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October 23, 2013

*** ***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **AMENDED FINAL REPORT for** In the Matter of ***, 2013-03, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

This is the Amended 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" or "parents") filed the Complaint on behalf of their child,*** (Student), a student in ***School District No. * (District). Complainants allege 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.by allegedly:

(1) failing to have medical personnel available at the beginning of the school year to meet Student's emergency safety needs;
(2) failing to provide prior written notice of denial of Complainants' request for nursing/medical services;
(3) failing to provide educational services (including related and homebound services) after Student missed 10 days of school;
(4) failing to complete Student's reevaluation within 60 days from the time consent was provided;
(5) failing to provide Student with a one-on-one aide to ensure Student's medical, safety, physical and communication needs were met;
(6) failing to notify parents when Student's primary aide was not available for student; and
(7) failing to provide transportation services to Student.

A. Procedural History

1. On April 8, 2013, the Montana Office of Public Instruction (OPI) received a state special education complaint (Complaint) signed by Complainants.
2. The OPI Early Assistance Program concluded 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 April 30, 2013.
4. An appointed investigator conducted interviews with: Complainants, Complainants' advocate, Complainants' family support specialist, the District's superintendent, principal, special education

teacher, kindergarten teacher, and the director of the special education cooperative to which the District belongs.

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. Complainants have standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3661.
2. Student has significant medical needs. He has been diagnosed with Duchenne Muscular Dystrophy, Congenital Adrenal Hypoplasia, and Glycerol Kinase Deficiency. Student requires daily medication because of his adrenal insufficiency and, in an emergency adrenal crisis, would require administration of hydrocortisone.
3. Student was initially evaluated by the District in May of 2011 at the age of 3 years 11 months, and was found eligible for special education services under the categories of developmental delay and speech-language impairment.[1]
4. For the 2011-2012 school year student attended a specialized preschool program paid for by the District. The District also paid for Student's parent to transport Student to and from the preschool and for the time Student attended preschool, due to the significant distance between the preschool and Student's home. Student resides in a small rural town in Montana.
5. Student's preschool IEP meeting took place on August 30, 2011, and the parents signed the IEP on September 24, 2011.
6. The August 20, 2011, IEP lists transportation as a related service.
7. On September 7, 2011, a Special Needs Healthcare Plan was developed and signed by a health care professional and Complainants. The emergency care section of the plan states that if certain symptoms are present[2], Student should receive a 3ml oral dose of hydrocortisone while waiting for parents or medical help to arrive.
8. On or around May 15 and May 31, 2012, two IEP meetings were held to discuss Student's transition to kindergarten.
9. Student's family support specialist took notes at the May 15, 2012, IEP meeting. These are the only notes that can be found. Her notes state that an IEP meeting is scheduled for August 30, 2012, to discuss "seizure protocol (possible absence), medical protocol (hydrocortisone shot)."

[1] Student was reevaluated and, pursuant to the December 18, 2012 Evaluation Report, the disability categories of cognitive delay, other health impairment and orthopedic impairment were added.

[2] Parents were to be notified if Student "seems lethargic, unusual behavior or possible seizure activity, docile or fatigued, possible fever or illness." 911 was to be called as well as parents if Student is incoherent, seizure activity, unresponsive, extreme fatigue or drowsiness." Other medical issues were also noted in the plan including limited mobility, use of a wheelchair, toileting and that Student needed food broken into bite size pieces to prevent choking or gagging.

10. Student's pediatrician wrote a note on a prescription pad dated August 13, 2012, indicating "one aide at school-'safety issues.' SX: 359.1 'Choking and gagging issues.'"[3]
11. On August 20, 2012, Complainants signed an Authorization of Confidential Information form, for the District to obtain information from Student's endocrinologist regarding procedures to follow at school for administering hydrocortisone and emergency medical procedures.
12. Student's private occupational therapist wrote a letter dated August 16, 2012, stating Student would benefit from a teaching assistant "who would be familiar with and have been trained to recognize the signs and symptoms of fatigue and seizures, his communication needs, as well as his individual learning style. Having one aide assigned to him would seem advantageous and reduce risk for oversights."[4]
13. On August 20, 2012, an IEP meeting was held and a draft IEP was developed for Student.
14. On August 24, 2012, the District received an email from Student's endocrinologist stating, "If [Student] isn't feeling well at school, as with other children, the parents should be notified immediately so they can pick [Student] up and begin stress doses of PO hydrocortisone…as they would at home. If [Student] is unable to take PO, then the parents give the injection at home…not the school."
15. On August 24, 2012, Complainants sent a letter to the District Superintendent stating, "Due to the fact that [Student] at this point, is being denied his own one-on-one aide (being the same person) we, [Complainants], along with [Student's pediatrician] feel that [Student's] safety at …school will not be met. [Student] will not be attending school until this matter is resolved."
16. On August 27, 2012, the District Superintendent sent a letter in response to Complainants' August 24, 2012 letter, stating that the August 24, 2012 email from the endocrinologist seems to negate information regarding administration of hydrocortisone to Student at school. The letter stated Student would receive "required adult supervision" to provide Student with a free and appropriate education.
17. Another IEP meeting was convened on September 13, 2012, where further discussion of the one-on-one aide issue occurred. It was decided to delay further decisions on the school administering hydrocortisone until Student had an appointment with the endocrinologist in October 2012.
18. On September 17, 2012, the District sent Complainants prior written notice refusing to designate one person as a one-on-one aide.
19. The District requested consent to evaluate Student on September 20, 2012. Parents signed and returned the Evaluation Plan to the District providing consent to the reevaluation on October 1, 2012.
20. On September 25, 2012, Student's pediatrician sent a letter to the District stating the school will need to be able to administer an emergency dose of cortisol by mouth or if unresponsive to drink, injected hydrocortisone. Also stating the school will need an "appropriately trained individual" on premises to be familiar with Student and recognize signs of distress and render care.
21. On October 10, 2012, the endocrinologist directed a note to the District on a prescription pad which states, "A competent adult needs to be onsite and trained to give the life-saving injectable hydrocortisone to [Student] for severe illness, as directed by his parents in a written care plan." The note goes on to state the endocrinologist will sign off on the plan after it is developed.
22. On October 13, 2012, the Superintendent sent a letter to Student's pediatrician seeking clarification of the letter and the conflicting information received from the endocrinologist on August 24, 2012.

[3] The District received a copy of this note at some point prior to or at the September 13, 2012 meeting.
[4] The District received a copy of this letter at some point prior to or at the September 13, 2012 meeting.

23. On October 18, 2012, a third doctor wrote a note on a prescription pad directed at the District stating Student required a primary para-educator/educational aide and a secondary backup, while in school.
24. The District performed assessments for Student's revaluation beginning on October 26, 2012. Student was also assessed November 27 and 28, 2012, and December 6 and 18, 2012.
25. In late October 2012, the District determined that per Montana state law, a nurse would be required to administer the injection of hydrocortisone.
26. On October 31, 2012, a meeting took place and an IEP was drafted. However, this was not an IEP meeting because some members of the team were not present and wanted to reconvene after they heard back from the endocrinologist about the health care plan.
27. At the October 31, 2012, meeting the District agreed to provide Student with one primary aide and a backup aide.
28. The October 31, 2012, meeting notes state "Transportation will be provided by the school."
29. At the October 31, 2012, meeting, at the request of Complainants' advocate, the District offered the Student homebound services. Complainants wanted to think about homebound services and agreed to accept them on November 14, 2012.
30. The October 31, 2012, meeting notes state, "Parents will be notified if aides are changed or not available."
31. The October 31, 2012, IEP was signed by the parents on November 7, 2012 with exceptions.
32. On November 13, 2012, the Superintendent received an email from the endocrinologist's nurse verifying that the hydrocortisone injection should only be given if the Student is unable to take the oral dose.
33. On November 14, 2012, another IEP meeting took place. At this meeting parents agreed to homebound services.
34. On November 19, 2012, Student began homebound services.
35. On December 4, 2012, Student's endocrinologist signed off on Student's Emergency Health Plan and Procedures. It is noted that this plan does not include the oral dose of hydrocortisone.
36. Another IEP meeting was held December 6, 2012. The team agreed a nurse would be onsite at school and the IEP notes indicate, with regard to the one-on-one aide, that "[if] primary or back up aide is not available, parents will be notified."
37. Transportation was discussed at the December 6, 2012, IEP meeting. The meeting notes state, "Discussion on what school bus is available for transporting [Student]: Parents agree to Individual Transportation Contract (mileage reimbursement and transport time) until no later than April. IEP team will reconvene when bus arrives to further discuss specifics of transportation." This was an oral agreement there was no separate written Transportation contract.
38. On December 7, 2012 a Special Education Meeting Notice for an evaluation meeting was sent by the District to notify Complainants of an evaluation report meeting scheduled for December 12, 2012.
39. On December 10, 2012, Student began attending school half days.
40. On December 18, 2012, an Evaluation Report meeting occurred. In the Evaluation Report, transportation is selected as a related service that is recommended to be discussed by the IEP team
41. On December 19, 2012, Student could not attend school because a nurse was not available to be at the school.
42. On January 7, 2013, and January 9, 2013, the Superintendent emailed Complainants letting them know Student's primary aide was unavailable and the backup aide would be there.

43. On or about the week of January 7, 2013, per email, Complainants sought to discontinue the IEP's direct speech therapy services.
44. On January 14, 2013, the District sent a Prior Written Notice to the parents informing them they would be revoking all special education services if they sought to revoke speech services alone.
45. On January 15, 2013, Complainants withdrew their request to revoke speech services.
46. On January 15, 2013, an IEP meeting was held.
47. On January 17, 2013, the District's nurse was not available and none of the three back up nurses were available from 2:45 p.m. to 3:35 p.m. so Student could not attend school at that time.
48. On January 29, 2013, Complainants signed the amended October 31, 2012 IEP.
49. On January 30 and 31, 2013, Student's primary aide was not at school and the District did not provide prior notification.
50. On February 7, 2013, the parties held an IEP meeting. The District agreed to notify parents if the primary aide was unable to be at school.
51. February 7, 2013, IEP notes state, "Bus is being ordered and should be here by Fall of 2013. Will discuss transportation in April 2013."
52. None of the IEPs drafted in 2012 and 2013 list transportation as a related service.

D. Analyses and Conclusions

Issue 1: Did the District deny Student a Free Appropriate Public Education (FAPE) when it failed to have proper medical personnel in place to meet Student's safety and medical needs in an emergency?

Complainants allege the District denied FAPE when it failed to have proper medical personnel services and supports in place to meet Student's medical needs, prior to school starting on August 22, 2012, until the time Student began receiving education services at the school on December 10, 2012. They assert FAPE was also denied on December 19, 2012, and January 17, 2013, when Student could not go to school because his paraprofessional aides were not available. Student has very significant medical needs and has been diagnosed with Duchenne Muscular Dystrophy, Congenital Adrenal Hypoplasia, and Glycerol Kinase Deficiency. Due to Student's medical needs, he requires daily medication because of his adrenal insufficiency and in an emergency adrenal crisis would require hydrocortisone. Of significance is that Student is developmentally delayed and has difficulty communicating. Student is unable to communicate when he begins to feel symptoms of adrenal failure. He also has some mobility issues and uses a wheelchair or walker as necessary.

On August 22, 2012, Student was to begin kindergarten. The previous 2011-2012 school year Student attended a preschool program at a specialized preschool program paid for by the District. The Student had an IEP through the District for his 2011-2012 school year along with a Special Needs Healthcare Plan. The emergency care portion of the September 7, 2011, Special Needs Healthcare Plan states that if certain symptoms are present Student should receive a 3ml *oral* dose of hydrocortisone while waiting for parents or medical help to arrive. There is no mention of the possibility of an injection of hydrocortisone.

The District knew Student would be transferring into kindergarten in the fall of 2012, since they had attended two IEP meetings in the spring of 2012 regarding this transition. Unfortunately, this

investigation revealed no District IEP meeting notes regarding what was discussed at these meetings. Complainants provided notes of the May 15, 2012 IEP meeting taken by their family support specialist. It appears from those notes the team planned to reconvene August 30, 2012, to discuss "seizure protocol (possible absence), medical protocol (hydrocortisone shot)." The District contends they did not hear about the possibility of a hydrocortisone injection until the August 20, 2012, IEP meeting. The District did not request an Authorization for Release of Confidential Information from the parents to obtain information from Student's doctors regarding procedures to follow at school for administering hydrocortisone and emergency medical procedures until August 20, 2012.

Complainants claim the District should have had a new IEP in place at the beginning of the school year pursuant to 34 CFR §300.323; that it failed to locate the August 30, 2011, preschool IEP; and did not extend the preschool IEP through the fall of 2012. However, the 2011 IEP was available from the state AIM system. The IEP team met on August 20, 2012, before school started on August 22, 2012, to draft a new annual IEP and at that time the parties did not reach an agreed upon IEP. In fact, a new IEP was not signed by the Complainants until November 7, 2012. Therefore, the August 30, 2011, IEP, was still in effect at the start of school year on August 22, 2012. The **District was not in violation of 34 CFR § 300.323.**

On August 24, 2012, the District received an email from Student's *endocrinologist* stating, "If [Student] isn't feeling well at school, as with other children, the parents should be notified immediately so they can pick him up and begin stress doses of PO hydrocortisone…as they would at home. If he is unable to take PO, then the parents give the injection at home…not the school." This email negates the parents' contention that the school was required to administer a hydrocortisone injection.

The IEP team met again September 13, 2012, but decided to reconvene after Complainants talked with the endocrinologist regarding his email before further developing an emergency plan. On September 25, 2012, Student's *pediatrician* sent a letter to the District stating the school will need to be able to administer an emergency dose of cortisol by mouth or if unresponsive to drink, injected hydrocortisone. The letter stated the school will need an "appropriately trained individual" on premises to be familiar with Student and recognize signs of distress and render care. On October 10, 2012, the *endocrinologist* directed a note to the District on a prescription pad which states, "A competent adult needs to be onsite and trained to give the life-saving injectable hydrocortisone to [Student] for severe illness, as directed by his parents in a written care plan." The note goes on to state he will sign off on the plan after it is developed.

On October 13, 2012, the Superintendent sent a letter to Student's *pediatrician* seeking clarification of the letter and the conflicting information received from the *endocrinologist* on August 24, 2012. The District never heard back from the pediatrician, but Complainants said the pediatrician would defer to the endocrinologist. Complainants then began working with the endocrinologist to develop an appropriate emergency care plan. Sometime in late October the District discovered that ARM 24.159.625 requires a nurse to administer the injection of hydrocortisone. The District explored possibilities on how they were going to meet this need, including whether or not the nurse would have to be onsite at the school. On November 13, 2012, the Superintendent received an email from the endocrinologist's nurse verifying that the hydrocortisone injection should only be given if the Student is unable to take the oral dose. On December 4, 2012, the endocrinologist signed off on the Emergency Health Care Plan and Procedures. It is noted that the plan does not refer to the oral dose of

hydrocortisone only the injection.[5] It was agreed at the December 6, 2012 IEP meeting that the nurse would be onsite at the school.

Student began attending school on December 10, 2012. The Superintendent was working on putting together a schedule with backup nurses. On December 19, 2012, Student was unable to attend school because the District was unable to find an available backup nurse. At that time, the District exhausted their list of 3 potential backup nurses. The District then hired a school LPN. The school LPN was unavailable on January 17, 2013 from 2:45 p.m. to 3:35 p.m. The School was unable to find a backup nurse for this time period as well. Both times the school did give prior notice via email to the parents that they were not able to provide a nurse on those days. The District has on only these two occasions since December 10, 2012, been unable to have a nurse available during the time period Student was to attend school. The District gave Complainants prior notice of the nurses' unavailability and exhausted their list of potential back up nurses.

There will be occasions when a nurse may be unavailable. Given the limited number of occurrences and the rural difficulties of obtaining part-time medical professionals, and the rigor with which the District performed its duties, some flexibility must be accorded the District. Under these facts, the District is not in violation for the unavailability of medical personnel provided they offer the Student time to make up the missed services and instruction.

A free and appropriate public education (FAPE) under the IDEA includes special education as well as related services. 34 CFR §300.17. Related services are "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology…physical and occupational therapy…school health services and school nurse services." 34 CFR §300.34(a). School health services and school nurse services are "health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person." 34 CFR §300.34(c)(13).

The preschool IEP did not have provisions for a nurse to be available to give an injection in the event of a medical emergency. However, for kindergarten, the District does not deny they are responsible under IDEA for providing school nursing services to Student. Pursuant to its Policy 3416, the District needed medical authorization from a physician and parent to administer the medicine to Student. However, because of the conflicting information the District received from various doctors, even with District diligence, it took some time for the District to learn they needed to hire a school nurse to be onsite to administer any needed emergency injections during the time Student attends school.. The District is small and rural. Initially, it did not have a school nurse. While there is conflicting information as to when the District first realized Student may require an injection, as set out above, the facts do not show significant delay on the District's part in hiring a school nurse once it was determined a nurse needed to give any emergency injections. The District **did not violate 34 CFR § 300.17** on this issue. However for the days Student missed due to the unavailability of a nurse while Student was at school, the District must offer Student time to make up the missed services and instruction.

[5] Complainants allege the second page of the Emergency Health Care Plan indicates the need for oral hydrocortisone pills. However, the wording on the second page is not clear as to how or where it fits in with the Plan on the first page.

Issue 2: Did the District err when it failed to provide prior written notice of denial of Complainants' request for nursing and medical services?

Complainants allege the District failed to provide prior written notice to their request for nursing/medical services for Student. Pursuant to 34 CFR § 300.503(a)(2), prior written notice is required a reasonable time before the District proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

The facts for the nursing issue are set forth above in Issue 1. These facts do not demonstrate the District refused a request for nursing and medical services. The District received conflicting information from medical professionals regarding exactly what medical needs Student had and how to meet those needs in conformity with the Administrative Rules of Montana. The delay in providing those services was not an undue delay and the District did in fact provide those services. Therefore the District was not required to give prior written notice and **did not violate 34 CFR § 300.503(a)(2).**

Issue 3: Did the District err by failing to provide educational services including related and homebound services to Student in the fall of 2012?

Complainants allege the District failed by not providing educational services (including related and homebound services) to Student after Student missed 10 days of school. Complainants appear to be relying on 34 CFR §300.530, which applies to students missing 10 days due to disciplinary procedures. Also, it does not appear that the District sought to dis-enroll Student after ten days of absences pursuant to usual district policy. Except in disciplinary situations, the IDEA does not contain a ten day absence rule which would require a school to provide alternatives for educational services. Here, Student had not been removed from school for disciplinary reasons. The **District did not violate 34 CFR § 300.530** with regard to the 10 days.

However, the District had an obligation to provide Student with a FAPE which is special education and related services that:

(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the state educational agency;
(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(d) Are provided in conformity with an individualized education program (IEP).

34 CFR §300.17.

After the August 22, 2012 meeting, Student did not attend school because Complainants did not think the school could meet his medical needs. Specifically, as stated in their August 24, 2012, letter to the Superintendent, they wanted a one-on-one aide designated for Student. At this time Complainants were incorrectly assuming an aide would administer any emergency medical treatment. Then a letter from the Superintendent dated September 17, 2012, incorrectly asserts the District could provide Student with the necessary special education services at that time although the medical services were not lined up. At an October 31, 2012 IEP meeting, Complainants' advocate raised the issue of homebound services and the

District offered Student homebound services at the meeting. Complainants did not accept homebound services until November 14, 2012 and Student began homebound services November 19, 2012. Once the medical issues were worked out as discussed in Issue 1, Student began attending at the school on December 10, 2012.

Thus, Student received no educational services from the District until November 19, 2012, missing approximately two and a half months of school. By the time of the September 13, 2012, IEP meeting, the District realized Student was not going to be able to attend school until the medical emergency issues were resolved. The District did not offer homebound service or other placement options during that time. Alternative placements, even if only on an interim basis, were never discussed. The District contends it was the parents' choice through their August 24, 2012, letter, not to send Student to school because the District would not designate a one-on-one aide. [6] The District did offer to pay Complainants to be Student's aide. However, Complainants respectfully declined this arrangement.

Both the District and Complainants wanted Student educated in the least restrictive environment (LRE) pursuant to 34 CFR § 300.114. When the IEP team considers placement for Student, in selecting the LRE, the team must consider any harmful effect on the child. 34 CFR §300.116(d). During this ongoing process, the District had an obligation to continually reassess its obligations to provide FAPE even though the parents had initially refused to send their child to school due to differences with the District. The intervening circumstances between August 24, 2012 and September 14, 2012, revealed the District had a responsibility to provide a nurse or other medical personnel to meet Student's medical emergency needs. It could have been medically unsafe if Student had been required to attend school without the proper medical arrangements. By September 14, 2012, the District began to realized the extent of its' medical obligations for these related services, but was not ready for Student to attend school until they clarified the conflicting medical information. At this point, the IEP team had an obligation to offer an alternative placement despite the parent's letter of refusal. Student received no educational benefit at all from the District during this time. District failure to provide any educational benefit denied Student a FAPE between September 14, 2012, and October 31, 2012 when the District offered homebound services. In this regard, the **District did violate 34 CFR §300.17**.

Issue 4: Did the District err when it failed to complete Student's reevaluation within 60 days from the time consent was provided?

On August 20, 2012 the IEP team agreed to a comprehensive reevaluation to determine Student's current achievement levels. The District requested parental consent to evaluate on September 20, 2012. The parents signed the Evaluation Plan, consenting to the re-evaluation on October 1, 2012. The evaluation report meeting was held December 18, 2012.

The IDEA requires that an *initial* evaluation be conducted within 60 days of receiving parental consent. 34 CFR §300.301(c)(1)(i). There is no similar time requirement set out for re-evaluations pursuant to 34 CFR § 300.303 but the timeline needs to be reasonable under the circumstances. As per the evaluation report of December 18, 2012, the District performed assessments for the revaluation beginning on October 26, 2012. Student was also assessed November 27 and 28, 2012, and December 6 and 18, 2012. A Special Education Meeting Notice for an evaluation meeting was sent by the District on December 7,

[6] This topic is discussed in Issue 5.

2012 for a meeting scheduled for December 12, 2012. The evaluation meeting took place December 18, 2012.[7]

The 60 day timeframe does not apply to reevaluations, but must be accomplished within a reasonable timeframe. While the District could have provided the consent form earlier, given the unfolding, intervening circumstances, we conclude the delay between the time the parties agreed to a reevaluation and when the District completed the reevaluation was not unreasonable. The District **is not in violation of 34 CFR § 300.301(c)(1)(i).**

Issue 5: Did the District deny FAPE when it failed to provide Student with a one-on-one aide to ensure Student's medical, safety, physical and communication needs were met?

Complainants allege the District failed to provide a one-on-one aide to ensure Student's medical, safety, physical and communication needs were met prior to school starting on August 22, 2012 denying Student a FAPE. Because of Student's significant medical needs and inability to effectively communicate, Complainants felt it was necessary for one person to be designated as Student's aide.[8] The District contends it always planned to provide Student one-on-one adult supervision, but that at the beginning of the school year they did not agree to appoint a single designated person to serve as Student's aide due to Student's complex needs which required a variety of professionals be involved.

At the August 20, 2012, IEP meeting, the IEP team discussed at length the need for a designated one-on-one aide versus one-on-one adult supervision.[9] Complainants provided the District with a prescription from Student's pediatrician dated August 13, 2012 which read "one aide at school-'safety issues' SX: 359.1 'choking and gagging issues.'" Complainants also provided the District with a letter from Student's private occupational therapist dated August 16, 2012 which recommended Student would benefit from a teaching assistant trained to recognize signs and symptoms of fatigue and seizures: "Having one aide assigned to him would seem advantageous and reduce risk of oversights." Complainants wrote the Superintendent a letter dated August 24, 2012 which stated, "Due to the fact that [Student] at this point, is being denied his own one-on-one aid (being the same person) we, [Complainants], along with [Student's] pediatrician… feel that [Student's] safety at …school will not be met. [Student] will not be attending school until this matter is resolved."

The District Superintendent responded with a letter dated September 17, 2012, giving the parents prior written notice pursuant to 34 CFR § 300.503(a)(2). The letter set forth various reasons why it did not feel a designated one-on-one aide was appropriate for Student. These reasons included: Student's individual needs require various service providers including the special education teacher and related services providers; the District believed it was best for the special education teacher to initially work

[7] The parties do not have a clear recollection as to why the meeting was moved. It should also be noted, the assessment that took place on December 18, 2012 was the classroom based assessment. This assessment appears to be in addition to those assessments originally requested on the Evaluation Plan dated September 20, 2012, because classroom based assessments were not addressed in that plan.

[8] The District did agree to provide Student with a designated, consistent one-on-one aide with a designated back-up aide at the October 31, 2012 IEP meeting.

[9] At the August 20, 2012 IEP meeting the District, upon hearing about the possibility of injections, did offer the Complainants to be an aide for the Student until the medical and aide issues were straightened out. The Complainants declined this request.

with Student and gradually include instructional assistants; Student received similar special education services during preschool and made meaningful progress; and the District believed it could ensure Student's safety with the proposed personnel assignments (a copy was attached to the letter); and lastly, the District considered this to be its administrative responsibility to assign personnel. The parents responded with an additional doctor's recommendation on October 18, 2012, written on a prescription pad stating Student requires a primary paraeducator/educational aide and secondary backup while in school.

The August 30, 2011, preschool IEP states under Supplementary Aids and Services: "additional supervision during feeding; Special Needs Health Care Plan." The proposed August 20, 2012, IEP states under Supplementary Aids and Services: "Adult supervision is required during [Student's] school day, including eating assistance," "Adults need to be aware of how [Student] manifests symptoms of distress-parents will provide list," and "See attached Health Care Plan, including Emergency Procedures Plan; this will be reviewed with all personnel who work with [Student]." It is noted that a 2012 IEP was not signed until November 7, 2012, therefore, as discussed in Issue 1, the August 30, 2011 IEP was controlling at the beginning of the school year.

The proper standard to determine whether a student with a disability has received FAPE pursuant to 34 CFR §300.17, is the "educational benefit" standard. *J.L v. Mercer Island School Dist.,* 592 F.3d 938,951 (9th Cir. 2010). A district must confer at least "some educational benefit" on students with disabilities. *Id*. This standard is referred to as "a basic floor opportunity" not a "potentially maximizing education." *Id* at 947 citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 197 (1982). The decision as to whether a one-on-one aide is required is one left up to the IEP team when developing the IEP in accordance with 34 CFR § 300.320 through § 300.324. Supplementary aides and services in an IEP are "aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate…" 34 CFR 300.42. [10]

The District position is that it did not deny one-on-one adult supervision proposed in the IEP. The District made a personnel decision to assign several staff to implement the IEP team decision for one-on-one supervision at the start of the year. The District denied Complainants' request to designate a particular person as the designated aide. It then provided proper prior written notice of denial to Complainants. The personnel assignments in the District's prior written notice letter dated September 17, 2012, assigned the Student's current aide and the special education teacher for the first two weeks of school. District IEP team members contended that it made the most sense to have the special education teacher with an aide for the first few weeks. These arrangements were similar to Student's preschool arrangements. The District gave proper notice regarding the denial of a single designated one-to-one aide and therefore was **not in violation of 34 CFR § 300.503(a)(2)**.

[10] See also, *Lainey C. v. State of Hawaii, Dep't. of Educ.*, 2013 WL 1856065 at 9 (D. Haw. 2013) (Unpublished), the Court determined the state hearings officer did not err by upholding the IEP team's decision not to provide a Student with autism a one on one aide. There was testimony from witnesses against having a designed one on one aide and also testimony from a psychologist, and teacher that an aide would have been helpful. "However, being "helpful" is not the same as being necessary for provision of a FAPE."

Additionally, the function of the IEP team is to determine what *services* are necessary to provide FAPE, including any decision on whether or not one-on-one adult supervision is needed. The IEP team is not precluded from providing suggestions to the District about traits or skills that might pair well with a particular student. However, the IEP team does not have authority to require a particular employee be designated as a one-on-one aide. Ultimately, the District administration is responsible for assignment of qualified personnel to provide services deemed necessary by the IEP team. At the beginning of the school year, the District assigned several personnel to meet the Student's complicated needs and provide one-on-one adult supervision. The August 20, 2012 offer of FAPE to Complainants would have conferred some education benefit on Student. Under these facts, **the District did not deny FAPE in violation of 34 CFR §300.17.**

Issue 6: Once in school, did the District deny FAPE when it failed to notify parents when Student's primary aide was not available?

Complainants allege that after Student began attending school on December 10, 2012, the District violated Student's IEP by failing to notify them on two occasions, January 30 and 31, 2013, when the primary aide was unavailable and the designated backup aide would be with Student. The IEP in effect at the time was the IEP dated October 31, 2012 and signed January 29, 2013.

The October 31, 2012 IEP meeting notes state, "Parents will be notified if aides are changed or not available." The December 6, 2012, IEP meeting notes state, "If primary or back up aide is not available, parents will be notified." The District contends these provisions mean that if *both* the primary and back up aide are unavailable the parents will be notified. Complainants argue they were supposed to be notified if the primary aide is going to be unavailable. The Superintendent did email Complainants on both January 7 and 9, 2013 giving them notice the primary aide was going to be unavailable and the backup aide would be with Student on those days. The Superintendent did not email the parents about the January 30 and 31, 2013 absence of the primary aide.

The Ninth Circuit set forth the standard for failure to implement an IEP in *Van Duyn v. Baker School District*, 502 F.3d 811 (9th Cir. 2007). The Court held that in accordance with the IDEA and the Supreme Court's decision in *Bd. of Educ. of Hendrick Huson Cent. Scho. Dist., Westchester County* v. *Rowley*, "…that a *material* failure to implement an IEP violates the IDEA." *Id* at 822. A material failure is more than a minor discrepancy between services a school provides and those required by the child's IEP. *Id.* "…[W]e clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id*. In the *Van Duyn* case, the Court reviewed issues such as the amount of weekly math instruction, failures in implementing a behavior management plan, whether work was presented at the student's level and whether student was provided with a self-contained classroom. *Id* at 823-825. The court held that the District did not materially fail in any of the provisions of the IEP (except the math instruction which had been satisfied under the ALJ's order). *Id* at 825.

Here, the IEP notes committed the District to notifying the parents if either the primary or secondary aide were going to be gone. The failure to do so on two occasions was a **procedural violation under 34 CFR § 300.17(d).** The parties resolved the issue within two weeks of the controversy. This minor

procedural violation is not a material or substantive failure to implement the IEP and did not deny FAPE. To avoid confusion, the IEP team would be well advised to clarify the issue for all parties.

Issue 7: Did the District err by failing to provide the related service of transportation to Student to accommodate his wheel chair and nursing/medical services which would meet Student's emergency medical and safety needs during transport?

Complainants allege the District failed to provide adequate transportation services to Student that would accommodate his wheel chair and medical and safety needs during an emergency. Transportation is a related service pursuant to 34 CFR § 300.34. Transportation as a related service includes, "Travel to and from and between schools; Travel in and around school buildings; and Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability." 34 CFR §300.34(16). Complainants entered into an independent transportation contract for Student's 2011-2012 school year and transportation is listed as a related service on 2011 IEP. However, transportation is not listed as a related service on any IEP for the 2012-2013 school year.

Transportation was discussed at the May, 2012, IEP meetings. At that time a few options were discussed to accommodate Student. However, since Student did not receive educational services until he began homebound services on November 19, 2012 transportation was not a relevant issue. The October 31, 2012 meeting notes state, "transportation will be provided by the school." Transportation was discussed again at the December 6, 2012 meeting in the IEP meeting notes stating, "Discussion on what school bus is available for transporting [Student] : Parents agree to Individual Transportation Contract (mileage reimbursement and transport time) until or no later than April. IEP team will reconvene when bus arrives to further discuss specifics of transportation." The Individual Transportation Contract was an oral agreement. There is no documentation that a written contract was entered into by the parties.[11] In the December 18, 2012 Evaluation Report, transportation is selected as a related service that is recommended to be discussed by the IEP team. During the February 7, 2012 IEP meeting bussing was again discussed. Per the February 7, 2012 IEP notes, "Bus is being ordered and should be here by Fall of 2013. Will discuss transportation in April 2013." An IEP meeting was not held in April of 2013. The District reported their omission of transportation in the IEP was an oversight since they had an agreement to pay parents for the service.

Complainants consented to personally transporting Student until April of 2013 and agreed to enter into an Individual Transportation Agreement. No IEP meeting was held in April of 2013. Pursuant to the agreement, the District plans to reimburse Complainants for the transportation costs as set out in the IEP meeting notes referenced above. The District is providing transportation to Student and is **not in violation of failing to provide transportation but is in violation of 34 CFR § 300.34 for failing to include transportation in the IEP as a related service.**

E. Disposition

The District is ORDERED to take the following action:

[11] The District did provide an undated note on District letterhead (the note is not addressed to anyone) stating that the Complainants would be reimbursed for the days they transport their son for both mileage and time at a rate of $12.66 per day to be paid at the end of the school year.

1. During the summer of 2013, the District shall provide compensatory education services for the deprivation of FAPE under 34 CFR § 300.17 from September 13, 2012 to October 31, 2012 and for times Student could not attend due to the District not having a nurse or aide available to Student. Complainants are free to decline compensatory services or related speech services if they choose. The District shall inform the OPI Dispute Resolution Director of the compensatory education arrangements by **June 7, 2013**.

2. The District shall amend the Student's IEP to clarify that transportation is a related service and, at the next IEP meeting, the IEP team shall determine the particulars of Student's transportation for the next school year pursuant to 34 CFR § 300.34. The District shall notify the OPI Dispute Resolution Director of compliance with this provision **by August 28, 2013.**

3. The District shall report to the OPI Dispute Resolution Director by **November 28, 2013** on their efforts to properly implement Student's IEP pursuant to 34 CFR § 300.17(d).

4. To avoid further medical issues, it is recommended the District obtain clarification of the Emergency Health Plan and Procedures from medical professionals regarding under what conditions an oral dose of hydrocortisone is to be given to Student and how to address the medical concerns regarding gagging/choking risks mentioned by Student's medical professionals. We urge Complainants to consider the District's offer to pay for an independent pediatric endocrinologist for this purpose.

With regards,

_____

Mary Gallagher for
OPI Compliance Officer Gilkey

c: Megan Morris, Kaleva Law Office