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February 1, 2013

***

*** , Superintendent
***, Montana

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT for** In the Matter of ***, 2012-06, Alleged Violations of the Individuals With Disabilities Education Act and Montana special education laws.

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 *** (District). Complainant asserts 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.:

(1) when it allegedly implemented the January 25, 2012 Individualized Education Program (IEP) although Complainant had not consented;
(2) when it allegedly failed to respond to Complainant's written rejection of the IEP and request for written notice dated March 12, 2012;
(3) when it allegedly denied Student a free appropriate public education (FAPE) because the 2011-12 IEP was not reasonably calculated to confer educational benefit;
(4) when it allegedly denied Complainant the right to parental participation by failing to schedule the December 1, 2011 evaluation report meeting at a time when Complainant could attend;
(5) when it allegedly did not consider autism/Asperger's syndrome as an eligibility category for Student; and
(6) when it allegedly denied Student a FAPE by placing him full time at *** for the 2012-2013 school year.

A. Procedural History

1. On December 4, 2012, the Montana Office of Public Instruction (OPI) received a Special Education Complaint (Complaint) signed by Complainant.
2. The OPI Early Assistance Program found the parties were unable to resolve their issues within 15 business days of the date of the Complaint. The Complaint proceeded to investigation.
3. The OPI received a written response to the Complaint on January 7, 2013.
4. An appointed investigator conducted interviews with: Complainant, the District's special education director, the director of *** , the Student's case manager/behavioral specialist, Student's teacher, and paraprofessional.

B. Legal Framework

The OPI is authorized to address alleged violations, which occurred within one year prior of the date of a complaint, of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §§ 300.151-153 and ARM 10.16.3662. Pursuant to 34 CFR §§ 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination must be made as to whether a violation of federal or state statute, regulation or rule concerning the identification, evaluation, placement or the provision of a free and appropriate education occurred.

C. Findings of Fact

1. Complainant has standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3661.
2. In 2006, in a different state, Student was diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified (NOS), and attention deficit-hyperactivity disorder (ADHD) combined type.
3. A psycho-educational evaluation was performed in 2008, in another state, which diagnosed Student with atypical autism and ADHD.
4. In 2009, Student began psychotropic medication for aggression and other difficulties.
5. The District placed Student on a 504 plan until 2010.
6. In 2010 Student was identified as eligible for special education services under the category of Other Health Impairment and Speech and Language Impairment. His first IEP was implemented January 19, 2011 when Student was in fourth grade.
7. During the 2010-2011 and early in the 2011-2012 school year, Student attended half days at the public elementary school.
8. In September of 2011, the beginning of Student's fifth grade year, Student was admitted to a youth treatment hospital for medication readjustment for approximately 16 days.
9. Upon his return to the District in October of 2011, the District paid for a neuropsychological evaluation of Student which addressed his various impairments including Asperger's.
10. In November of 2011 the District obtained a functional behavior assessment and behavior intervention plan from a board certified behavior analyst (BCBA).
11. Student was provided a 1:1 aide and attended full educational days at the District elementary school for the remainder of fifth grade.
12. On December 1, 2011 an Evaluation Report (ER) meeting was held and Student was determined eligible for special education services under the categories of Emotional Disturbance, Other Health Impairment, and Speech and Language Impairment. Complainant did not attend the ER meeting.
13. An IEP meeting was convened December 12, 2011, resulting in an amendment to the January 19, 2011 IEP. Complainant attended the meeting and signed her agreement to the amendment on January 24, 2012.
14. The IEP and functional behavior assessment (FBA) included services and accommodations relevant to Student's educational needs and diagnoses.
15. An annual IEP review took place January 25, 2012. The IEP team discussed Student's placement for the next school year because he would be transferring out of the elementary school.
16. The District recommended *** as the best placement for Student. *** is a program operated by an inter-local cooperative of 17 school districts. It has small classrooms and structure. It is only open to students eligible for services under the emotionally disturbed category. Each classroom is limited to eight students and has a teacher, paraprofessional and behavioral specialist.

17. The District provided Complainant a copy of the January 25, 2012 proposed IEP.
18. Complainant did not consent to the January 25, 2012 IEP as proposed.
19. Further discussions were held and Complainant eventually delivered to the District written notice dated March, 12, 2012 rejecting the proposed IEP and requested the District provide "…'written prior notice' explaining the basis for the proposed IEP and change in placement."
20. The District did not provide Complainant with a adequate prior written notice of a proposed change in placement for Student.
21. By letter dated March 28, 2012, Complainant refused the District's request for an IEP meeting to address her rejection of the IEP until after a further assessment was completed.
22. Complainant hired ***, a licensed psychologist and BCBA to perform an assessment of Student in May of 2012.
23. Complainant removed Student from school May 10, 2012 to the end of the 2011-2012 school year reportedly relying on [the licensed psychologist's] review. She concluded Student was not learning or benefiting from attending.
24. The IEP team met again May 29, 2012. At least six additional meetings were held between the special education director and Complainant over the course of the summer to attempt mutual resolution of the annual IEP.
25. On August 8, 2012 the special education director, *** director, Student's assigned teacher at ***, and Complainant with addendum and comments, signed approval of the IEP dated January 25, 2012 with placement at *** contingent on an additional evaluation to take place in the fall of 2012.
26. *** staff, including the behavior specialist assigned to Student, attended training on autism in August of 2012, and additional staff members were trained on autism in October of 2012.
27. In the Fall of 2012, an independent educational evaluation was in process, but not completed by the time this Complaint was filed. Student remains at *** with Complainant's contingent consent.

D. Analyses and Conclusions

Issue 1: Did the District err by implementing the January 25, 2012 IEP when Complainant had not provided consent?

Complainant alleges the District implemented Student's January 25, 2012 IEP without her consent. Student's annual IEP meeting convened on January 25, 2012. Complainant did not consent to the IEP proposed on January 25, 2012. Complainant gave the school written notice on March 12, 2012 that she rejected the proposed IEP. Pursuant to ARM 10.16.3505, parental consent of the annual IEP must be obtained from the parent. Since consent was not obtained and Complainant eventually rejected the proposed IEP, the District was obligated to follow the last implemented IEP, which was the December 12, 2011 amended IEP, until agreement could be reached in keeping with ARM 10.16.3505(2) or until procedural safeguards such as due process were initiated.

Student's progress reports issued in March and June of 2012 are titled "For plan: 1/26/12 -1/25/13." The progress reports list Student's IEP goals and assess how well Student is performing on each of them. One of Student's social/emotional/behavioral goals included data that was charted to correspond to quantified, measurable behaviors. On the chart drafted prior to the January 25, 2012 IEP meeting, three behaviors are listed which correspond to the December 2011 amended IEP. On the first chart dated after the January 25, 2012 IEP meeting, the key includes an additional behavior. The four behaviors listed correspond to this goal on the proposed January 25, 2012 IEP. Substantively, the social/emotional/behavioral goal is the same for both IEPs. Additionally, the other three goals listed on

the December 2011 amended IEP and proposed January 25, 2012 are virtually identical. Also, no change of placement was made at the time. Therefore, there is not sufficient evidence to suggest the District implemented the proposed January 25, 2012 IEP without the consent of Complainant and **the District did not violate ARM 10.16.3505.**

Issue 2: Did the District err when it failed to respond to Complainant's March 12, 2012 rejection of the proposed January 25, 2012 IEP and request for prior written notice?

Complainant gave the District written notice on March 12, 2012 that she rejected January 25, 2012, proposed IEP. The letter states she disagrees with the proposed IEP and specifically requests ''written prior notice' exploring the basis for the proposed IEP and change in placement." Prior written notice must be given to 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.

34 CFR §300.503(a).

The required content of the notice is set out in 34 CFR §300.503(b):

(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… 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 rejection; and
(7) A description of other factors relevant to the agency's proposal or refusal.

During the January 25, 2012 IEP meeting, placement was discussed extensively as Student would be transferring out of the elementary school the next year.[1] After the meeting, discussions between the District and Complainant were on-going. However, after the District received the March 12, 2012 letter denying consent to implement the IEP and requesting written notice, it did not send prior written notice proposing to initiate a change in placement to *** or for other changes proposed in the IEP.

[1] The District does not dispute an actual change of placement was proposed by the IEP team and eventually disputed by Complainant. The transition to *** would be a change in placement in that it is substantially and materially different from the former placement at the elementary school. See *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 46588 (August 14, 2006).

The District correctly asserts that, according to *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008), the IEP itself can be used as prior written notice if it contains the proper contents listed above. [2] Comparing the 34 CFR §300.503(b)(1-7) requirements to these facts we note for:

§300.503(b)(1) and (2): The IEP notes state: Educational options are presented because Student will be transferring out of his current school for 6th grade. The special education director offered that *** may be the most appropriate placement for him. The team recommended the smaller structured environment available at *** would be most optimal to meet Student's individual learning and behavioral needs.
The IEP notes do not specifically state *** is the proposed placement for Student. The IEP does not delineate the educational options presented at the IEP meeting.

§300.503(b)(3): The IEP has a generic reference under "Supplementary Aids and Services" and "Necessary Accommodations and Modifications," to refer to supplementary reports for additional information. It lists some reports but does not specifically state which ones were considered as a basis of the proposed action.

§300.503(b)(4): The District stated in its Response that a copy for the procedural safeguards were given to Complainant, but this is not noted on the IEP itself.

§300.503(b)(5): The IEP does not list sources for parents to contact to obtain assistance in understanding Part B of IDEA. Although parent had an advocate with her at the IEP meeting, the District may not allocate its responsibilities to a parent's advocate.

§300.503(b)(6): The Director of *** shared an overview of the program as did the principal of the middle school. However, there is nothing in the notes that specifically states why the middle school option was viewed disfavorably.

§300.503(b)(7): The IEP and notes discuss some other factors relevant to the team's proposal.

The proposed January 25, 2012 IEP touches on many of the required elements of 34 CFR 503(b). The IEP, however, does not completely satisfy the prior written notice requirements. The District proposed or refused certain actions affecting placement and FAPE in the IEP. At the time Complainant notified the District she was refusing to consent to the proposed IEP, the District should have provided Complainant with prior written notice. The fact that she requested such notice should have also served as a catalyst to send one. A purpose of prior written notice is to clarify the District's position on proposals and refusals to take action. The District may not ignore its obligation to provide notice and

[2] See also *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 466691 (August 14, 2006), "There is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet all the requirements in§300.503."

assume Complainant understands the District's position and plans for implementation of the proposed IEP.

The District argues that the placement issue was "only a point of discussion" and "only discussed as an option" at the IEP meeting because there were no available placement at the *** program at that time. The use of the term "recommendation" in the IEP is not sufficient to conclude that placement at *** was not proposed action. The IEP does not support the notion that this was only a recommendation. The IEP did not state that the issue was deferred, or that the team would consider it at a later date. It appears the District proposed placement at *** when an opening was available - whether that would be during Student's 5th grade year or when he entered 6th grade - because the January 25, 2012 IEP was the annual IEP covering the remainder of Student's 5th grade year and 6th grade. The District had a duty to notify, and Complainant had a right to know, specifically what the team and the District were proposing for the coming year. Adequate prior written notice would have clarified for Complainant whether the IEP was proposing a new placement at *** or merely making a recommendation.

The District claims there is no form in the AIM system[3] for prior written notice and the form provided on OPI's website is formulated for refusals to take action, not proposals. The OPI is reviewing its forms on this issue and will make further determinations in the near future. Nonetheless, the federal regulation is clear that prior written notice also applies to proposals to take action.[4]

Montana's annual consent provision[5] may also cause some confusion regarding how long parties should continue to work to obtain consent before providing prior written notice and seeking resolution in due process proceeding. In this case, by March 12, 2012, it was clear Complainant would not consent to the January 25, 2012 IEP, and did not agree with the *** placement option at that time. **The District violated 34 CFR § 300.503 by not providing Complainant prior written notice in conformity with 34 CFR § 300.503(b).**

Issue 3: Did the District deny Student a free appropriate education (FAPE) because Student's IEP for the 2011-2012 school year was not reasonably calculated to provide educational benefit?

Complainant alleges that no educational benefit was conferred under the IEP, and therefore Student was denied FAPE for the 2011-2012 school year. Complainant relies upon Dr. ***'s (undated) letter to claim a denial of FAPE. The letter was a review of his observations of Student in May of 2012 as requested and paid for by Complainant. Complainant argues Dr. ***'s letter reaches the following conclusion, "….that my son was given a plan that encouraged him not to learn, it was a failed plan in that it lacked fidelity not changing as he progressed or encouraging learning the entire school year." However, the letter actually states, "The school has implemented a BIP that is sound in its formation and construction, however, I feel as though its implementation does not have the fidelity it should to be as effective as possible." Dr. *** seems to agree that the behavior intervention plan was sound in formation. The appropriateness of an IEP cannot be judged exclusively in hindsight. "An IEP must take

[3] The Office of Public Instruction's state-wide computerized IEP system.
[4] The regulation remains applicable even though there may be confusion as to what is a proposal or refusal. For example, in January, 2012, did the District propose a placement at *** when one opened up or did they refuse Complainant's request for Student to remain at the middle school?
[5] ARM 10.16.3505

into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999), citing *Fuhrman v. East Hanover Bd. of Educ*., 993 F.2d 1031, 1041 (3rd Cir. 1993). As a result of Dr. ***'s letter, Complainant removed Student from school from May 10, 2012 to the end of the school year stating that Student was not gaining any benefit from attending.

Because of the timeline of this Complaint, this FAPE issue is limited to events arising from December 4, 2011, to the end of that school year in June, 2012. As background affecting the issue of FAPE during this time, we note that in September of 2011, Student was admitted to a youth treatment hospital for medication readjustment. Upon his return to the District in October of 2011, Student had a neuropsychological evaluation at Complainant's request paid for by the District. In November of 2011, the District obtained a functional behavior assessment from a board certified behavior analyst and implemented a behavior intervention plan.

During the applicable timeframe for this issue, on December 12, 2011, the IEP team reconvened to amend the IEP to consider and include relevant information from the recent neuropsychological and functional behavior assessment. Complainant consented to the IEP as amended. During the school year Student had a 1:1 aide and attended full educational days at the public elementary school. In March, 2012, Complainant formally rejected the IEP proposed as a result of the January 25, 2012 annual review meeting. From December 12, 2011 to March 12, 2012, Complainant consented to the provision of FAPE as outlined in the December 2011 amended IEP. However, since she did not consent to the January 25, 2012 IEP until August 8, 2012, the practical effect was that through August 8, 2012, the District could only continue to implement the December 2011 amended IEP, to which Complainant had consented. The allegation that the District denied FAPE during the 2011-2012 school year is therefore denied and **no violation of 34 CFR § 300.17 is found.**

Issue 4: Did the District deny Complainant's right to parental participation and thereby deny FAPE when it failed to schedule the December 1, 2011 evaluation report meeting at a time when Complainant could attend?

The OPI is authorized to address alleged violations, which occurred within one year prior of the date of a complaint. ARM § 10.16.3662(2)(a). The OPI received this Complaint on December 4, 2012. The evaluation report meeting occurred on December 1, 2011.[6] That meeting is outside the one year timeframe. Therefore, this allegation is not addressed in this Final Report.

Issue 5: Did the District fail to consider the diagnosis of autism/Asperger's in determining eligibility for special education services and err when it did not find Student eligible under the autism category?

Student was diagnosed with Pervasive Developmental Disorder in 2006. Student had a private evaluation in 2008 which again diagnosed him with Pervasive Developmental Disorder, NOS and

[6] ER Notes: "While [Complainant] was given prior notice of this meeting, she did note that she would be unable to attend and will be informed of the outcomes of our discussion within the next week or so as the [elementary school] staff can communicate these points with her. We will schedule an IEP at a date when [Complainant] is able to attend. [Complainant] did stop in to the meeting, asked for copies of this Evaluation Report and indicated that she will wait to hear from us and coordinate a date for the IEP."

ADHD combined type. A psycho-educational evaluation was also done in 2008 in another state which diagnosed him with atypical autism and ADHD. In 2009 Student began psychotropic medication for aggression and other difficulties. In school, he was on a 504 plan until 2010 when he was found eligible for special education services which noted his behavior, particularly defiance and noncompliance (later aggression and other behaviors), were interfering with his academic work.

In January of 2011, the District determined Student was eligible for special education services based on the category of Other Health Impairment and Speech and Language Impairment. Subsequently, Student's mood dysregulaton and difficulty regulating his behavior became more pronounced. Student entered a children's psychiatric hospital for approximately 16 days at the start of the 2011-2012 school year. Complainant set up an October 2011 neuropsychological evaluation of Student. The District paid for this evaluation and also conducted a functional behavioral assessment by a certified behavioral specialist in November of 2011. The neuropsychological evaluation notes a history of aggression, sleep problems, and difficulty with social interactions, among others. The evaluation report considers Student's diagnosis and symptomology related to Asperger's syndrome. The evaluation ultimately diagnosed Student with Bipolar I Disorder, Oppositional Defiant Disorder, Asperger's syndrome, and ADHD (by history).

The District held an Evaluation Report meeting December 1, 2012. The ER team[7] reviewed the state criteria for Emotional Disturbance and determined Student met the criteria listed for that category in ARM 10.16.3015. The ER states Student exhibited qualifying characteristics over a long period of time that adversely affects his educational performance and that have been observed in one or more settings in an educational environment. The ER team found him eligible under the ED eligibility category. All of these evaluations took place before the one-year timeframe of this Complaint, but are relevant background information relied on to continue his eligibility under the ED category.

Complainant asserts Student should be eligible under Asperger's or autism categories because of his history of being diagnosed with Asperger's and pervasive developmental disorder. The District argues Student was provided with services relevant to all categories of eligibility. Asperger's and pervasive developmental disorder are not individual eligibility categories classified under ARM 10.16.3010 through 10.16.3022. The District relied upon the autism eligibility criteria in ARM 10.16.3011(5) "student may not be identified as having autism if the student's educational performance is adversely affected primarily because the student has an emotional disturbance." The ER team determined, and the IEP team continued to conclude Student was primarily affected by an emotional disturbance and did not qualify under the autism category.

Eligibility categories under special education are not the same as a medical diagnosis. "One of the express purposes of the IDEA is 'ensure children with disabilities have available to them a free and appropriate public education and related services designed to meet their *unique needs* and prepare them for further education, employment, and independent living.'" *Fort Osage R-1 School Dist. v. Sims*, 641 F.3d 996 (8th Cir. 2011) citing 20 U.S.C. § 1400(d)(1)(A). This is why districts are responsible for evaluating children in all suspected areas of a disability. In evaluating a child with a disability under the IDEA, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category which the child has been classified." 34 CFR 300.304(6).

[7] Complainant was not in attendance at the meeting but did stop in and obtain the report and make plans to discuss it.

In *Fort Osage* the court found an IEP for a student who had been classified as having Other Health Impairment did not deny FAPE as a result of the student not being identified as having autism. *Id.* "We believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases be substantively immaterial because the IEP will be tailored to the child's individual needs. Consequently, while the IDEA intends that IEPs contain accurate disability diagnosis, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis." *Id* at 1004. In order to set the IEP aside it must be shown that failure to include the proper disability diagnosis 'compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.' *Id* citing *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010).

Here, the District evaluations was sufficiently comprehensive under 34 CFR 300.304(6) to identify all the child's special education and related services needs. The evaluators did consider the diagnosis of autism or Asperger's in their analyses. The relevant IEPs addressed special education and related services for deficits typically tied to Autism Spectrum Disorder as well as the other noted categories. Thus the District did adequately consider the autism diagnosis for Student during the relevant time period. Further, ARM 10.16.3011(5) is determinative of whether the IEP team had authority to find Student eligible for special education under the autism category given the other difficulties he was experiencing. From the IEP meeting on December 12, 2011 and forward, the IEP team continued to rely on the determination that the category of emotional disturbance was the primary or predominant category. In doing so, Student could not then be identified as eligible under the autism category. **The District did not violate 34 CFR §300.304 or ARM 10.16.3011.**

For clarity we also address the fact that by March 12, 2012, Complainant was clear that she disagreed with the January 25, 2012 IEP and sought to challenge it based on these concerns. The District failed to give adequate prior written notice and Complainant requested another evaluation from Dr.***. That evaluation was completed and it too considered autism/Asperger's and other categories but did not make diagnoses. It referred to previous diagnoses and made various recommendations with regard to strategies and services. The District and Complainant met numerous times to finalize the January 25, 2012 IEP and meet Student's unique needs. At Complainant's request, the District implemented recommendation of Dr. *** and trained some *** staff, including the behavioral specialist assigned to Student, on autism issues in August of 2012. Two additional staff members were trained in October 2012. [8]

In Issue 3, we concluded Student was not denied FAPE during the 2011-12 school year. Here, the evidence does not support Complainant's contention that the District failed to consider the diagnosis of autism/Asperger's. Further the District did not err or fail to review the categories of autism and emotional disturbance and did not err by concluding, pursuant to ARM 10.16.3011 and ARM 10.16.3015, that the category of emotional disturbance was the appropriate eligibility category under which to provide Student special education services. A review of the record indicates the District provided appropriate services addressing the evaluation diagnoses and Student's individual special education and related services needs. **Therefore, no violation of 10.16.3011, ARM 10.16.3015, or 34 CFR 300.304(6) is found on this issue.**

[8] The ***' s staff meets daily to discuss various topics, including dissemination of information from trainings. Also, the *** program retained an ABA specialist and consultant on children with autism to conduct a complete review of their program.

Issue 6: Did the District deny Student a FAPE by placing him full time at * for the 2012-2013 school year?**

Complainant alleges placing Student at *** for the 2012-13 school year denied him a FAPE. She signed approval of the August 8, 2012 IEP with this exception.

> The IDEA states that schools must ensure that:
>
> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities form the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(2).

In determining educational placement, the district must ensure that:

> (a) The placement decision—
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the LRE provisions of the IDEA;
> (b) The child's placement--
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
> (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR § 300.116.

The *** program is designed to address behavioral and educational concerns for students who are emotionally disturbed. The number of participants in the *** program is limited to ensure more structure and smaller class sizes. Complainant does not dispute that placement in the middle school would have been less appropriate. Her concerns are that *** is not designed to meet Student's needs in regard to his Asperger's diagnosis.

Placement for Student began with discussion during the January 25, 2012 IEP meeting. Complainant attended this meeting where individuals from *** and the middle school gave overviews of their programs, and a discussion of partial days at the alternative school occurred. In May 2012, Complainant toured ***, the middle school, and other private options with Dr.***. Complainant, Dr.***, and the District agreed a small structured class size would be beneficial to Student. There was discussion regarding the fact that Student would not be attending the same school if he was not disabled, and

consideration was given to any potential harmful effect on Student and the quality of services he needed. Because of his individual needs, it was determined a large school with large classes would not be beneficial for Student, which basically ruled out placement at the middle school.

Complainant submitted an addendum to the IEP meeting notes regarding meeting discussions that took place 5/29/12, 6/1/12, 6/4/12, 6/18/12, 7/10/12, 7/16/12 and 7/23/12. She reiterated she was not convinced *** was appropriate for Student because it is designed to meet the needs of students with emotional disturbance, not autism. As discussed in Issue 5 above, Complainant disagreed with the eligibility category of emotional disturbance but the IEP team properly determined that the category encompassed the primary concerns related to the barriers to Student's education at that time. Notably, behavior issues were a major concern, whether related to emotional disturbance or autism/Asperger's. The *** program properly provided the small structured class size and services to address these primary issues, meeting the requirements listed in 34 CFR § 300.116. Further, despite Complainant's reservations, she agreed to a trial placement at *** until an independent educational evaluation (IEE) could take place in fall, 2012. [9] This Complaint was filed before completion of the IEE and Student remains at *** at this time. Therefore we find **no violation 34 CFR 300.114(2) or 34 CFR § 300.116 for the 2012-2013 school year** with respect to placement at ***.

E. Disposition

The District is ORDERED to take the following action:

1. The District shall promptly review its policies and practices with regard to prior written notice in compliance with 34 CFR §300.503 and by **March 15, 2013,** the District shall inform the EAP Director at the Office of Public Instruction of any proposed changes or modifications for approval.
2. After the IEP team meets to consider the evaluation currently being completed at Complainant's request, and decides whether or how the IEP should be amended, prior to implementation the District shall provide adequate written notice to Complainant, copied to the EAP Director at the Office of Public Instruction for approval **by March 15, 2013**.

_____

Ann Gilkey
OPI Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director
Megan Morris, Kaleva Law Offices
SPED Director Chris Bilant

[9] Complainant states she agreed to the placement with the understanding that Dr. ***'s suggestions would be implemented. The IEE took place during the pendency of this investigation. Upon receiving the report, the District and Complainant plan to address the IEE.