



June 8, 2012

****, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of ****, 2012-01, 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 the Administrative Rules of Montana (ARM) 10.16.3662. **** (Complainant) filed the complaint on behalf of her child, *** (Student), a student in *** School District No. ** (District). Complainant alleges the District 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 failed to provide a paraprofessional as contemplated by the Student's IEP for school year 2011-2012.

A. Procedural History

1. On April 13, 2012, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainant.
2. Complainant 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 May 1, 2012.
4. An appointed investigator conducted interviews with Complainant, teacher ****, ****, **** School Principal, and the District's special education director,****. The Student's educational records were reviewed as were all other documents submitted by the District and Complainant.

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. Complainant has standing to file this Complaint on behalf of her child pursuant to the Montana special education administrative process in ARM 10.16.3661.
2. Student was identified in November, 2009, as eligible for special education services under the category of Developmental Delay, Pervasive Developmental Disorder, not otherwise specified (PDD-NOS). She was served in Head Start through May, 2011, when an IEP meeting was held for her transition to elementary school for the fall of 2011. The transition IEP Notes indicate that Student "required adult assistance 95% of the time!!" The February 2011 IEP and transition meeting documents as well as a Progress Report state Student "requires an adult to supervise her throughout the day, for her safety as well as the safety of the other children... An adult needs to be with [Student] as she transitions throughout the day..."
3. When the Student entered elementary school in the fall, 2011, her problematic behavior continued. District personnel recorded data and called an IEP meeting on September 14, 2011.
4. The September 14, 2011 IEP team amended the IEP so that Student would be in a self-contained classroom with the assistance of a one-on-one paraprofessional rather than in the regular classroom. The team noted Student had a propensity to run from the classroom posing a danger to herself; that she was unpredictably violent at times placing the safety of herself, other students, staff, and faculty in jeopardy; and she "requires one on one paraprofessional assistance throughout her day for safety reasons for all students as well as language, behavior, self help and academic development."
5. The September 14, 2011 IEP team did not include a District administrator or agency representative who had the authority to commit District resources with regard to paraprofessional services. The team consisted of the parent, the Occupational Therapist, the Special Education Teacher, a Family Outreach person and the School Psychologist. This team apparently understood it would have to separately contact the Special Education Director who was not at the IEP meeting for permission to obtain the services of a paraprofessional. After the meeting, the amended IEP and supporting data were forwarded to the Special Education Director for action.
6. The District Response to the Complaint asserts that the District interpreted the IEP to be a request for an "adult/paraprofessional." It states "[t]herefore, after careful consideration, it was determined by the Special Education Director, with assistance from Board of Trustee, Superintendent and other administrators that we would utilize currently employed paraeducator(s) for this position."

7. The Special Education Director's determination was not shared with the parent or the IEP team who continued to assume that a specific one-on-one full-time paraprofessional would be hired for the "position."
8. The District placed an additional person, called a "monitor," in the Student's classroom.
9. No one-on-one full-time paraprofessional was assigned to the Student on a consistent basis during the fall.
10. The District Response includes dates by the elementary principal detailing when a paraprofessional was "sent" to the Student's classroom. Extensive gaps in the dates on which a paraprofessional was reportedly sent are evident. These include school days between September 1-26, September 30 through November 22, 2011, November 24-27, 2011, February 8-23, 2012, and April 5-12, 2012. (May and June were not included.)
11. No prior written notice was given to Complainant stating a full-time one-on-one paraprofessional would not be assigned to the Student consistently.
12. During the fall of 2011, Student's behavior continued to deteriorate and she began to regress in her speech, coping skills, and toilet training among other skills. Her independent speech therapist estimated she lost a year's worth of progress in one month. Because of the behavior issues the Student was only in school two hours a day.
13. Another meeting was held at some point although not recorded as an official IEP meeting. The Special Education Director did attend this meeting. The Team understood her to agree that a full-time one-on-one paraprofessional was needed. A "sub" was promptly assigned while the District ostensibly began the process of hiring a paraprofessional.
14. With the help of the "sub," the Student began to progress in gaining back some of the lost skills.
15. The "sub" was only available through the end of January. In December, 2011, Complainant inquired again about the progress toward hiring the paraprofessional. The Special Education Director reported she had requested funding from the administration to hire the paraprofessional.
16. On February 13, 2012, the IEP Team met again. Although the school principal was present, no agency representative/administrator empowered to commit the resources of the district for purposes of the paraprofessional support was present.
17. The February 13, 2012 IEP states that Student's school day has been modified throughout the school year due to behavioral issues and available individual support. It states the Student "needs a monitor/para for all school activities and services. She can't be left alone for any time. She will run away, knock furniture over, and climb on tables, sink, etc....needs para/monitor assistance with all group activities." The Notes state Student needs a "specific 1 on 1 para/monitor for all academic, self-help, safety and behavioral concerns."
18. These IEP team determinations were passed along to the Special Education Director at some point after the meeting and on March 9, 2012, the Director sent a memorandum to the Board of Trustees requesting funding to hire a "one-on-one

- paraprofessional four hours a day through the end of the school year" (even though at that point the Student was in school for over 5.5 hours per day.) The request was approved but paraprofessional services remained intermittent.
19. Complainant initially declined to sign her approval of the IEP until a paraprofessional was in place for her daughter but ended up signing it on May 10, 2012.
 20. In interviews on May 11, 2012, Complainant, the classroom teacher, and the principal each stated that a one-on-one full-time paraprofessional was not assigned to the Student on a consistent basis as required by the IEPs.
 21. In a May 11, 2012 interview, the Special Education Director stated that a one-on-one full-time paraprofessional was assigned to the student.
 22. On May 11, 2012, the OPI investigator visited the classroom at approximately 1:00 PM and observed that no one-on-one full-time paraprofessional for the Student was present.
 23. On May 11, 2012, the OPI investigator observed that the Student was restrained in a "Rifton" chair by a lap belt which physically restricted her movements.

D. Analyses and Conclusions

Issue 1. Did the District fail to ensure a qualified administrator or agency representative attended the Student's IEP meetings?

Complainant alleges the District failed to assign a one-on-one full-time permanent paraprofessional to consistently work with her child as required by the student's September 14, 2011 and February 13, 2012, IEPs. The District's Response contained a letter from the principal that confirmed a designated one-on-one paraprofessional was not provided to the student on a full-time basis. At times, the school psychologist would step in to assist with problematic situations for this student and for others. At other times, no paraprofessional was provided at all. This affected the Student's progress and the amount of time she spent in school. For months, she was only in school two hours a day.

The District general position on one-to-one paraprofessionals is "[t]o the greatest extent appropriate, **** School District does not want to create an overreliance on the use of one-to-one paraprofessional in inclusive classrooms. Our district considers the utilization of one-to-one paraeducator(s) as the most restrictive support options." *District Response to the Complaint*. With respect to this Student, the District argues that an "Adult/ paraprofessional" was provided for the Student and that "[the Student]'s current educational setting is a small K-1 self-contained classroom located at [xx] Elementary. The classroom ratio is nine (9) students to three (3) adults; with support staff consisting of OP, PT, adaptive PE, Speech therapist and speech aid. This setting provides a full continuum of services with support to this student." This was not the full-time one-to-one paraprofessional contemplated by the IEP and that the team did not believe the above classroom arrangement was adequate to provide this Student with FAPE.

The District held a transition meeting (May 27, 2011) and two IEP meetings during Student's Kindergarten school year (September 14, 2011 and February 13, 2012) at which there were no District representatives clearly empowered to commit resources for paraprofessionals. The building principal was at the February 13, 2012, meeting but this investigation clearly revealed that she was not empowered to commit the agency's resources when it came to paraprofessional services. That authority was vested in the Special Education Director. The IEP team understood this and basically submitted their team determination as a "request" to the administration after each IEP meeting. If the request went nowhere, they would re-submit it or ask Complainant to meet directly with the Special Education Director to make the request directly.

A central concern expressed throughout the investigation was that even when the IEP team determined there was a need for specific one-to-one paraprofessional support, the administration might not approve it. This concern proved true and the Student spent a large part of her first year at elementary school without the required IEP services.

The IDEA requires each IEP team be made up of, at a minimum, a parent, a regular education teacher, a special education teacher, other necessary professionals, and a representative of the administration. 34 CFR § 300.321(a)(4). IDEA regulations and Comments clarify the role of the administrative representative:

Section 34 CFR § 300.321(a)(4) ... "requires the IEP Team to include a representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable of LEA resources. A public agency may determine which specific staff member will serve as the agency representative in a particular IEP Team meeting, so long as the individual meets these requirements... **It is important, however, that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are described in the IEP will actually be provided.**" 71 Federal Register 46670. (emphasis added)

Here, the District failed to ensure that the appropriate administrator attended the IEP meetings and failed to clearly identify or empower other administrators at the meeting with actual authority to commit agency resources for paraprofessional services. This failure forced the parent and other team members to meet (or attempt to meet) separately at various intervals to plead for the IEP-mandated services. This failure goes beyond simple "staffing decisions" which are within the ambit of any district. Requiring an IEP team to place a determination or implementation of needed services on hold while an administrator obtains Board permission for funding is inappropriate. The purpose of including an administrator with the authority to commit resources is to remove the IEP team from such administrative activities in the first place.

The IDEA scheme was designed to preclude these stalemates by having the decision-maker at the table to implement district policy and participate as an active problem-solving member of the IEP team. The District's failure to empower a designee to make such decisions is antithetical to the tenets of the IDEA. The District is **in violation of 34 CFR § 300.321(a)(4)** and must immediately remedy this violation throughout the district. Further, the IEP team is ordered to meet to determine the extent of the effect of this violation on the Student's education in keeping with this Final Report and act promptly to remedy any regression caused by the failure to implement the contemplated IEP services.

Finally, it is important to note that District administration had a duty to clarify IEP team decisions, not exploit any lack of clarity or specific wording. The first IEP did not specifically state a "full-time" or "permanent" or "dedicated" paraprofessional was needed. Team members clearly assumed this was implicit in the term "paraprofessional." The September 14, 2011 IEP stated "one on one assistance throughout her day" and the February 13, 2012 IEP clarified she needed a "monitor/para for all school activities," "can't be left alone for any time," and frequently requires "hand over hand" assistance." The District asserted that administration had decided to utilize "currently employed paraeducator(s) for this position."

The administration appears to have created or exploited IEP ambiguities about the particulars of this paraprofessional position rather than attempt to clarify them. While this clearly worked to give administration greater staffing flexibility, it did not meet the Student's needs as identified by the IEP team. Actual staffing decisions are left to the discretion of the District but the District Response shows that it chose to obfuscate the details of the contemplated services by interpreting them one way at one time and another way at another time. The result was that Student received her IEP services only intermittently and not as contemplated by the IEP team. The District was obliged to clarify in a team meeting, and with representation from administration, the determinations of the team and implement them accordingly. Given the District's de facto designation of the Special Education Director as the empowered agency representative, the Director was required to be at the IEP meetings to determine and clarify with the team the exact services needed by the Student.

Issue 2: Did the District err when it failed to provide Prior Written Notice to Complainant about its' decision to not hire a paraprofessional as designated in the IEP?

Complainant was essentially dealing with two separate administrative levels: elementary school administration and the IEP team on the one hand and the district-level Special Education Director, Superintendent, and Board of Trustees on the other. She never knew exactly where she stood with her child's services. She did, however, learn that there was a hierarchy to the process outside of the IEP meeting.

This confusion did not relieve the district of responsibility to issue written notice of refusal to provide services Complainant requested. For example, after the September 14, 2011 IEP, the District chose to not assign a one-on-one paraprofessional to the Student on a consistent basis during the fall. No prior written notice was given to Complainant letting her know this would not be done and for all she knew it was her responsibility to track down and direct a separate request to the Special Education Director. The District failed to provide prior written notice **in violation of the requirements in 34 CFR § 300.503.**

Note on Mechanical Restraint:

Although this issue was not raised in the Complaint, the investigation revealed a potential violation of the aversive treatment regulations. Once identified, the OPI, through its' general supervisory obligations, is required to address the potential violation with a district. The investigator observed the Student to be strapped into the Rifton chair which physically restricted the Student's movement. The Student did not appear to have a medical condition for which such a seating arrangement is necessary. The use of a mechanical device such as this is prohibited by ARM 10.16.3324. This matter will be referred to the Special Education Monitoring Division for inquiry and remediation.

E. Disposition

The District is hereby ORDERED to take the following steps:

1. By **July 8, 2012**, the District must review its policies, procedures and practices with regard its failure to include at IEP meetings an agency representative or administrator empowered to commit the resources of the agency to ensure appropriate IEP team composition in compliance with 34 CFR § 300.321. 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. Starting **July 1, 2012**, and each month thereafter **through December 31, 2012**, for every IEP completed after the date of this Final Order, the District shall submit to the Dispute Resolution/EAP office a list detailing the IEP meetings held (using dates and initials or other identifier) and the name of the administrator or agency representative in attendance at the meeting who was empowered to commit the resources of the District in compliance with 34 CFR § 300.321.
3. By **September 8, 2012**, the District shall present a plan, to be reviewed in a technical assistance meeting with the OPI Special Education Division or Dispute Resolution Director regarding implementation of in 34 CFR § 300.321 and 34 CFR § 300.321.

4. **Prior to September 8, 2012**, the District must send a meeting notice to Student's IEP team. The team shall meet and determine if the child is in need of further services to make up for the regression suffered during the school year as a result of the District's actions. **By September 8, 2012**, the District will submit to the Dispute Resolution Director, the IEP team's written determination and state the timeline and actions, if any, to be taken to remedy any regression resulting from these violations.

Sincerely,

Ann Gilkey, Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director