



June 11, 2013

***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT for In the Matter of *****, 2013-05, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) 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. *** (“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 exposing Student to mistreatment by the regular education teacher and refusing to accommodate Student’s request for creation of a new 2nd grade class to remove Student from the teacher’s instruction.

A. Procedural History

1. On April 12, 2013, the Montana Office of Public Instruction (OPI) received a Special Education Complaint (Complaint) signed by Complainants’ attorney.
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 May 7, 2013.
4. The OPI received a written reply from Complainants on May 17, 2013.
5. An appointed investigator conducted interviews with: Complainants, the District’s superintendent (superintendent), the classroom teacher, speech and language pathologist and three classroom paraprofessionals.

B. Legal Framework

The OPI is authorized to address alleged violations, which occurred within one year prior to 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 is eligible for special education services under the category of Speech and Language Impairment.
3. Student moved into the District at the beginning of the 2012-2013 school year for second grade.
4. The District implemented Student's IEP from his prior Montana school district at the time the speech and language therapist received the transfer documents on September 27, 2012. Student received speech and language services until mid-February, 2013.
5. Complainants removed Student from school intermittently from mid-February to March 7, 2013.
6. Student's annual IEP meeting took place on December 12, 2012.
7. The resulting IEP provides for 30 minutes of speech and language services per week. The IEP has one speech goal on his IEP related to articulation of /s/z/ sounds.
8. Student was in the regular education classroom setting.
9. Student did not attend school for several days in February due to Complainants' concerns regarding his regular education teacher hitting and kicking Student's and others' desks. The superintendent and Student's teacher assured Student's mother during the first week of March that the alleged behaviors had stopped.
10. On March 6, 2013, Complainants allege that Student's teacher physically abused him by grabbing his arm and leaving a bruise.
11. Student's mother filed a District Grievance under District policies against Student's classroom teacher on March 7, 2013, for the alleged physical abuse as well as prior incidents of the teacher hitting or kicking Student's desk. Complainants removed Student and March 7, 2013 was Student's last day of attendance.
12. Another parent went to the superintendent for concerns with the same teacher in January of 2013 for allegedly hitting and kicking of her child's desk. The superintendent performed an investigation and found the allegations to be true. The superintendent continues to monitor the teacher and the teacher's alleged kicking and hitting the desk has ceased.
13. Student has not attended school since March 6, 2013 upon the advice of Student's private counselor. The counselor has not provided any written documentation to the District. The District has not un-enrolled Student.
14. On March 8, 2013 the superintendent, who is also the principal, mailed a response to Complainants' Grievance stating she planned to investigate per board policy.
15. On March 14, 2013 the superintendent mailed a letter to Complainants stating she had completed her investigation by interviewing three teacher's aides, the teacher, and four students who were present the day of the alleged incident. "The results of my investigation substantiated the claim that the teacher was hitting desks with a ruler, kicking desks, and slamming desk with his hands. These issues were addressed with the teacher in January and the resulting plan in place is being monitored. Based on the results of my investigation they have stopped and have not occurred since the issue was addressed by administration." Further, the results of the investigation did not substantiate a claim of physical abuse which was alleged to occur on March 6, 2013.
16. On March 14, 2013, Student's speech/language pathologist contacted Student's mother by telephone to offer speech therapy as set out in Student's IEP either at home or at school.
17. On March 21, 2013 Complainants' attorney filed a Notice of Appeal of the Superintendent's investigation and Determination with the superintendent, requesting the Board appoint a neutral

investigator to look into the allegations, schedule a hearing, and make “reasonable accommodations” to allow the child to return to school.

18. On March 28, 2013 Student’s speech and language pathologist contacted Student’s mother by telephone to offer speech therapy services even though Student was not attending class.
19. On April 4, 2013, the superintendent, speech and language pathologist and Student’s mother met to discuss Student. They did not come to a resolution for Student to return to school because Complainants wanted the regular education teacher removed from the classroom or a new classroom set up for the Student. Student was again offered speech and language services even though he was not attending class.
20. On May 2, 2013 the speech and language therapist provided Complainants’ daughter (who attends the same school) a copy of the Student’s IEP to take home, as requested by Student’s mother. A note was attached to the copy of the IEP asking Student’s mother to let her know when she was ready to bring Student in for speech.
21. Student’s progress reports dated November 9, 2012, January 24, 2013, March 28, 2013 as well as the speech and language pathologist’s therapy notes, demonstrate that Student was making progress on his speech and language goal and was expected to meet his goal.
22. Student did receive some additional help with math and reading skills but this was part of the regular classroom curriculum and was not provided as a part of Student’s IEP.
23. Complainants did not return Student to school and filed this Complaint on April 12, 2013.

D. Analyses and Conclusions

Issue: Did the District deny Student a FAPE in the Least Restrictive Environment by subjecting him to alleged mistreatment from a regular education teacher and by refusing Complainants’ request to remove Student from the teacher’s classroom and create another second grade classroom?

Complainants allege Student was abused by his regular education teacher when the teacher would hit or kick the desks of students in the classroom, including Student’s desk, and during an incident where the teacher took him by the arm and caused a bruise. Generally, claims of abuse may be raised in district court as torts or constitutional violations, among others. The term has other specific meaning for criminal and child protection purposes. For clarity we refer to Complainants IDEA allegations as allegations of mistreatment by the teacher affecting FAPE.

Most case law addressing allegations of student abuse or mistreatment at school as a violation under the IDEA is presented when district courts seek to determine whether such a claim falls under the IDEA for purposes of exhaustion of state administrative remedies. One court held that to determine whether certain acts of alleged abuse violate the IDEA, the mistreatment must be shown to interfere with the student’s FAPE. In *Doe v. Clark Co. Board of Ed.*, 2007 WL 2462615 *5 (D. Nev. 2007) (unreported), the court upheld the State Review Officer’s finding which assumed, for purposes of the decision, that the alleged mistreatment of a preschooler with autism, including physical abuse, had occurred as described by plaintiffs. The court found no denial of FAPE because plaintiffs failed to establish how the mistreatment of preschooler interfered with FAPE.

“Where the alleged acts constitute discipline and not random acts of violence, courts have generally held that claims based upon such conduct fall ‘within the IDEA.’ And that therefore exhaustion of administrative remedies under the IDEA would need to occur.” *Sagan v. Sumner Co. Board of Ed.*, 726

F. Supp.2d 868, 879 (M.D. Tenn. 2010). “When a parent alleges that a School District’s abuse of a disabled child interfered with the child’s right to FAPE, IDEA can provide relief in the form of education and additional services to compensate for any educational deficits caused by the past abuse.” *Fulton County School District, Ga. SEA, OSAH-DOE-SE-1135718-60-Schroer*, (Feb.1, 2012) citing *Bowden v. Dever*, 2002 U.S. LEXIS 5203 (D. Mass. 2002).

The Ninth Circuit has determined the proper standard to determine FAPE 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). To demonstrate FAPE was provided, a district must show that some educational benefit was conferred. The Ninth Circuit has also examined whether bullying by other students was a denial of FAPE. The Court held that, “[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.” *M.L. v. Federal Way School District*, 394 F.3d 634 (9th Cir. 2005). Thus our investigation addresses whether the actions of the teacher interfered with the provision of special education and related services to the Student and denied Student some educational benefit.

The IDEA is in place “[t]o ensure that all children with disabilities have available to them a *free appropriate public education* that emphasizes *special education and related services* designed to meet their *unique needs* and prepare them for further education, employment and independent living.” 34 CFR § 300.1 (emphasis added). Under the IDEA, FAPE is defined as 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.

Special education and related services include speech and language pathology. CFR §300.39(a)(2)(i). Student’s IEP set out speech and language pathology as the only special education and related service Student was to receive. Student had one measurable goal on his December 12, 2012, IEP related to articulation of /s/z/ sounds. Student’s speech disability does not affect his involvement in the regular classroom or his progress under the regular curriculum. Student did not need any additional modifications, accommodations, supplementary aids or services under his IEP. Student received 30 minutes of speech services per week from the District speech and language pathologist pursuant to the IEP.

Complainants allege mistreatment by Student’s regular education teacher denied him FAPE. They allege one instance of physical abuse on March 6, 2013 in which the teacher allegedly grabbed Student’s arm and other incidents earlier in the year when the teacher hit or kicked classroom desks including their child’s desk. Complainants assert Student is unable to attend school in the regular classroom on the advice of Student’s private counselor. The District disagrees that the Student was denied FAPE. When

the allegations came to light the District did an investigation that confirmed the teacher in question had at times hit or kicked desks. The investigation did not substantiate Complainants' allegation that the teacher had physically grabbed Student's arm.

Complainants do not allege any issues with the Student's IEP; differing treatment of Student as a special education student as compared to regular education students; failure to implement the IEP goals; or other events related to Student's IEP program. Student had one IEP goal for speech and language articulation of /s/z/ sound. Complainants have not alleged any problems with the speech and language services Student was receiving under his IEP. Student's progress reports dated November 9, 2012, January 24, 2013, and March 28, 2013, as well as the speech and language pathologist's therapy notes, demonstrate that Student was making progress on his speech and language goal and was expected to meet his goal. The objectionable behavior of the regular education teacher occurred in the regular education classroom. It was not directed specifically to this Student and did not involve Student's special education services.

The parents chose to remove Student from the classroom while the issue was investigated. The District speech and language pathologist continued to offer Student speech services at least five times after Student finally stopped attending school March 7, 2013. The regular education teacher was not involved in delivery of these services. Applying the FAPE standard set out in *Rowley* and *M.L.*, the facts do not demonstrate that the teacher's behavior deprived Student of a FAPE. While not to be condoned, the mistreatment cannot be said to be abuse or mistreatment that is "is so severe that the child can derive no benefit from the services that he or she is offered by the school district." This investigation has revealed that educational benefit was conferred on Student and that Student was progressing fine in the regular classroom with a speech-only IEP. He received no classroom accommodations or supplementary aids or services under his December 12, 2012 IEP. Parents chose to withdraw Student from school after reporting the allegations. They also chose not to make Student available for speech services after withdrawing Student because it was not convenient to bring him there during the day. The IEP services were properly offered and made available but Complainants chose not to use them. We conclude that these facts do **not demonstrate a denial of FAPE in violation of 34 CFR § 300.17.**

Complainants also vaguely allege least restrictive environment (LRE) and reasonable accommodation violations related to the return of Student to school. They claim the District responses to their requested solutions to the "mistreatment," in essence, denied Student reasonable accommodations and a FAPE in the least restrictive setting.

We note that in January, 2013, the superintendent had investigated the allegations of the teacher hitting student desks. After verifying the truth of these allegations, the teacher was reprimanded and put under a monitoring plan to assure the behaviors would not recur. Complainants disagreed with the reprimand plan and filed a formal District Complaint on March 7, 2013. The superintendent followed up with an investigation as required by District policy. The single allegation of physical abuse was not substantiated and the superintendent informed Complainants the hitting of desks had been addressed and had stopped. Complainants chose to remove Student from school on the recommendation of a private counselor due to disagreement with the District's actions that did not include teacher termination or the creation of a new classroom setting for Student. The parties chose to put Complainants' appeal of the District Complaint on hold while Complainants pursued this state special education administrative

complaint. Student remained out of school and received no special education services at the choice of the parents.

Complainants' reliance on reasonable accommodations as a mechanism to resolve their concerns is misplaced. Reasonable accommodation is a term of art under Section 504 of the Rehabilitation Act of 1973 (29 USC § 701 et seq.), and the Americans With Disabilities Act (42 USC § 12101 et seq.). The IDEA does not speak in terms of "reasonable accommodation" but provides for accommodations and modifications of the regular curriculum or services pursuant to 34 CFR § 300.320(a)(4) and (5). Under the IDEA, "[t]he terms 'accommodations' and 'modifications' are terms of art referring to adaptations of the educational environment, the presentation of educational material, the method of response, or the educational content." Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations at 46577. The requests to remove the teacher or place Student in a new classroom that did not yet exist are not requests for accommodations under the IDEA. The IDEA does not address personnel matters such as the requested removal. Those matters are left to the discretion of District. The District did not fail to provide accommodations and modification in the provision of IEP services **and is therefore not in violation of 34 CFR § 300.320(a)(4) and (5).**

With regard to the least restrictive setting allegation, Complainants argue that Student's grades have suffered (presumably as a result of the teacher's behavior) and the "effect that the educational setting has had on his disability, have made JLP unable to continue his enrollment in that educational setting." Complainants' Reply, III (a), p.3. These arguments have never been directed to the IEP team where they can be considered under the IDEA. However, from the information presented, the Student was in the least restrictive setting appropriate to his unique special education speech needs which is in the regular education classroom. But for the teacher, parents had no disagreement with the LRE placement. It would be inconsistent with the IDEA to use an LRE argument to remedy this situation. Given the circumstances presented during this investigation, we conclude **the District did not violate the LRE provisions under 34 CFR § 300.114 through 300.118.**

Complainants may have valid claims in another forum. They have appealed their District Complaint to their Board of Trustees and requested appointment of a neutral investigator. That process should go forward to address any personnel issues which are not a part of this OPI special education state complaint process.

No violations under the IDEA are found. This Complaint is therefore DISMISSED.

With regards,

Frank Podobnik
OPI Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director