation but do not find educational harm to Student 1.

B. Whether the District failed to follow the required IEP procedures when the director decided a one-to-one paraprofessional in a regular classroom setting would be removed immediately although the IEP Team had agreed to review FBA information before making a final decision on the paraprofessional services and placement to which the parent objected.

Student 2

At IEP meetings in May and June, 2010, Student 2's IEP Team concluded he needed "… 100% assistance everywhere he goes throughout the school any part of the day" for the start of the next school year. The Team sought to replace the assigned one-on-one aide with paraprofessionals and change the settings to a special education setting but the parent objected. The Team agreed to finish ongoing evaluations, including an FBA to be completed by fall. Notes indicate the FBA would "be used to make decisions on the one-on-one" paraprofessional. The parent agreed to select someone to do an FBA and approved the IEP with exception that stated "with further looking into."

An IEP meeting was held November 12, 2010 to discuss, among other things, the FBA. The parent had not selected an evaluator for the FBA. The IEP Notes indicated the District emphasized the need to select the evaluator because the FBA was crucial to determining whether to assign a one-on-one paraprofessional to Student 2.[1] The parent agreed to identify the FBA evaluator by Thanksgiving and the IEP Team gave approval to continue with a "temporarily 1:1" until it could meet to consider the FBA recommendations.

Apparently no evaluator was identified by the parent and no follow-up IEP meeting was held to address the proposed removal of the temporary one-on-one aide who continued to provide services through the winter. On March 2, 2011, the special education director sent Complainant 2 a letter stating "To date, we have no documentation that you have followed through with this agreement [to bring Student 2 to the Rural Institute in Missoula for additional assessment]. Therefore, as of March 7, 2011, the paraeducator will no longer be providing the one-on-one service" because his current classroom setting had a paraprofessional[2] to which he would have access.

The IEP Notes clearly indicate the District intended to rely on the results of the FBA to establish whether to continue to assign a one-on-one paraprofessional specifically to

[1] While not at issue in this Complaint, the law is clear that the District had the responsibility to move the FBA assessment process forward once the need for an FBA was identified by the IEP Team as necessary for FAPE. Services may not be unreasonably delayed due to parent inaction if those services are necessary to provide FAPE.

[2] The letter uses the term "monitor" for "paraprofessional."

Student 2. No IEP meeting took place before the director's letter was sent. The letter erroneously altered the IEP without an IEP Team meeting. This constitutes a **procedural violation of the requirement to amend the IEP in accordance with 34 CFR §300.324(6).**

On May 18, 2011, the IEP Team did meet about the temporary paraprofessional and school setting issues. Notes indicate District hiring procedures would govern newly hired paraprofessional staff. Complainant 2 reiterated her objection to removal of the specific one-on-one paraprofessional and the change of setting and on May 19, 2011, signed her approval of the IEP with exceptions "request[ing] that [Student 2's] 1:1 paraprofessional is added to this IEP. She does not consent to not including this support." The investigation revealed the director was not aware the student's IEP called for "100% assistance everywhere he goes. A one-on-one paraprofessional was re-assigned.

The unilateral change to the IEP is a procedural violation. The IEP Team must complete any necessary FBA if that has not yet been accomplished. No harm was alleged by Complainant 2 after removal of the one-on-one paraprofessional after March 7, 2011 and we find none here.

Issue 2. Whether actions taken by the District comply with procedural safeguards regarding parental consent, prior written notice, and parental participation after Complainants objected to specific services in the annual IEPs.

Complainants argue that through the District's letters and action, the District provided inaccurate information to Complainants, and possibly other parents, about procedural safeguards including parental participation and consent, and prior written notice. The District argues they complied with all procedural safeguard requirements.

Parental Consent and Prior Written Notice

Complainants did not give their consent to specific proposed changes and clearly listed their objections to the changes. While it is apparent that each IEP Team sought to work out the differences, Complainants maintained their objections and the differences were not resolved. The District sought to implement the disputed changes through letters to the parents. We concluded above that the issuance of the letters did not follow the amendment process of the IDEA. Here we address the unique provisions in Montana special education regulations regarding annual parental consent for specific services in an annual placement.

A district must obtain written parental consent for initial and annual placement of a student with disabilities in special education and related services from a parent prior to the placement. ARM 10.16.3505(2). The procedure for resolving a dispute over annual consent is described in ARM 10.16.3505(2)(b) as follows:

> If the parents and local educational agency cannot agree on the IEP but can agree on certain IEP services or interim placement, the student's new IEP would be implemented

in the areas of agreement and the student's last agreed-upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved.

Pursuant to this regulation, the proper procedure would have been to implement the areas of agreement and the last agreed upon IEP[3] until the differences were resolved either formally or informally. Since the District proposed to change the educational placement and the provision of FAPE to Students 1 and 2, Prior Written Notice under 34 CFR §300.503 was the appropriate mechanism to use to move the disagreement forward once it became clear the parties could not reach a resolution.[4] Prior Written Notice should have been sent to the parents in place of the director's letters. While those letters contained some elements of the required notice, they did not address all required elements for Prior Written Notice and actually contradicted the IEP plans to reconvene at the end of the year for re-consideration of the disputed services. The letters themselves were not adequate notice and the District's failure to provide Prior Written Notice **violated the requirements of 34 CFR §300.503.**

Further, once the disagreements reached an impasse, each party had the right to request mediation or a due process hearing to resolve the disagreement. Here the parents were content to keep the services agreed to in the last IEPs. The onus was on the IEP Team to decide whether their proposed changes to the IEPs were necessary to provide FAPE, particularly with respect to the goal of "independence." If the Team determined the proposed changes <u>were not necessary</u> to provide FAPE, the District was required to discontinue or refrain from implementing them. If the IEP Team determined the proposed changes <u>were necessary</u> to provide FAPE, the District was obligated to request a due process hearing to resolve the issue.[5] Here, rather than clarify its position and seek due process, the District sent

[3] Here, Student 1's IEP of December 21, 2010 and Student 2's IEP from November 21, 2010.

[4] **§ 300.503 Prior notice by the public agency; content of notice.**
(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.
(b) *Content of notice.* The notice required under paragraph (a) of this section must include—
(1) A description of the action proposed or refused by the agency;
(2) An explanation of why the agency proposes or refuses to take the action;
(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
(7) A description of other factors that are relevant to the agency's proposal or refusal.
(c) *Notice in understandable language.* (1) The notice required under paragraph (a) of this section must be—
(i) Written in language understandable to the general public; and (ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure—(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (ii) That the parent understands the content of the notice; and (iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met. (Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

[5] The OSEP *Letter to Richards* provided to districts by the OPI is informative as to what party has the ultimate responsibility for FAPE. It does not override the specific provisions in Montana regulation on annual parental consent to specific IEP services.

a directive to Complainants implementing the disputed provisions. Under ARM 10.16.3505, this is impermissible. The District is **in violation of the parental consent provisions in ARM 10.16.3505(2).**

Parental Participation and Involvement in Placement Decisions

Complainants further argue that they were denied the right to adequately participate in IEP meetings and placement decisions. A school district must provide parents with an opportunity to participate in IEP decisions through attendance and participation at IEP meetings and receipt of IEP documents. 34 CFR § 300.322, 34 CFR § 300.501. A review of the records shows Complainants were actively involved in all IEP meetings held by the District and were clearly engaged in the IEP process and registered their disagreements. With regard to parental involvement in placement decisions, 34 CFR § 300.501(c) states the district must ensure a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. Here the parents were active participants in the IEP Team meetings which sought to address annual placement. However, due to the failure of the District to follow IEP procedural requirements, neither the parents nor the IEP Team had a voice in the ultimate decision reached by the director.

We have already concluded the District erred when it failed to: follow the required procedures regarding Complainants' refusal of consent; give adequate prior written notice; and determine whether services were necessary for FAPE and, if so, move forward with due process. Complainants did participate in IEP meetings as members of the IEP Teams involved in making placement decisions. Therefore we decline to find the District in violation of the procedural safeguards under 34 CFR § 300.322 and §300.501. Complainants allegations are **denied** as to the parental participation provisions in 34 CFR § 300.322 and 34 CFR § 300.501.

E. Disposition

The District is hereby ORDERED to take the following steps:

1. By **October 12, 2011,** the District must review its policies, procedures and practices with regard to annual parental consent for specific services and prior written notice to ensure compliance with ARM 10.16.3505(2)(b) and 34 CFR § 300.503. Any necessary policy or procedure changes must be approved by the Dispute Resolution/EAP Director. Upon approval, a copy of any revised policies and/or procedures shall be sent to all District administrators and special education staff.
2. By **October 26, 2011**, the District must provide training to special education administrators to address IEP processes in 34 CFR § 300.324, parental consent to annual IEPs in ARM 10.16.3505, prior written notice in 34 CFR § 300.503, and ways to address paraprofessional staffing concerns without interfering with these regulations. The trainer must be approved by the Dispute Resolution/EAP Director and a list of participants forwarded to that office.
3. The District must determine whether the services it proposed in the IEP for Student 2 on May 18, 2011 are necessary for the student to receive FAPE and

follow the applicable procedures outlined in this Final Report. The District will inform the Dispute Resolution/EAP Director of the actions taken by **October 26, 2011.**

4. The District must send to the Dispute Resolution Office the next two IEPs for students whose parents disputed specific IEP services or signed the IEP with "exceptions" or "objections" and include an explanation as to specific actions taken by the District.

Sincerely,

Ann Gilkey, Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director