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November 1, 2013

*** ***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT for** In the Matter of ***, 2013-07, Alleged Prohibitions 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. *** (Complainant) filed the complaint on behalf of *** (Student), a student in *** School District No. * (District). Complainant alleges 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 facilitate the transfer of Student into the District and failing to obtain the Student's records in a timely manner;
(2) failing to provide Complainant with timely access to Student's educational records;
(3) denying Student a free appropriate public education (FAPE) because Student's 2012 and 2013 IEP's were not reasonably calculated to provide educational benefit;
(4) failing to determine appropriate present levels of academic and functional performance (PLAAFP) in order to provide measurable goals on the amended 2012 and 2013 Individualized Education Programs (IEPs);
(5) changing Student's educational placement without prior written notice by moving Student out of a general education science class to a functional social skills class and amending Student's 2012 IEP to reflect the move without the consent of Complainant;
(6) failing to provide Student appropriate accommodations so Student could be successful in the general education science class;
(7) failing to reevaluate Student within a reasonable amount of time after the request for reevaluation was made January 15, 2013;
(8) not allowing Complainant to participate in an IEP meeting to discuss an evaluation plan for Student; and
(9) failing to consider Complainant's request for an Independent Educational Evaluation (IEE).

A. Procedural History

1. On August 26, 2013 the Montana Office of Public Instruction (OPI) received a Special Education Complaint signed by Complainant. OPI sent a copy of the Complaint to the District on August 30, 2013 and allowed three days for mailing, setting the date of filing as September 3, 2013. OPI dismissed the [prior district] School District, who was named in the Complaint as a party because the Complaint did not allege any prohibitions by the [prior district] School District occurring within one year of the date of filing. 34 CFR § 300.153(c).
2. On or around September 12, 2013 and September 20, 2013 OPI received revised complaints from Complainant.
3. On September 19, 2013 the Office of Public Instruction's Early Assistance Program (EAP) concluded the matters alleged in the complaint were not able to be resolved through the EAP the time and sent a Request for Response to the District. The Complaint proceeded to investigation.
4. The OPI received the District's written response to the Complaint on October 3, 2013.
5. The OPI received additional documents from the parties and received Complainant's reply on October 25, 2013.
6. An appointed investigator conducted interviews with the Complainant, Complainant's advocate, the director of special education for the District, Student's case manager for the fall semester of 2012-2013 (who was also one of his science teachers), the special education director for the high school, the school psychologist, the high school's speech pathologists, and Student's 2012-2013 functional daily living skills language arts teacher.

B. Legal Framework

The OPI is authorized to address alleged prohibitions, 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 occurred.

C. Findings of Fact

1. Complainant currently has standing to file this Complaint as the surrogate parent of Student under the Montana special education complaint process at ARM 10.16.3661. Complainant is ** serving as his foster mother under a kinship care placement by the state health and human services agency. She is in the process of adopting Student.
2. Complainant enrolled Student in the District on August 20, 2012 for his freshman year of high school. Student was transferring from another district in Montana. At this time, the District faxed a Request for Transfer of Student and Special Education Records to the previous District.

3. On or around August 23, 2012 the District received Student's electronic records from the statewide student information system including Student's January 31, 2012 IEP[1]. The records did not include a copy of the Evaluation Report for the reevaluation that was conducted May 16, 2012.
4. On September 5, 2013 the District's school psychologist emailed a request to the previous district for the May 16, 2012 Evaluation Report. The District received the Evaluation Report sometime around the end of the week of September 10-15, 2012.
5. On August 27, 2012 the special education coordinator for the high school met with Complainant to discuss enrollment, Student's class schedule and needs based on his January 31, 2012 IEP. [2] It was decided amendments needed to be made to fit Student's needs. The IEP was amended to add more reading support, and social, emotional, and behavioral support in the special education setting and regular classroom. Other additions were made regarding supplementary aids, and services and Student's reading goal was also amended.
6. These amendments were implemented on August 29, 2012. The District amended the January 31, 2012 IEP document on September 6, 2012.
7. On September 6, 2012 the District sent home the amended IEP with Student for Complainant to sign. This copy was lost. Complainant signed the amended IEP on September 24, 2012.
8. On November 27, 2012, by email, Student's case manager stated Student was transferred out of his physical science class because the material was too difficult and placed in a functional daily living social skills class. The email makes reference to a previous discussion with Complainant regarding the matter. Student's IEP was amended and signed November 30, 2012 by everyone except Complainant who signed on January 15, 2013.
9. The District did not send Prior Written Notice of the change in placement for the transfer from the regular education class setting to the special education class.
10. On January 15, 2013 the IEP team met for the annual review of Student's IEP. Complainant requested a reevaluation and the IEP team agreed and marked "yes" for the need for reevaluation. The IEP notes state, "[j]oint discussion on the appropriate scope of the evaluation will occur." Complainant signed the IEP on January 19, 2013.
11. On January 17, 2013, by email to Student's case manager, Complainant requested an entire copy of Student's special education file.
12. On January 24, 2013 the director of special education mailed Complainant a copy of Student's special education file, including copies of recent and past IEPs and evaluations. The file did not include testing protocols (answer booklets) due to copyright prohibitions.
13. On February 24, 2013 by email to Student's case manager, Complainant requested an IEP appointment to discuss testing. On February 25, 2013 the case manager responded by suggesting a conference call and noting they have 60 calendar days to complete the testing. On February 28, 2013 Complainant again requested an IEP meeting to discuss the proposed evaluations but that she would not be available until after March 18, 2013. On March 1, 2013 Student's case manager emailed Complainant offering a meeting on March 19, 2013 from 1:00 to 1:30, noting it would not be an IEP meeting but they will go over the areas in need of evaluation and provide Complainant with an Evaluation Notice. An additional

[1] Student has previously been identified as eligible for special education services under the category of specific learning disability in reading, math, and written expression. Student has also been diagnosed as having ADHD.
[2] The District noted at this time the January 31, 2012 IEP had been signed by Student's previous guardian, but only as a participant in the IEP meeting, not for approval.

email was sent on March 1, 2013 stating the District had the current IEP year to conduct the evaluation since Student was evaluated at the end of the last year.

14. An evaluation planning meeting was held March 19, 2013 and an Evaluation Plan and Permission for Evaluation or Reevaluation was signed by Complainant. The following tests and other evaluation procedures were marked to be administered: academic achievement, classroom-based assessment, communication, and observations.
15. The District's speech language pathologist began assessing Student on March 27, 2013 to determine Student's current levels of language understanding and expression.
16. June 7, 2013 Complainant emailed a request for an entire copy of Student's special education file to Student's case manager. That case manager responded to the email stating she would forward Complainant's request to Student's new case manager and asked Complainant to clarify if there was something specific she was looking for because Student's file had been copied and sent to her in January.
17. On June 10, 2013 Complainant responded that she wanted a copy of every page, and that the District's file "looked larger than hers." On June 12, 2013 she refined her request to the following records: (1) Academic testing results and narrative from [prior district] that was conducted in 2012; (2) Copies of all reading and math tests, and writing samples documenting progress toward achieving IEP goals, given since January 2013; (3) All teacher narratives; and (4) Written minutes from [current district] IEP meetings. The District sent these records to Complainant on August 6, 2013. Complainant received the records on August 8, 2013.
18. Students' PLAAFs and goals on his January 31, 2012 and January 15, 2013 IEPs from the previous district are appropriately drafted with the exception of the January 31, 2012 IEP reading PLAAF which was amended on September 6, 2013 by the District.
19. The District did not adequately track Student's progress on his IEP goals and is not able to demonstrate that he progressed during the 2012-2013 school year.
20. The District began the speech and language assessments soon after the January, 2013 IEP meeting. The District continued with the speech and language assessments at the start of the 2013-2014 school year but these were not finalized as of October, 2013. None of the other assessments had been started as of October, 2013.

D. <u>Analyses and Conclusions</u>

Issue 1: Did the District err when it allegedly failed to facilitate the transfer of Student into the District and failed to obtain Student's records in a timely manner?

<u>Records Transmittal.</u>

Complainant alleges the District did not properly facilitate the transfer of Student into the District at the beginning of the 2012-2013 school year and did not obtain Student's records from the prior district in a timely manner. Student enrolled as a freshman at a high school within the District on August 20, 2012. Student was transferring from another district in Montana. At this time the District faxed a Request for Transfer of Student and Special Education Records to the previous District. On August 23, 2012, in compliance with § 20-1-213, MCA, the District received Student's January 31, 2012 IEP from his former school district.

The procedure for the transfer of a student from a district within the same state is set out in 34 CFR § 300.323(e):

> If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same state) transfers to a new public agency in the same state and enrolls in a new school *within the same school year,* the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous agency), until the new public agency either-
>
> (1) Adopts the child's IEP from the previous agency; or
> (2) Develops, adopts, and implements a new IEP…

(Emphasis added). It is noted that this regulation only addresses transfers within the same state during the same school year. There is not a specific regulation which deals with transfer at the beginning of a school year. Pursuant to 34 CFR § 300.323(a), every district must have an IEP in effect, for each child with a disability. The Department of Education in their comments to the federal regulations, refuse to clarify this process other than to state that "…public agencies need to have a means for determining whether children who move *into the State* during the summer… and for ensuring that an IEP is in effect at the beginning of the school year." *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 46682 (August 14, 2006) (emphasis added). The Department of Education also offers that if a child's IEP has recently been developed or revised by the previous district at the end of a school year or in the summer, and the child moves during the summer, it is up to each individual district how they want to handle the matter. They can decide to adopt and implement that IEP, unless they determine an evaluation is needed or the newly designated IEP team could develop, adopt and implement a new IEP. *Id.*

Further, in order to facilitate such a transfer, the new district must take reasonable steps to promptly obtain the student's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services. 34 CFR § 300.323(g). The District properly followed the procedure set out in 34 CFR §§ 300.323 (g). Upon enrollment of Student the District requested Student's records via the statewide student information system and fax to the prior District. Student's electronic records, including Student's January 31, 2012 IEP, were received on August 23, 2013, but the file did not include a copy of the Evaluation Report for the reevaluation that was conducted May 16, 2012. On September 5, 2013 the District's school psychologist emailed a request for the May 16, 2012 Evaluation Report. The District received the Evaluation Report sometime around the end of the week of September 10-15, 2012. The District acted reasonably and promptly to obtain Student's records. **The District did not violate 34 CFR §§ 300.323(g).**

<u>IEP at Beginning of School Year.</u>
The special education coordinator for the high school met with Complainant and Student on August 27, 2012 to discuss enrollment, class schedule, and implementation of his existing IEP. Student was changing from middle school to high school in a new district and the new district was trying to determine how to best serve Student given the limited information they had been provided. To complicate matters, Complainant did not know the extent of Student's disabilities and was not familiar with his special education at the time of enrollment. As a result of the

meeting, they determined they needed to amend the transfer IEP. The District was concerned because the January 15, 2012 transfer IEP had not been properly implemented, since it was not signed for approval by a parent or guardian. The District amended the IEP to add more reading support, and social, emotional and behavioral support in the special education setting and regular classroom. The District made additions for supplementary aids and services and amended Student's reading goal. The newly amended IEP was implemented on August 29, 2013, the first day of school. **The District had Student's amended IEP in effect at the beginning of the school year and did not violate 34 CFR § 300.323(a).**

Amendment Without IEP Meeting.
Complainant further complains that the District should not have amended the IEP without an IEP team meeting. Pursuant to 34 CFR § 300.324(a)(4) and (6), amendments to an IEP may be made either by the IEP team at a team meeting or the parent and district can agree not to convene an IEP meeting and develop a written document to amend or modify a student's current IEP. The District was not required to conduct an IEP team meeting to make the amendments. The District and Complainant discussed the changes on August 27, 2012 and implemented them August 29, 2012, the first day of school. On September 6, 2012, the District provided a written copy of the amendments for Complainant's signature which she signed on September 24, 2012. Because no IEP meeting was required for the amendments, **the District did not violate 34 CFR § 300.324(a)(4) and (6).**

Issue 2: Did the District err by allegedly failing to provide Complainant with timely access to Student's educational records when requested?

Complainant alleges the District did not allow her timely access to Student's educational records. Complainant first alleges she asked the District by telephone call to give her a copy of Student's records in December, 2012 prior to the IEP meeting which took place January 15, 2013. There is no record of the request and the District alleges they actually received Complainant's first request, for a copy of Student's most recent IEP, in November, 2012. In response, the District provided her with a copy of Student's January 15, 2012 IEP, as amended, on September 6, 2012.

Next, the parties agree that a copy of Student's entire special education file was requested at the January 15, 2013 meeting and again by Complainant's follow-up email to Student's case manager dated January 17, 2013. On January 24, 2013 the director of special education mailed Complainant a copy of Student's special education file, including copies of recent and past IEPs and evaluations. The file did not include testing protocol answer booklets due to copyright prohibitions. Again on June 7, 2013, Complainant emailed a request to Student's case manager for the entire copy of Student's special education file. The case manager responded stating she would forward her request to Student's new case manager and asked Complainant to clarify if there was something specific she was looking for because the file had been copied and sent to her in January. On June 10, 2013, Complainant responded that she wanted a copy of every page, and that the District's file looked larger than hers. On June 12, 2013 Complainant further clarified her request for: (1) Academic testing results and narrative from [prior district] from 2012; (2) Copies of all reading and math tests, and writing samples documenting progress toward achieving IEP goals given since January 2013; (3) All teacher narratives; and (4) Written

minutes from [current district] IEP meetings. Records were again copied and sent to Complainant on August 6, 2013. Complainant alleges that these August 6, 2013 records failed to include teacher notes or a report that was a part of Student's May 16, 2012 Evaluation Report done by the previous district.

A district is required to permit parents to inspect and review any education records that are collected and maintained by the agency and must comply with a request "without unnecessary delay and before any meeting regarding an IEP…and in no case more than 45 days after the request has been made." 34 § CFR 300.613(a). **The investigation revealed the District acted in a timely manner to comply with the requests made in November and January 2013.**

Regarding the June, 2013, request, Complainant apparently believed she had not gotten all the documents in Student's file. She alleges she should have been sent copies of teachers notes and a report attached to the Student's May 16, 2012 Evaluation Report from the previous district. No additional minutes were provided. The actual written minutes from the IEP meeting were on the previously provided IEP document. **No error occurred regarding the written minutes.** As to teacher notes, a district is not responsible for keeping notes by teachers who may have individually taken their own notes at the IEP meeting, because those generally do not become part a student's educational record. In addition, the May 16 Evaluation Report was provided to the extent the District had received it from the previous district.[3] The District **did not violate 34 § CFR 300.613** by not providing teacher notes and a report they did not have.

Finally, in her Reply to the District Response to this Complaint, Complainant argues she did not receive the fluency or lexile assessment data that the District submitted with its Response despite her specific request for "reading tests demonstrating progress on goals" after January 2013. The District may have belatedly found these documents for the investigation but it should have been thorough in producing the records at the time of her request. Failure to provide the **fluency and lexile assessment data was therefore a procedural violation of 34 CFR § 300.613 (a).**

Issue 3: Did the District err by allegedly denying Student a free appropriate public education (FAPE) because Student's 2012 and 2013 IEP's were not reasonably calculated to provide educational benefit?

Complainant alleges Student's 2012 and 2013 IEPs were not reasonably calculated to provide Student with education benefit. FAPE means 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.

[3] There is nothing to indicate that the 23 pages of Evaluation Report excluded any additional reports. The evaluation form is hand written and it is noted several times there are attachments. There is nothing to substantiate a claim that the District intentionally withheld records.

34 CFR §300.17. The proper standard to determine whether a student with a disability has received FAPE, is the "educational benefit" standard. *J.L v. Mercer Island School Dist.,* 592 F.3d 938,951 (9th Cir. 2010). The 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 Complaint asserts several times that Student is "stuck" and not progressing and hadn't been for several years. The 2012-2013 school year was Student's first year with this District so we must look to the progress or lack of progress during the 2012-2013 school year. This investigation gave the District numerous opportunities to demonstrate how they evaluated Student's progress throughout the year and requested progress reports and copies of data they based their decisions on for each goal. Each goal area is discussed individually below.

Reading: Progress was measured using Easy CBM tests for reading comprehension. Student was tested four times during the 2012-2013 school year. His score did not increase throughout the year. Significantly, his lowest score was the last testing in May of 2013. Progress for reading fluency was also measured using Easy CBM tests. Student was tested three times over the course of the year and did increase his reading fluency from 122 words per minute on a 3rd grade passage to 110 on a 4th grade passage over the year. In addition Student's lexile score improved from 295 to 325 over the course of the year. It is noted that Student's reading goals were redrafted in January and his reading goal in fluency and comprehension was made easier. It appears his PLAAFs from the transfer IEP of January 31, 2012 are at a higher level than those on January 15, 2013. Student's January 31, 2012 PLAAF states he is reading 120 to 130 words per minute at 4.5 grade level and that he comprehending with 80% accuracy. In contrast, Student's January 15, 2013 PLAAF states Student is fluently reading "late third grade text" and comprehending 30% of third grade text. The June 14, 2013 Progress Report stated Student was expected to meet his reading goal. However, it is not clear what objectives this is measuring. This goal had been further broken down into comprehension and fluency benchmarks but progress is not reported for either of these. Student was not expected to make progress on the second reading goal which was "[Student] will increase his reading comprehension by forming at least 2 essential questions and writing a summary for at least 2 paragraphs in 9/10 articles, increasing his assignment percentages by at least 10% over the course of one semester."

Math: The District assessed Student using the Easy CBM tests in September 2012 and January 2013. Student did improve on his score. However, the investigation did not reveal any other testing or assessments for math done after January 2013. Student's January 15, 2013 math goal states the goal will be measured by CBM testing every quarter. Student's June 14, 2013 progress report states he is not expected to meet the goal. The comments state his moods are inconsistent and student is not able to focus.

Social/emotional/behavioral: The investigation did not reveal how this social/emotional/behavioral goal was assessed. No specific data was provided. The June 14,

2013 progress report states that two of the three social/emotional/behavioral goals are expected to be met.

Written expression: The investigation did not reveal how this written expression goal was assessed. No specific data was provided for assessments on written expression for the 2012-2013 school year. The June 14, 2013 progress report indicates Student was not expected to meet this goal. This goal was further broken down into two benchmarks and these were not indicated or addressed on the progress reports. The District produced a blank data sheet for the investigation which was for targeted objectives and included reading and written expression goals. The District reported it did not have any completed data sheets available reportedly because Student's case manager for spring semester transferred to another school and apparently took Student records with her.

Self help/independence: The investigation did not reveal how this self help/ independence goal was assessed. No specific data was provided. Student's March 13, 2013 progress report states Student was not expected to meet this goal. The June 14, 2013 progress report said no assessment had been made for this area. It is unclear if or how progress on this goal was tracked by the District.

The District does not have to provide Student with the most potentially maximizing education available. To demonstrate a FAPE was provided, it must be shown that some educational benefit was conferred. An IEP cannot be judged exclusively in hindsight, "In striving for 'appropriateness,' an IEP must take 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). The case of *McCallion v. Mamaroneck Union Free School District*, 2013 WL 237846 at *9 (S.D.N.Y.) is instructive in this analysis. The *McCallion* Court looked to several factors to determine if the IEP was reasonably calculated to provide educational benefit: the student received passing marks progressing from grade to grade; test results indicate student maintained overall achievement level when compared to same age peers; whether meaningful academic progress was made pursuant to past IEPs; and that the proposed IEP contains several recommendations and accommodations not found in past IEPs which were aimed at improving student's performance.

Here, Student did receive passing grades in all his classes,[4] but he did not maintain an overall achievement level when compared to his same age peers. The District did provide Student with additional accommodations on the January 31, 2012 IEP as amended September 6, 2012, and even more were added to the January 15, 2013 IEP. As discussed in Issue 4 below, the PLAAFs and goals on Student's IEPs were overall procedurally compliant. However, the evidence presented does not demonstrate educational benefit because the District has failed to adequately assess the Student. No data was provided for the 2012-2013 school year on Student's self/help/ independence, social/emotional/behavioral or written expression goals and no data was taken after January 2013 for the math goal. The District must track Student's progress or lack of progress as set out in the IEP through testing, teacher observation, or other means. When Student's progress reports record that Student was not expected to meet the majority of his goals,

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[4] All but two of Student's classes were special education classes and he received a D grade in both general education classes.

review of special education and related services in the IEP is appropriate, but did not happen. While this alone is not a denial of FAPE, the District did not demonstrate that it was tracking Student's progress and thus **could not demonstrate that some educational benefit was provided to Student. Therefore we conclude denied Student a FAPE in violation of 34 CFR § 300. 17**

Issue 4: Did the District err by allegedly failing to determine appropriate present levels of academic and functional performance (PLAAFP) in order to provide measurable goals on the amended 2012 IEP and the 2013 IEP?

PLAAFPs January 31, 2012 IEP (as amended).
Complainant also alleges that Student's PLAAFPs are inappropriate and therefore the District was not able to develop appropriate IEP goals. An IEP must include a statement of the child's PLAAFPs including how the child's disability affects his involvement and progress in the general education curriculum. 34 CFR § 300.320(a)(1). PLAAFPs are set out to further goals development. An IEP begins by measuring the student's present level of performance which provides a benchmark for measuring the student's progress toward the goals stated in the IEP. *Ravenswood City School District v. J.S.,* 870 F.Supp.2d 780, 790 (N.D. Ca. 2012) citing *Settlegoode v. Portland Pub. Schs.,* 371 F.3d 503, 508 n. 1 (9th Cir.2004).

Complainant alleges no specific problems with the PLAAFPs but argues generally they fail to communicate Student's specific, unique or individual needs with specific skill-related data, or his functional performance. She further argues error because there are no statements regarding how his disability in reading or writing affects his involvement or progress in a general education curriculum.

The investigation revealed the PLAAFs were overall procedurally compliant despite the District's failure to measure progress. The District, at the beginning of the 2012-2013 school year, chose to adopt the previous district's PLAAFs from the January 31, 2012 IEP, with the exception of the reading PLAAF that they amended on September 6, 2012. They revised the reading PLAAF but did not include Student's present level of functioning or establish a benchmark to measure progress. The amended reading PLAAF makes general reference to what the Student will be working on but fails to record the Student's current lexile level. However, as remedy to the oversight, in the fall of 2012, the District conducted their own assessment of Student's lexile level so they could measure Student's progress using the District's own assessments.

Student's remaining PLAAFs describe his current levels as compared to a typical 8th grade student. This information does give indication as to how his disability affects his involvement in the general education curriculum. With the exception of the reading PLAAF, Student's present levels communicate his unique individual needs and at what level he is currently performing. The District amended Student's IEP a second time on November 30, 2012, but did not change any of the PLAFFs. Overall however, despite the one defective reading PLAAF, the January 31, 2012 IEP and amendments as a whole met the requirements for properly written PLAAFs. **Therefore we do not find the District in violation of 34 CFR §§ 300.320(a)(1) with regard to**

the amended January 31, 2012 transfer IEP.

PLAAFPs January 15, 2013 IEP

The January 15, 2013 IEP PLAAFs communicate Student's individual needs and where he was currently performing at the time the IEP was drafted. Each of the PLAAFs does not specifically delineate how his disability affects his involvement in the general curriculum. However, his reading and math PLAAFs do state at which grade level he is currently performing, giving the District an idea of how far behind he is and what skills he may need more assistance with to be successful in general education 9th grade classes. Also, for the functional goals in self/help/independence and social/emotional/behavioral, the PLAAFs clearly state how his disability affects his participation in the general curriculum because it is assumed a typical 9th grade student would not need help in these areas. **The PLAAFS set out in Student's January 15, 2013 IEP are procedurally compliant and the District is not in violation of 34 CFR §§ 300.320(a)(1) with respect to that IEP.**

Issue 5: Did the District err by allegedly changing Student's educational placement without prior written notice when Student was moved out of a general education science class to a functional social skills class?

On November 27, 2012 by email to Complainant, Student's case manager stated Student was transferred out of his physical science class because the material was too difficult and placed in a functional daily living social skills class. The email makes reference to a phone conversation where this had previously been discussed with Complainant. Complainant now disputes that she agreed with the change. The investigation concludes that Complainant discussed and approved the change during the phone call with Student's case manager. Whether or not she actually understood those changes is not something we address.

Complainant now asserts that prior written notice was not provided to her, but should have been because this was a change of placement. The District did not provide prior written notice for the change in schedule. Student's IEP was subsequently amended and signed by the IEP team on November 30, 2012, except for Complainant who did not sign this amendment until January 15, 2013. The change in schedule involved a transfer out of Student's regular education science class and into a special education social skills class. The issue is whether this change in his schedule was a change of educational placement that would trigger further procedural protections under the IDEA, specifically prior written notice of the change of placement.

A change in educational placement is not defined by federal or state law. However, some guidance as to what is not a change in placement is provided in the following comments to the federal regulations: "…[i]t is this Department's long standing position that maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in placement." *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 46588-46589 (August 14, 2006). If a substantial or material change in the child's educational program occurs, the public agency must provide prior written notice a reasonable time before the public agency proposes to initiate or change educational placement of the child. 34 CFR §300.503(a).

In *Dong v. Bd. of Education of Rochester Schools,* 197 F.3rd 793, 801 (6th Cir. 1999), the court held a change in an IEP of a child with autism from 13 hours of classroom-based instruction and 30 to 40 hours of home-based discrete trial therapy, to an IEP consisting only of 27.5 hours of a TEACCH-based program was not a change in placement. The change doubled the child's classroom time, but allowed the child to stay at the same school, in the same program, and have the same teacher and staff working with her. *Id.* at 802. Here, Student's change was an increase of 250 minutes of social/emotional/behavioral special education services. Student was removed from a general education setting where he was learning science to a functional social skills class in a special education classroom. This was a substantial and material change in Student's placement and the District should have provided Complainant with prior written notice prior to taking the action at an IEP meeting. **The District violated 34 CFR §300.503(a) by failing to provide prior written notice.**

Issue 6: Did the District err by allegedly failing to provide Student appropriate accommodations so Student could be successful in the general education science class?

As discussed above, at the beginning of the 2012-2013 school year, Student was in a regular education science class. Amendments to the transfer IEP added some accommodations to assist student in his regular education science course. However, despite the District's efforts to accommodate Student in the regular science course, it was too difficult for Student and he was not succeeding. Complainant alleges the accommodations provided to Student for science class were not appropriate, essentially because his science textbook was the same one used by other non-disabled 9th graders and no supplementary homework materials or lessons were provided.

When determining the educational placement of a child, a district must ensure that a child "…is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 CFR § 300.116(e). A student must be served in the regular education environment unless 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(a)(2). Recognizing that regular classrooms are not appropriate for all students with disabilities, districts must have a continuum of alternative placements available. 34 CFR § 300.115(a).

The investigation revealed that Complainant agreed with the fact that the class was too difficult for Student due to Student's reading and math abilities. Given the level of reading and math skills required for the science course, it does not appear that modifications to the curriculum, supplementary aids or services, or other accommodations would have made the class manageable for Student. Even when one-on-one services were provided for Student, the class was frustrating to him. The concerted efforts to integrate and accommodate Student were unsuccessful because the course material was too difficult given his reading and math skill levels. Therefore **the District is not in violation of 34 CFR § 300.116(e)**.

Issue 7: Did the District err by failing to reevaluate Student within a reasonable amount of time after the request for reevaluation was made by Complainant and agreed to by the IEP team at the January 15, 2013 IEP meeting?

Complainant alleges that Student should have been reevaluated in a reasonable amount of time after the January 15, 2013 IEP meeting when the IEP team agreed, as evidenced on the IEP, that Student needed a reevaluation. A reevaluation must be conducted if a public agency determines the educational or related services needs of the student warrant a reevaluation or a parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation may occur more than once a year if the parent and district agree. 34 CFR § 300.303(b)(1). 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. While the 60-day timeframe does not apply to re-evaluations, they must be accomplished within a reasonable timeframe. What a reasonable amount of time for a reevaluation is shall be determined on a case by case basis. *OSEP Letter to Saperstone*, 21 IDELR 1127 (OSEP 1994). "Though vague, the interpretation of the IDEA requiring reasonableness shows that prompt resolution of disputes involving the educational placement of learning disabled children is imperative." *Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259-260 (D.C.C. 2005).

The notes to the January 15, 2013 IEP meeting state, "[t]he team discussed the need for evaluation. Even though an evaluation was completed in the prior district last spring, the school psychologist… offered that an evaluation to consider eligibility under Other Health Impairment may be appropriate. The team agreed that we would mark 'yes' for the need for reevaluation. Prior evaluation information will be shared with the family for review. Joint discussion on the appropriate scope of the evaluation will occur." On February 24, 2013 by email to Student's case manager, Complainant requested an IEP appointment to discuss the testing. On February 25, 2013 the case manager responded by suggesting a conference call and noting they have 60 calendar days to complete the testing. On February 28, 2013 Complainant again requested an IEP meeting to discuss the evaluations. She stated she would be available after March 18, 2013. On March 1, 2013 Student's case manager emailed Complainant scheduling the meeting for March 19, 2013 from 1:00 to 1:30. She stated it would not be an IEP meeting but that they would go over the areas needed to evaluate and provide Complainant with the Evaluation Notice. An additional email was sent on March 1, 2013 changing the case manager's 60-day note and stating the District had the current IEP year to conduct the evaluation since Student was evaluated at the end of the last year.[5] A few members from Student's IEP team and Complainant met as planned on March 19, 2013 and Complainant signed an Evaluation Plan and Permission for Evaluation or Reevaluation. Also in March, the District's speech and language pathologist began assessing Student, and those evaluations are continuing to date. Other than beginning the speech and language assessments, no other evaluations have taken place.

The District's position that they have one year from the IEP meeting to conduct the reevaluation is not reasonable under the circumstances here. Reasonableness is determined on a case-by-case

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[5] Some confusion may have arisen out of a training provided by OPI to school staff in the Fall of 2013 regarding the timeliness of reevaluations occurring more than every three years. This decision clarifies OPIs position on the timeliness of reevaluations.

basis. While the law does not provide a timeline for reevaluations, identified issues for reevaluation may not be left unaddressed for months on end to the detriment of a student. Prompt evaluation of identified concerns is necessary to ensure a student receives appropriate services. Student had been reevaluated eight months prior to the January 15, 2013 IEP meeting by his previous district. However, the IEP team determined Student should be reevaluated and Complainant likewise saw the need. The IEP team had recently revised Student's goals and it appears from the investigation that the IEP team was still trying to figure out how to best meet Student's needs. Student was still struggling. Progress notes indicated some goals might not be reached. The reevaluation could possibly be a key to successfully addressing some of Student's struggles. A delay of at least 9 months is not reasonable under the circumstances and the District is in **violation of 34 CFR § 300.303.**

Issue 8: Did the District err by not allowing Complainant a chance to participate in an IEP meeting to discuss an evaluation plan for Student?

Complainant asserts she had a right to a formal IEP meeting to discuss the reevaluation and was denied that right. The January 15, 2013 IEP notes about a reevaluation state, "[J]oint discussion on the appropriate scope of the evaluation will occur[.]" Clearly Complainant was expecting a joint discussion on the matter. Neither the IDEA nor the regulations require an IEP meeting prior to an evaluation. It is the District's responsibility to determine what evaluation procedures will comply with the requirements set out in 34 CFR § 300.304 and make sure to provide parental notice describing any evaluation procedures it proposes to conduct and obtain their consent to do so. 34 CFR §§ 300.304(a) and 300.300(c).[6] Appropriately, on March 19, 2013 some relevant members of Student's IEP team, Complainant, and her consultant held the evaluation planning meeting and put in place the plan and written consent for reevaluation. No further procedural rights are afforded for this process. **The District did not violate 34 CFR § 300.304 by not holding a formal IEP meeting to discuss the evaluation plan.**

Issue 9: Did the District err by failing to consider Complainant's request for an Independent Educational Evaluation (IEE) at public expense?

Complainant alleges that she requested an IEE at public expense during the January 15, 2013 IEP meeting and at the March 19, 2013 evaluation planning meeting. An IEE may be requested at public expense "…if the parent disagrees with an evaluation obtained by the public agency…" 34 CFR § 300.502(b).[7] The parties had just agreed at the January 15, 2013 IEP meeting to reevaluate Student. The prior district had done a reevaluation in the spring of 2012. However,

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[6] Complainant alleges she should have received prior written notice for the March 19, 2013 reevaluation meeting. Complainant was at the January 15, 2013 IEP meeting where they discussed reevaluation as noted in the IEP notes. The IEP itself can be used as prior written notice if it contains the proper contents listed in § 300.503(b). *Letter to Lieberman,* 52 IDELR 18 (OSEP 2008),The IEP notes as well as the reevaluation meeting on May 19, 2013 and the Notice of Intent to Conduct an Evaluation or Reevaluation provided to and signed by Complainant on May 19, 2013 were sufficient to meet the prior written notice requirements in 34 CFR § 300.503(b).

[7] The Complainant erroneously relies up on the fact the District conducted curriculum based assessments in the fall of 2012 and that therefore an evaluation was performed by the District. The District has not completed an evaluation of Student.

the Student was no longer at that district so the "public agency" contemplated by the regulation is the current district. The current district had not yet had the opportunity to evaluate Student. Therefore Complainant had no District evaluation to "disagree with" until the District completed one. **The District did not violate 34 CFR § 300.502(b).**

E. Disposition

The District is ORDERED to take the following actions:

1. The District shall promptly complete the agreed-upon assessments for reevaluation by **December 1, 2013**.

2. Upon completion of the reevaluation and in keeping with this Final Report, by **December 1, 2013,** the District shall submit to the Dispute Resolution Office for approval the IEP and a plan offering compensatory education services in all IEP areas for the deprivation of FAPE to Student during the 2012-2013 school year.

3. From **December 1, 2013 through June 1, 2014**, the District shall provide the Dispute Resolution Office monthly progress reports on Student's progress toward each IEP goals, and make any necessary adjustments to their process as identified by the Office.

4. The District shall provide training by OPI or an OPI-approved trainer and curriculum on prior written notice, timely reevaluation, tracking and reporting progress, data gathering, adequate assessment, and appropriate response to issues identified in progress monitoring. Training shall be provided to all special education personnel and administrators and verification of such training and attendance shall be provided to the Dispute Resolution Office by **March 31, 2014.**

5. The District shall promptly review its policies and practices with regard to data collection and retention when tracking educational progress to ensure compliance with this Final Report. By **December 1, 2013,** the District shall inform the Dispute Resolution Office of any proposed changes or modifications for approval.

6. The District shall promptly review its policies and practices with regard to thorough records production and prior written notice to ensure compliance with this Final Report. By **December 1, 2013,** the District shall inform this Office of any proposed changes or modifications for approval.

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Ann Gilkey
OPI Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director
Lynda White, Attorney for the District