Montana
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July 17, 2012

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THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of ***, 2012-02, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

Dear Complainant 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"), parent of *** ("Student"), alleges the ** School District ("District") failed to follow appropriate IDEA procedures and failed to provide a free and appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, MCA, and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq.

Specifically, Complainant alleges:

1. The District failed to provide prior written notice to the parent about their unilateral decision to deny an evaluation[1] and delayed the evaluation;
2. The District failed to obtain signed parental consent for a special education evaluation[2];
3. The District incorrectly refused the parent's request for an Independent Educational Evaluation (IEE);
4. The District denied the parent meaningful participation in the Individualized Education Program (IEP) process;
5. The District failed to consider the use of positive behavior interventions, supports, or strategies to address the Student's behavior; and
6. The District failed to provide FAPE to Student.

A. Procedural History

1. On May 18, 2012, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainant.

[1] Complainant uses the term "evaluation," and was referring to an FBA which may or may not be a part of a 3-year reevaluation.
[2] Complainant is referring to a particular type of evaluation called a "functional behavioral assessment" or FBA.

2. The OPI Early Assistance Program attempted to resolve the controversy pursuant to ARM 10.16.3660. The EAP Director concluded that resolution was not possible.
3. The District provided a written response to the Complaint dated June 15, 2012.
4. An investigator was appointed as part of the investigation and conducted interviews with Complainant, special education teacher Ann Schindler, Superintendent ***, and school mental health program private provider, ***. Student educational records were reviewed as well as all documents submitted by the District and Complainant.

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.

C. Findings of Fact

1. Complainant has standing to file this Complaint under the Montana special education complaint process provided for in ARM 10.16.3661.
2. The Student was a 10 year-old 4th grader attending elementary school in the District during the relevant time period.
3. The Student is eligible for special education services under the categories of autism and speech/language impairment.
4. Complainant requested a behavior intervention plan at the Student's annual IEP meeting on October 10, 2011, November 29, 2011, and December 15, 2011.
5. The October 10, 2011 IEP team discussed a behavior plan. IEP notes indicate the team would "look at all the resources and if needed will amend this IEP." The parents and District agreed that a 3-year reevaluation was not necessary at that time.
6. The October 10, 2011 IEP team agreed that behavior did impede the Student's learning or that of others and recorded it under the Special Factors section of the IEP. The October 10, 2011 IEP did not contain a behavior goal or consider positive behavior interventions and supports.
7. The District agrees the IEP should have contained a behavioral goal.
8. Complainant and the Student's father approved the October 10, 2011 IEP.
9. On January 9, 2012, Complainant requested a functional behavioral assessment (FBA).
10. In response, the District convened an IEP meeting January 30, 2012, and a behavior plan was presented to which Complainant expressed some disagreement. A new social/emotional goal for behavior was amended into the IEP with the consent of Complainant. The team agreed to implement the behavior intervention plan.
11. Complainant actively participated in the IEP process.

12. Believing it had resolved Complainant's concerns, the District did not seek written parental consent for a behavioral assessment or send Prior Written Notice of refusal to do an FBA.
13. On March 21, 2012, Complainant emailed the District to request an IEE stating she did not agree with the "FBA" and the behavior intervention plan.
14. No FBA or reevaluation has been done.
14. On March 29, 2012, the District replied to Complainant's request for an IEE, interpreting her request to be for a reevaluation, and offering to complete a reevaluation upon submission of signed consent. The District stated an IEE would have to be done at the parent's expense.
15. On April 8, 2012, Complainant again sent the District a request for an IEE- this time requesting a specific provider to perform the IEE.
16. On April 18, 2012, the District responded, and again offered to do an updated reevaluation stating there appeared to be confusion "over an evaluation and an FBA."
17. The District did not send adequate Prior Written Notices of refusal to permit an IEE in response to either IEE request from Complainant.

D. Analysis and Conclusions of Law

Issue 1. Was the District required to provide Prior Written Notice to Complainant pursuant to 34 CFR §300.503?

a. January 9, 2012 FBA Request

A district is required to provide a parent with Prior Written Notice pursuant to 34 CFR §300.503(a)(1) whenever it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. On January 9, 2012, Complainant requested an "FBA" evaluation. In response, the District scheduled an IEP meeting and added a behavior goal. The January 30, 2012 IEP team discussed a tentative behavior plan for Student. The investigation revealed Complainant expressed her disapproval of a portion of the behavior intervention plan that said disruptive behavior would be dealt with according to classroom rules. IEP notes do not reflect Complainant's concerns nor mention a discussion regarding an FBA. The team scheduled Student to attend the school mental health program two times a week and agreed to give Complainant daily updates. At the end of the meeting all parties signed their approval of the plan.

At the time of the January 30, 2012 meeting the parties appeared to agree to work on the new social/emotional goal, including a behavior intervention plan, and agreed to change the IEP as necessary in response to developments on the new goal. Later, Complainant alleged that no FBA was completed. An FBA is required only when a child is in a discipline proceeding where the offending conduct was found to be a manifestation of the child's disability under 34 CFR §300.530(d) and (f), or under Montana's regulation for the use of aversive treatment procedures under ARM 10.16.3346. The clearer procedure would have been for the District to send a prior written notice about the decision to forego the FBA and work on the goal and the behavior plan. However, because all parties gave approval to the IEP amendments, it is reasonable to conclude that the issue had been resolved at the IEP meeting. The District was not required to send a prior

written notice regarding the FBA denial. The District **is not in violation of the Prior Written Notice provisions in 34 CFR §300.503** with respect to the FBA request.

b. March 21, 2012 and April 8, 2012 IEE Requests.

Complainant sent written requests on March 21, 2012 and April 8, 2012 requesting an IEE. District letters denied the requests stating: the Student was receiving FAPE; the IEE was premature because no District evaluation/reevaluation had been done since the parties had agreed it was not necessary; and the District would do a reevaluation at parent's request. Prior Written Notice under 34 CFR §300.503 requires specific factors to be addressed in a written notice before the District proposes or refuses to initiate or change the identification, evaluation, or educational placement or the provision of FAPE to a child.[3] While the District did respond to Complainant's requests, the responses did not contain the full content of the notice required in 34 CFR §300.503(b). The District was required to provide adequate Prior Written Notice to the parents after each request and its failure to do so resulted in a **violation of 34 CFR § 300.503**.

Issue 2. Was the District required to obtain parental consent for an FBA evaluation pursuant to 34 CFR §300.300?

Complainant alleged the activities performed by the District after her January 9, 2012 request for an FBA and prior to their January 30, 2012 IEP meeting constituted an FBA evaluation. The District's position is that they did not perform an FBA but did take other measures in response to

[3] **§ 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))

Complainant's concerns culminating in the addition of a behavior goal and a draft behavior intervention plan at the IEP meeting. The investigation revealed that no FBA was performed. Therefore the District did **not violate parental consent provisions of 34 CFR §300.300**.

Issue 3. Did the District incorrectly refuse Complainant's IEE request in violation of 34 CFR §300.502?

Parents have the right to an independent education evaluation at public expense, subject to the conditions in 34 CFR §§ 300.502 (b)(2) through (b)(4). If a parent requests an IEE at public expense, a district must, without unnecessary delay, either file a due process hearing request to demonstrate its evaluation is appropriate, or ensure that an IEE is provided at district expense unless the district demonstrates at a hearing that the IEE did not meet district criteria. 34 CFR § 300.502(b). Additionally, when a parent requests an IEE, the district must provide the parent information about where an IEE may be obtained and the district criteria applicable for IEEs. 34 CFR § 300.502(a)(2). These requirements become the responsibility of a district only after they have performed an evaluation or reevaluation pursuant to 34 CFR § 300.301 -311 with which the parent disagrees.

Complainant argues that in response to her request for an FBA, the District should have followed the IEE provisions in 34 CFR §300.502 and either filed for due process or approved an IEE. In some situations, an FBA can be considered to be an evaluation. However, as we concluded above, no FBA or other reevaluation had been done by the District at the time Complainant made a request for the IEE. The parents and District agreed a 3-year reevaluation was not necessary when they met for the October, 2011 IEP meeting. In January, 2012 Complainant requested an FBA. The District convened an IEP meeting which resulted in apparent satisfaction of the parties at the time. When Complainant had a third party review the behavior intervention plan she became dissatisfied with it. At that point Complainant had the right to request a reevaluation, or file a state complaint or due process. Eventually the District inquired as to whether Complainant now wanted the reevaluation. Complainant refused to agree to the reevaluation and wanted a private provider to evaluate the Student. The situation reached an impasse.

Prior written notice would have clarified to Complainant that no evaluation had been performed to which she could object. However, the District **did not violate the provisions in 34 CFR §300.502** requiring an IEE since no FBA had been done.

Issue 4. Did the District deny Complainant the right to meaningful participation in the IEP process in violation of 34 CFR § 300.322?

A school district must provide parents with an opportunity to participate in IEP decisions. 34 CFR § 300.322. Complainant argues that she was denied meaningful participation because the school failed to respond to her requests for a behavior intervention plan and did not discuss all issues on her list at the IEP meeting. Compounding this issue is the fact that the parents are

divorced and the father was the current custodial parent during the school week and was in regular contact with the District about the Student. The father did not agree that a reevaluation was necessary and noted that Complainant had not involved him in her current ideas of how their child should be educated.[4]

A review of the records shows the IEP team discussed a behavior intervention plan at the October 10, 2011 IEP meeting. Complainant continued to request a behavior intervention plan. In response to Complainant's January 9, 2012 request (which now included an FBA) the IEP team changed courses and added a behavior goal and a preliminary behavior plan to a January 30, 2012 IEP. The District included both parents in their meeting notices and in IEP meetings. Complainant attended all IEP meetings in question. There were ongoing communications where Complainant clearly stated her preferences. She had free access to District personnel and eventually received daily emails regarding the Student's progress.

Complainant actively participated in the IEP process. The District is found to be **in compliance with the parental participation provisions at 34 CFR § 300.322**.

Issue 5. Did the District fail to consider the use of positive behavior interventions to address the Student's behavior in violation of 34 CFR §300.324(2)(i)?

The October 10, 2011 IEP team determined the Student's behavior impeded his learning or that of others. For any student whose behavior impedes the student's learning or that of others, the IEP team "must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]" 34 CFR §300.324(2)(i). The Student's IEP was required to address positive behavior interventions and supports. There is no disagreement between the parties that the annual October 10, 2011 IEP contained no behavior goal, behavior plan, or other indications of positive behavior interventions and supports, and the Student continued to struggle with behavior issues. The District's failure to implement positive behavior interventions and supports into the October 10, 2011 IEP **violated 34 CFR §300.324(2)(i).**

Notes indicate the January 30, 2012 IEP began to address positive behavioral interventions and supports by identifying a behavior goal and producing a behavior intervention plan. However, IEP statements about Student's "bad attitude towards school" are not reflective of producing a positive behavior intervention plan or learning environment. The behavior plan reports that Student gets "physical" at times (hits, kicks pinches, etc.) when teachers seek to engage him in starting or finishing an assignment. In May, 2012, Complainant asserts the Student was still being "dragged in the hallways by his arms." The behavior plan does not address these behaviors.

The behavior goal states the Student will be allowed to participate in the school's school mental health program "to receive emotion regulation and skills training" for 45minutes on Monday and Tuesday. The behavior intervention plan does not elaborate on how this is to be handled. There is no clear plan for when the Student may go to the school mental health program; who will assist in recognizing "disregulation;" what the role of each teacher will be in addressing disregulation

[4] Father's April 25, 2012 letter to District

or replacement behaviors; or whether the Student has the skills to know when those services should be accessed. There is no clear plan for how replacement skills will be addressed in a classroom setting. The one-to-one paraprofessional was not trained or integrated into the process and the school mental health program was not involved in development of the behavior intervention plan. Such services should be fully integrated into the behavior intervention plan with training on positive behavior interventions and supports for consistent responses across settings.

For these reasons, we conclude the District failed to adequately implement positive behavior interventions and supports in **violation of 34 CFR §300.324(2)(i).** The District has offered to perform a reevaluation and acknowledges the need to strengthen interventions to address performance across academic settings with necessary accommodations. The District must develop a behavior intervention plan to address the inappropriate behaviors with adequate interventions to address Student's performance across academic settings. A thorough evaluation will provide assistance with this process if the parents agree to a reevaluation.

Issue 6. Did the District deny the Student a FAPE pursuant to 34 CFR §300.101 through §300.113?

Complainant asserts the District failed to address "core deficits, provide accommodations, structure opportunities for generalizing skills, or accurately describe [the Student's] unique needs or the skills [the Student] is expected to develop in the IEP" in violation of the FAPE provisions of the IDEA. The proper standard to determine whether a disabled child has received a free appropriate public education is the "educational benefit" standard set forth by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v.Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). In this seminal decision construing the Act and the scope of a free appropriate public education, the Court held that States must "confer some educational benefit upon the handicapped child." *Id.* at 200.

The March 16, 2012 student progress report indicates the Student was "making gains" and was expected to meet the Student's behavior goal. At the end of the school year, the May 23, 2012 report states the Student's teacher was "seeing better independent work but improvements are still needed. [Student] states that [student] is too tired to work and [student's] brain can't think." The Student did not meet the reading goal, but was expected to meet the other IEP goals. The Student also received passing grades in all subjects. "Social and Work Habits" were rated "Unsatisfactory" for Conduct, Accepts Authority, Follows Directions, Works Independently, and Uses Time and Material Efficiently with most others marked "Needs Improvement."
While there is a demonstrated need to continue to address the Student's behavior issues in the IEP, the Student's IEPs did confer educational benefit and the District was **not in violation of the FAPE provisions in 34 CFR §300.101 through §300.113 .**

E. Disposition

The District is hereby ORDERED to take the following corrective measures:

1. The District shall provide adequate Prior Written Notice to the parents each time it proposes or refuses an action involving the Student's identification, evaluation, placement, or the provision of FAPE. A copy of each Notice shall be sent to the OPI for review through **July 31, 2013**.
2. The District shall train staff and management in appropriate drafting and implementation of positive behavioral interventions and supports, behavior interventions plans, and Prior Written Notice using a trainer approved by the OPI. The training must be completed by **November 31, 2012,** and the District shall notify the OPI of the completion of such training.
3. The District shall immediately present the Student's parents with the necessary paperwork for consent to reevaluate.
4. If and when consent is received, the District shall complete a reevaluation with a thorough behavioral assessment to address the Student's behavior concerns, and shall inform the OPI when the reevaluation has been completed.
5. The District shall develop IEP behavior goal(s) for the Student, and develop a strong behavior plan using positive behavior interventions and supports to address these goals, including interventions to address replacement behaviors. The District shall send a copy of these documents to the OPI within two weeks of their completion.
6. Each month **through February 28, 2013**, the District shall provide a copy of one behavior plan from the pool of IDEA-eligible students to OPI for review.
7. All corrective action documents and correspondence shall be directed to the Director of Dispute Resolution.

Sincerely,

Ann Gilkey
OPI Compliance Officer

c: Mary Gallagher, OPI Dispute Resolution/EAP Director
cc:***, father