



August 31, 2012

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**THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION**

RE: **FINAL REPORT:** In the Matter of \*\*\*, 2012-03, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

Dear Complainants 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. \*\*\* (“Complainants”), parents of \*\*\* (“Student”), allege the \*\*\* School District (“District”) failed to follow appropriate IDEA procedures 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, Complainants allege:

1. the District failed to identify, evaluate, or find Student eligible for special education services;
2. the District failed to provide Complainants with required procedural safeguards; and
3. the District inappropriately encouraged the parents to home school their son at a time when he was in crisis.

**A. Procedural History**

1. On June 22, 2012, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainants.
2. The OPI provided a copy of the Complaint to the District. The OPI Early Assistance Program attempted to resolve the controversy pursuant to ARM 10.16.3660 but concluded that resolution was not possible.
3. The District provided written responses to the Complaint on July 23, 2012.
4. The investigation consisted of a review of documents provided by Complainants and the District and interviews with Complainants, the District Special Education Coordinator, \*\*\* School Vice-Principal, \*\*\*\* School Student Advocate, District Psychologist who oversaw the Individual Education Plan (IEP) testing, \*\*\* teacher, and the \*\*\* School Special Education teacher.

**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. Complainants have standing to file this Complaint under the state special education complaint process at ARM 10.16.3662.
2. Student is a 14-year-old male and is currently enrolled as a ninth grader in the District.
3. Student had been off and on medications since early grade school for ADHD, PTSD, OCD, Bipolar tendencies, Anxiety, and Intermittent Explosive Disorder.
4. Student had physical tics from anxiety and significant behavioral issues while at school such that the District would call the parents to pick him up, place him on in-school suspension, detention, out-of-school suspension, and various sanctions for behavior in and out of the classroom.
5. Parents referred Student for a special education evaluation several times. The District first evaluated in 2008. In 2011, Complainants again requested an evaluation because Student was struggling socially and academically. The District did an evaluation, which is the most recent one completed for Student. Student was found ineligible for special education services.
6. The Evaluation Report (ER) is dated May 23, 2011. The Report's determination of ineligibility was made more than a year prior to the filing of this June 22, 2012 Complaint. The District continued to rely on the ineligibility determination during Student's eighth grade year, the 2011-2012 school year, at issue here.
7. The May 23, 2011 ER determined Student did not meet the disability criteria for either the Emotional Disturbance or Specific Learning Disability eligibility categories based on the team's determination that Student's academic performance was consistent with his grade level and his behaviors did not affect his academic performance. In 2008, he had been considered under the Other Health Impaired category as well.
8. The District recommended a structured, consistent environment where Student was accountable for his choices.
9. At the time of the 2011 evaluation referral, the District provided parents with a copy of the procedural safeguards including the right to challenge the District's special education decisions.
10. The May 23, 2011, ER states "Mom will take [Student] to specialist in [city] over summer and the team will meet before next year to develop a plan for intervention."
11. In a letter dated June 7, 2011, the District Assistant Principal told Complainants that although Student had at least 17 behavioral incidents his seventh grade year, Student would be permitted to remain at the middle school for the duration of the school year as per parents' wishes. If Student's behavior did not improve in eighth grade, Student would be transferred to the alternative school. The letter noted the District had tried numerous

- interventions such as behavior cards, limited mobility, more intensive supervision, attempts to have staff increase positive verbal praise, and other classroom interventions.
12. The 2011 ER team did not meet before school started to develop a plan for intervention as stated in the ER. The ER team did not meet until Student incurred more infractions after he started eighth grade.
  13. Student began attending regular education at the middle school in August, 2011. In the first 10 days of school, Student received four behavior complaints for various inappropriate sexually-related infractions and was ticketed by law enforcement. He was placed on out-of-school suspension for approximately a week between September 9<sup>th</sup> and the 16<sup>th</sup>.
  14. On September 26, 2011, the District transferred him to the alternative school.
  15. During the fall, the Student continued to have problems with medication adjustments, anxiety, and hyper-activity.
  16. After transfer to the alternative school, a behavior incident occurred on September 30, 2011, and another one on October 19, 2011. Student was placed on out-of-school suspension starting October 19, 2011 and returned on or about November 3, 2011.<sup>1</sup> Upon his return, Complainants were told Student would be placed on half-days because he did better in the mornings and that half-days would work better for him.
  17. Between August 31, 2011 and November 7, 2011, Student's Behavioral Log chronicled six separate behavioral incidents. No subsequent behavioral incidents were recorded in the Log provided for this investigation despite continued behavior issues and a suspension.
  18. While on half-days during the second quarter Student received Cs, Ds, and an F, down from Bs, C and an A in the first quarter. Student did not complete three other courses due to the half-day schedule.
  19. Student was not identified or referred for evaluation before or during the time the District placed him on a half-time schedule from November 7, 2011, to February 8, 2012.
  20. On February 8, 2012, Complainants requested Student be allowed to go full days as he was not receiving an adequate education. Complainants also again requested an evaluation because the Student's physician felt Student was unable to control his impulsive behavior and anxiety.
  21. The District made a special education referral and a District psychologist started a file review but no eligibility meeting was held.
  22. Student remained on half-days until a March 8, 2012 incident removed him from school for the year.
  23. On or about March 5, 2012 Complainant notified the District that Student's medication had been changed and requested district personnel observe him for any increase in behavior. Student became severely anxious about taking the CRT tests that week.
  24. On March 8, 2012, Student's teacher called Complainants to ask them to pick up their son because he had become very hyper, was pacing, and couldn't concentrate well on the CRT Tests. Parent responded immediately but before anyone could get to the school,

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<sup>1</sup> The District reports the suspension was for five days with a series of excused absences until October 27, 2011. Attendance charts were missing for October 4, 2011 to October 30 but do indicate Student received out of school suspension on October 31 and November 1 and in-school suspension on November 3, 2011. Parents report he was suspended through November 4 and returned November 7, 2011.

- Student was placed in what he understood was a locked testing room to finish the test. Student struggled to get out. He was physically restrained and fought back. He made suicidal threats. He was removed from the school, charged with assault, and given out-of-school suspension.
25. No expedited evaluation was completed before suspension.
  26. As a condition for returning to school, the District required Complainants to provide a medical release stating Student's medications were stabilized.
  27. Student's condition remained unstable so his psychiatrist did not provide the release.
  28. No evaluation plan or meeting was held after March 8, 2012, and Student received no school materials or services from the District. The District reports it did attempt to contact Complainants.
  29. In April, 2012, Student was admitted to a hospital in crisis and on April 23, 2012 was transferred to a children's psychiatric hospital.
  30. On April 23, 2012, Student's teacher contacted Complainants to inform them that due to the amount of time the Student missed they would need to home school him if they wanted to avoid truancy tickets. His probation officer confirmed this in an email. Complainants began home school for Student.
  31. On June 21, 2012, Complainants sought to meet with the District to request special education services. The parties met and Complainants provided written consent to complete the evaluation process after Student was released from the hospital. The District had not sought written consent prior to this time.

## **D. Issues, Analyses, and Conclusions**

### **ISSUE 1: Whether the District violated Child Find obligations to identify, locate and evaluate Student for special education services during the 2011-2012 school year.**

#### Parties Contentions

##### Spring 2011

Complainants assert Student should have been found eligible for special education services in the spring 2011 evaluation when he was in 7<sup>th</sup> grade. Complainants allege the District erred by failing to find the Student eligible for special education services at that time by not properly considering the impact of the Student's behavior on his educational performance, failing to recognize Student's behavior as being related to his "medical/mental" condition despite being fully informed of the condition, and concluding Student's behavior was "choice-based" thereby making him ineligible for special education services. This Final Report does not address the spring 2011 eligibility determination because it is beyond the statute of limitations for this Complaint. This Report will address the issues of Child Find and eligibility in Fall, 2011, when Student started 8<sup>th</sup> grade.

##### Fall 2011

Complainants also assert the District improperly failed to find, identify, and evaluate Student for special education services in his eighth grade year when his disability continued to progress and impact his educational performance as manifested by continual behavioral incidents, transfer to the District's alternative school, student code violations, classroom disruptions resulting in in-school suspensions and detentions, medication changes, out-of-school suspensions, and District reduction in his school hours and curricula. They assert the District erred when it continued to rely on the determination that Student's

behavior was “choice-based” such that he could change it if he only chose to and continually refused to recognize Student’s behavior was related to his medical or mental condition despite being fully informed of this condition.

The District argues that “the relevant time frame under consideration proves that the complaint should be dismissed” presumably because some events occurred more than one year prior to the date the Complaint was received. They assert Student’s academic performance was not impacted by his behavior in the classroom and most behaviors occurred during unstructured time. The District’s Response states Student’s behavior is a “medical issue not an educational issue” and his behavior is “choice-based” making him ineligible for special education services.

### District Request to Dismiss Complaint

We first address the issue of the relevant time frame for this Complaint. A signed written state special education complaint may be filed alleging a violation of the IDEA and/or Montana special education statutes or regulations. ARM 10.16.3662. The alleged violation must have occurred not more than one year prior to the date a complaint is received. *Id.* Complainants filed a valid Complaint with this Office on June 22, 2012<sup>2</sup>. The District evaluation is dated May 23, 2011, a month before the one year limitation for this Complaint. Complainants signed off on the May 23, 2011 ER but now contest the reasoning and the determination of ineligibility as well as the continued reliance on that determination. The relevant time period for this Complaint is June 23, 2011 to June 22, 2012.

The May 23, 2011 ER was precipitated by numerous behavior incidents resulting in in-school and out-of-school suspensions causing Complainants to request the District evaluate Student for special education eligibility. The District continued to rely on the ER ineligibility determination during the Student’s eighth grade year starting in the fall of 2011. Complainants’ contentions are not moot in so far as they relate to District activity or inactivity during this eighth grade year because this is the relevant time period of the Complaint. This report will address events occurring during the relevant time period. The District’s request to dismiss the Complaint is **denied**.

### Analysis

Early in Student’s elementary years, parents made the District aware of Student’s anxiety, Post Traumatic Stress Disorder, Obsessive Compulsive Disorder among others, and the fact that parents were trying various medications for these impairments. The 2008 evaluation assessed Student for eligibility under at least three eligibility categories: Specific Learning Disability (SLD), Emotional Disturbance (ED), and Other Health Impaired (OHI). The 2011 evaluation assessed the categories of ED and SLD and found Student met three out of the five ED characteristics. Teachers reported numerous behavior issues in the classroom. The ER team decided that while he met the criteria, those criteria did not “adversely affect the student’s academic performance” since he was above grade level, and his behaviors were “choice-based” and did not impact his “academic achievement.” He was found ineligible for services.<sup>3</sup>

In Fall 2011, Complainants report Student continued to have high anxiety and resisted going to school.

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<sup>2</sup> An invalid complaint had been received and returned several weeks earlier.

<sup>3</sup> The Report also noted that his fifth grade 2008 evaluation said “[Student] did not qualify as Other Health Impaired as there was no academic impact” but also mentions that in 6<sup>th</sup> grade, Student “continued to have behavior issues and failing grades.”

The general education interventions appear to have been preferential seating and behavior cards. Student continued to have numerous behavior incidents and was suspended twice in the first two months of school. Without further evaluation or intervention, District administration decided Student would do better on half-days and changed his schedule when he returned from suspension. Complainants report they were informed that half-days would only last two weeks. The half-days continued. He started receiving D's and F's in his classes. His behavior log was discontinued after November 7, 2011.

The State is obligated to ensure that policies are in place to ensure that all children with disabilities in the State who are in need of special education and related services, including those who are advancing from grade to grade, are identified, located, and evaluated. 34 CFR §300.111. State regulation defines local school district obligations to identify, locate, and evaluate students for special education services (also referred to as Child Find). ARM 10.16.3125 requires districts to have policies and ensure that:

all students with disabilities living within the boundaries of the local educational agency regardless of the severity of their disability are identified, located, and evaluated...Procedures must describe student identification activities, must review of data or records for students who have been or are being considered for retention,... long term suspension or expulsion,...regular education intervention and progress monitoring procedures and procedures for identification of children who are suspected of being a child with a disability even though they are advancing from grade to grade... ARM 10.16.3125.

Additionally, districts must consider the results of evaluations and data related to all areas of the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR §300.304.

In Fall 2011, the District was aware of the Student's health impairment, anxiety tics, medications, classroom and other school-related disruptions, and aware of his grades spiraling downward. After the October, 2011 incident, the District did not initiate identification or evaluation of Student but decided to place him on half-days. Under the circumstances, the District knew, or should have known or suspected, that Student's disabilities were interfering with his educational performance.<sup>4</sup>

Student's half-day schedule continued into Winter 2012. Student was getting into trouble in his unstructured time in the afternoons. He was unable to take several courses due to his half-day schedule. It had been communicated to the District that Student's medications were problematic. Student's grades had dropped to Ds and Fs. On February 10, 2012, Complainants requested the District re-consider the half-day schedule and evaluate him again for special education services. The District agreed to do a referral. On March 8, 2012, a serious incident occurred involving his changed medications and anxiety over the CRT tests. Only a file-review for the referral had been completed by then. The February 8, 2012 referral and the March 5, 2011 contact from Complainants about Student's medications again put the District on notice of suspected disability and potential eligibility. The District failed to meet its Child Find duties to identify and evaluate Student under these cascading circumstance **in violation of ARM 10.16.3125 and 34 CFR §300.111.**

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<sup>4</sup> District records are incomplete so it is not clear whether Student was suspended for over 10 days at this time which would have triggered the IDEA discipline procedures under 34 CFR §300.530 to -.537 at that time.

Student was suspended starting March 8, 2012, through at least March 30, 2012. Under 34 CFR §300.534 (a) and (b)(2) and (3) the District is deemed to have knowledge Student was a “child with a disability” for purposes of discipline under the IDEA because (a) Complainants had requested an evaluation in February, but also (b) the District had specific concerns about the pattern of behavior demonstrated by the child such that they had placed him on half-days and suspended him for his behaviors. Because a request for evaluation was pending and Student was the subject of disciplinary measures which would remove him from school for over 10 days, the District was required to perform an expedited evaluation under the IDEA discipline procedures in 34 CFR §300.530 through 34 CFR §300.537. If Student was eligible, the District was required to do a manifestation determination under these regulations. These measures would have guided the District in making disciplinary decisions. Instead, the District suspended Student from school. The District failure to complete an expedited evaluation prior to implementing a disciplinary removal in excess of 10 days is a **violation of 34 CFR 300.530 through 34 CFR §300.537.**

NOTE: Under the OPI general supervisory authority we also note the seemingly narrow interpretation made by the District in this case and possibly others interpreting the second prong of an eligibility determination under ARM 10.16.3007. The District referred only to Student’s “academic performance” as the reason for denying the Student eligibility under OHI, ED, and SLD. “IDEA eligibility does not turn on academic performance alone.” See *G. "J." D. v. Wissahickon School District*, 832 F. Supp. 2d 455, 56 IDELR 294, 111 LRP 41848 (E.D. Pa. 06/14/11) and *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008) (Sullivan, J.). The appropriate eligibility standard is educational performance, something broader than simply academic performance. State regulation explains the disability must adversely affect the student’s educational performance such that the student needs special education. ARM 10.16.3007. “Adversely affect the student's educational performance” is defined in ARM 10.16.3008 to mean “there is evidence that measures of student performance (e.g., achievement tests, grades, behavioral or developmental assessments, classroom based assessment, observations, progress monitoring, or criterion-referenced tests, etc.) indicate a pattern of educational, developmental, or functional attainment or achievement below the student's age or grade level based on state approved K-12 content standards that can wholly or in part be attributed to the disabling condition.” It is necessary to only ask whether the behavior impedes academic performance, but also whether the behavior impedes access to education. As in *Wissahickon*, the District must be mindful to not over-account for a student’s strong academic performance while downplaying his problematic behaviors. The District is advised to examine its’ implementation of this standard and make any necessary changes.

## **ISSUE 2. Were Complainants properly notified of their procedural right to challenge the District’s denial of IDEA eligibility?**

Complainants assert the District failed to make them aware of their procedural rights under IDEA and specifically their right to challenge the ineligibility decision of May 27, 2011. District personnel claimed Complainants were given a copy of the Procedural Safeguards and informed at the outset of the ER Meeting of their right to disagree with the ER team decision and request another evaluation.

This issue did not occur within the one-year statute of limitations for this Complaint and will not be ruled on. For guidance, we note that the Procedural Safeguard notice required in 34 CFR §300.504 explains procedures for challenging a district’s special education decision. Section 34 CFR §300.504

requires a district to provide the procedural safeguard notice once a school year, except that a copy also must be given to the parents: 1) upon initial referral or parental request for evaluation; 2) when a state complaint or due process is filed; 3) in certain disciplinary proceedings under 34 CFR §300.530(h); and 4) upon request by a parent. The regulation does not require the District to inform a parent each time there may be an opportunity for a parent to object to a team decision. The parents must make that decision. Complainants' allegation is **dismissed**.

**ISSUE 3. Did the District have a duty under IDEA to notify Complainants of their rights, responsibilities, and options regarding home school or home bound school in order for the Student to avoid being cited for truancy?**

This issue did not occur within the one-year statute of limitations for this Complaint and will therefore not be decided. Further, the OPI does not have authority over truancy matters in a district. The OPI does have authority under the IDEA regarding discipline procedures for youth suspected of having a disability as addressed in Issue 1. For these reasons Complainants' third allegation is **dismissed**.

**E. Disposition**

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

1. If it has not already done so, the District shall promptly convene an ER team meeting, determine Student's eligibility, and if eligible, immediately form an IEP team to draft an appropriate IEP. The IEP team shall consider recommendations made by the discharging psychiatric hospital and Student's current functional level. The IEP team is directed to determine the impact of the above violations on Student and provide any compensatory measures necessary to compensate Student in the high school setting. The District shall provide a copy of the ER to the OPI by **September 21, 2012** and a copy of any IEP and a list and timeline for corrective measures by **October 12, 2012**.
2. By **November 30, 2012**, the District shall provide a written statement to OPI detailing the services being provided to Student.
3. The District shall ensure administration and special education staff review and examine District procedures that relate to the following regulations: ARM 10.16.3125; 34 CFR 300.111; 34 CFR 300.530 through 300.537; ARM 10.16.3007; and ARM 10.16.3008. The reviews must be completed by **November 30, 2012**. The District shall provide written verification that it has completed the reviews and the list of participants.
4. Each month **through December 31, 2012**, the District shall provide to the OPI for review a list of students who were identified through Child Find, and a list of students who were denied eligibility with the reason given for such denial.

5. All corrective action documents and correspondence shall be directed to the **Director of Dispute Resolution** at the Office of Public Education.

Sincerely,

Ann Gilkey  
Compliance Officer