



August 10, 2018

Complainant

Superintendent

RE: **FINAL REPORT for In the Matter of ***, 2018-3, Alleged Violations of the Individuals With Disabilities Education Act (IDEA).**

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. ***, (Parent's attorney) filed the Complaint on behalf of *** (Complainant or Parent) concerning *** (Student) who is a resident of the *** District (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 regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq. The District allegedly:

- (1). failed to timely identify Student as a child in need of special education services;
- (2). failed to timely reevaluate Student;
- (3). failed to hold an IEP meeting to develop an IEP for Student and failed to make special education or related services available to the Student pursuant to an IEP; and
- (4). failed to provide a free appropriate public education (FAPE) to Student.

A. Procedural History

1. On May 24, 2018, the Montana Office of Public Instruction (OPI) received the signed Complaint from Parent's attorney on behalf of the Complainant regarding failure of the District to provide appropriate special education services to Student.
2. OPI's Early Assistance Program (EAP) has attempted to resolve the issues in the Complaint.
3. The parties agreed to extend the EAP period by seven days to continue to attempt to resolve the issues pursuant to ARM 10.16.3662(8) and 34 CFR § 300.152b(ii).



4. On June 25, 2018, the Office of Public Instruction's EAP Director concluded the matters alleged in the Complaint were not able to be resolved through the EAP and the OPI sent a Request for Written Response to the District. The Complaint proceeded to investigation.
5. The Complaint alleges violations that occurred prior to May 24, 2017. The attorney for District and Parents' attorney were contacted about the one-year lookback timeframe and the parameters for the investigation
6. The District's written response was received on July 3, 2018.
7. District submitted additional documentation on July 11, 24 and 25 and August 3 and 7, 2018.
8. Parent submitted additional documentation on July 24, 2018 and August 8, 2018.
9. An appointed investigator conducted interviews with the Student's mother, District special education teacher, District special education director and former superintendent. The Student's father did not participate in the interviews.
10. On July 16, 2018, an extension of time for resolution of Complaint 2018-3 was granted until August 10, 2018 for an exceptional circumstance pursuant to 34 CFR § 300.152(b)(i) and Admin. R. Mont. 10.16.3662(8) due to a medical emergency with one of the interviewees.

B. Legal Framework

The OPI is authorized to address alleged violations 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, which occurred within one year prior to the date the complaint was filed. Pursuant to 34 CFR §§ 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination is made as to whether a violation of federal or state statute, regulation or rule occurred. Any references to facts outside of the one-year timeframe, May 24, 2017 through May 24, 2018 are included strictly for background information.



C. Findings of Fact

1. Complainant has standing to file this Complaint pursuant to ARM 10.16.3661.
2. Student is 16 years old and a resident of the District.
3. Student attended *** (Academy), a parentally placed private residential facility, from January 15, 2017 through November 15, 2017.
4. In November 2016, the District determined Student was ineligible for special education services under the category of specific learning disability (SLD) prior to Student's attendance at Academy.
5. Parents requested an independent education evaluation (IEE) which was completed by Dr. *** on April 11, 2017. The District received a copy of the IEE report on June 11, 2017.
6. On August 15, 2017, Student was seriously injured while attending Academy and was hospitalized because of injury.
7. In an email dated August 16, 2017 to Parent's attorney, the District's attorney indicated they could not reach the parents to schedule the ER meeting. The District's attorney proposed scheduling an evaluation report (ER) meeting on August 23, 2017.
8. Parent's attorney responded to the District's August 16, 2017 email, to inform the District that Student suffered a serious injury and Parents would not be available to hold an ER meeting. Parents' attorney would contact the District when things changed and requested that Parents not be contacted before then.
9. A letter dated October 2, 2017 from Parents' attorney informed the District that Student had a serious head injury requiring surgery. It was requested the District move forward and schedule the ER.
10. The District's attorney continued to contact Parent's attorney to schedule the ER meeting. A meeting was scheduled for October 31, 2017. Medical records from the injury were provided to District on October 26, 2017. The ER meeting was held on October 31, 2017.
11. At the October 31, 2017 ER meeting, the ER team reviewed the IEE conducted by Dr. ***, two other mental health reports and the previous November 2016 District evaluation and determined that Student was eligible for special education services under the categories of other health impaired (OHI) and emotional disturbance (ED). The team also noted that they were unable to determine with existing data if Student was special education eligible under the categories of traumatic brain injury (TBI) or cognitive delay (CD).
12. The ER stated that Student needed modified curriculum, adaptive teaching methods and a conducive and safe learning environment.



13. The recommendations from the ER for the IEP team to consider included career/vocational services, math, self-help independence, social/emotional assistance, behavioral support, transition services, written expression, assistive technology, counseling, parent counseling and training, psychological services, social work services and therapeutic recreation.
14. The ER was signed by the Parents on November 20, 2017. No documentation of other participant signatures was provided.
15. District requested consent to complete additional assessments to determine additional eligibility categories and present levels of performance for development of IEP. Parent signed consent for additional assessments on November 20, 2017.
16. Additional assessments were requested in the following areas: psychological, speech and language, sensory motor, adaptive behavior, auditory processing and academic assessments in the area of math computation and written expression.
17. District also stated that they needed Student's records from Academy in order to develop an appropriate IEP for Student.
18. District first attempted to contact Academy about records by facsimile on November 14, 2017 after obtaining consent for release of information from Parents. After at least five attempts to contact Academy by facsimile, District was still unable to obtain the records. District requested assistance from Parents to obtain records.
19. An IEP meeting was scheduled for December 5, 2017.
20. District reported that they were told that a representative from Academy would participate by telephone in the December 5, 2017 IEP meeting. However, no one from the Academy participated.
21. District was informed at the December 5, 2017 IEP meeting that Student was no longer attending Academy.
22. District has continued to seek out information from Academy to no avail. Eventually, Parent provided Student's transcript from Academy.
23. Student was hospitalized again in late November of 2017. The additional assessments consented to on November 20, 2017 were not completed prior to the December 5, 2017 IEP meeting.
24. The IEP team verbally agreed at the December 5, 2017 meeting that the results from the additional assessments were necessary before the team could develop IEP goals.
25. The District provided a document (not an IEP form) which the participants of the December 5, 2017 IEP meeting signed. The very minimal notes indicate that the team agreed an IEP could not be developed without information about current levels. The document also indicated the team discussed options for interim academic services.



26. The video recording of the December 5, 2017 IEP meeting, shows that the IEP team (which included both Parents' attorney and District's attorney) agreed that the District would provide tutoring services to Student on an interim basis until the assessments were completed; at which time an IEP would be developed.
27. The video recording and District staff personal notes indicated Parents wanted to immediately focus only on academic services.
28. District reported that they offered Student the option of attending the alternative school, but the Parents declined that option.
29. The interim services included tutoring by District staff provided at the college library. Student received direct assistance from District staff after school for approximately one and one-half hours, four days a week. Student received a Chromebook to work on an online credit recovery program.
30. This interim tutoring services were not documented through the IEP process or through some other written form. No date was set for the completion of additional assessments or for when an IEP meeting would be held. There was nothing in writing about the parameters of what services would be provided. The District did not give the Parent prior written notice (PWN).
31. Tutoring services were to begin on December 11, 2017. On the first day, District staff were not at the college library and Student did not have a Chromebook, as was verbally agreed to by the IEP team. District was contacted and this was resolved; tutoring services began on December 13, 2017 and continued to the end of the school year on May 23, 2018.
32. The academic assessments were completed by end of December, 2017; no IEP was scheduled at that time.
33. Tutoring services for Student were primarily credit recovery with assistance from the special education teacher, alternative education teacher or special education director. Also, at parent request Student received services at the college library rather than at a District school because of concerns about Student's behaviors.
34. Student worked on written expression needs through journaling. The special education teacher reported that she worked on reading and math based on Student's academic assessments.
35. Parents were contacted weekly about Student's progress.
36. The District reported that Parents never questioned the tutoring services or why there was no IEP meeting; they were pleased with Student's progress.
37. Student struggled with reading at a 4th to 5th grade reading level and needed continued support in reading comprehension. Student had a full-scale IQ score of 70.



38. According to District personnel, Student was able to complete all of the credit recovery work with minimal assistance so that Student would be eligible to graduate early the next school year.
39. The school psychologist the District contracted with was unavailable to promptly test the Student. The psychological testing was partially completed in May of 2018. As of the date of the last interview on July 24, 2018, the adaptive behavior portion of the psychological assessment had not been completed, but the District planned on completing it within the following two weeks.
40. As of July 24, 2018, the date of the last interview, the auditory processing assessment had not been completed but is scheduled for August 10, 2018. The sensory motor assessment has not been completed but is scheduled for August 1, 2018.
41. No IEP has ever been developed for this Student.
42. The first day of school for 2018-2019 school year is August 23, 2018.
43. In the Complaint, it was stated that Student had been bullied at the college. District was not aware of the allegation and no documentation was provided to the investigator that the District was informed that Student was bullied.

Analysis and Conclusions

Issue 1: Did the District fail to timely identify Student as a child in need of special education services?

Child find is an affirmative, on-going responsibility of a local education agency (LEA) to identify and evaluate all students who are living in the boundaries of the LEA, regardless of severity of their disability are identified, located and evaluated to determine if special education and related services are needed. ARM 10.16.3125(1); 34 CFR § 300.111 (a)(1). Child find must also include children who are suspected of having a disability even though they are advancing from grade to grade. ARM 10.16.3125(1)(b)(ii); 34 CFR § 300.111 (c)(1). Once a LEA or District suspects a student may have a disability and need special education, the District proposes to conduct initial evaluation to determine if the Student qualifies. The District must, after providing written notice to the parent, obtain parent's informed consent prior to conducting the initial evaluation. 34 CFR § 300.300.300(a)(1)(i)-(ii); ARM 10.16.3320(2)(d). If a parent does not provide consent, or fails to respond to a request for consent, the district may but is not required to pursue the initial evaluation by utilizing the procedural safeguards such as mediation or due process, and by not pursuing the evaluation the district is not in violation of the child find. 34 CFR § 300.300(a)(3)(i)-(ii).



There were multiple instances where the District had a reason to suspect that Student was a child with a disability and in need of special education services. Although Parent alleges that District may have had reason to suspect that Student was a child with a disability in need of special education services prior to May 24, 2017, this state complaint process can only look at the allegations that occurred not more than one year prior to the date the Complaint was filed (May 24, 2018). The parent requested an IEE after Student was found ineligible under the IDEA in November of 2016. Upon receipt of the IEE conducted by Dr. *** on June 11, 2017, the District was put on notice that this Student may have a disability and may need special education services.¹ In an October 2, 2017 letter, the Parent's attorney informed the District that Student had suffered a serious head injury that required surgery, the Parent's attorney requested moving forward to schedule the ER meeting. This was the first time that the District was put on notice that Student may be eligible under traumatic brain injury (TBI); the medical reports, received on October 26, 2017, further reinforced the suspicion that Student may have a TBI.²

The ER meeting was held on October 31, 2017. At that ER meeting Student was determined eligible under the categories of ED and OHI. The ER participants were concerned about TBI and CD as additional eligibility categories. The team considered multiple additional assessments to determine Student's needs. Consent for further assessments was signed on November 20, 2017. The District's actions regarding child find were reasonable between May 24, 2017 and May 24, 2018. **There was no violation of Part B of IDEA on this record.**

Issue 2: Did the District fail to timely reevaluate Student?

The IDEA classifies evaluations as either initial evaluations or reevaluations. A District must conduct an initial evaluation in accordance with 34 CFR §§ 300.305 and 300.306 to determine if a student is a student with a disability. 34 CFR § 300.301. Once a student has been found eligible under the IDEA, a district or a parent may request a reevaluation be conducted in accordance with 34 CFR §§ 300.304-300.311. 34 CFR § 300.303. One of the purposes of a

¹ The District attorney's August 16, 2017 email to Parent's attorney indicated the District staff had been unsuccessful in their attempt to contact parents to schedule an ER meeting to discuss the IEE and re-consider eligibility. The District attorney proposed scheduling the ER for August 23, 2017. The Parent's attorney responded to the email on August 16, 2017 and informed the District that Student had suffered a serious injury. The Parent's attorney also requested the District hold off on scheduling an ER meeting and wait until he had more information on when to proceed.

² The District's attorney continued to contact Parent's attorney to schedule the ER meeting, on October 13, 2017 via email, the ER was scheduled for October 31, 2017 and the District issued a meeting notice dated October 16, 2017.



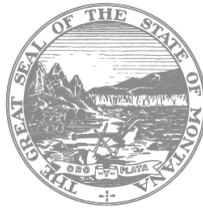
reevaluation is to determine the educational needs of the Student. 34 CRF § 300.303(a)(1); 71 Reg. 46,644 (August 14, 2006).

At the October 31, 2017 ER meeting, it was determined that Student was eligible for special education services under the categories of OHI and ED after review of the IEE conducted by Dr. ***, two other mental health reports and the District's previous November 2016 ER. The team was unable to determine if the Student was eligible under CD or TBI because of insufficient data. In addition, the ER report indicated that there was inadequate information about Student's present levels of performance which was needed for development of IEP goals. The District requested consent to complete additional assessments (a reevaluation) to determine additional eligibility categories and present levels of performance for development of the Student's IEP. On November 20, 2017, Parent signed consent for the additional assessments in the following areas: psychological, speech and language, sensory motor, adaptive behavior, auditory processing and academic assessments in the area of math computation and written expression. As of July 24, 2018, many of the assessments requested and consented to have not been completed.³

The only timeframe the IDEA specifically states with regard to evaluations is that a district must conduct an initial evaluation within 60 days of when it receives parental consent. 34 CFR § 300.301(c)(1)(i). The Office of Special Education and Rehabilitative Services, Department of Education's long-standing policy is that the evaluations and eligibility determinations must be completed in a reasonable time. 71 Fed Reg. 46637 (Aug 14, 2006). What is a reasonable amount of time for a reevaluation is determined on a case by case basis. *OSEP Letter to Saperstone*, 21 IDELR 1127 (OSEP 1994). Montana Office of Public Instruction guidance would suggest a reevaluation be conducted within a similar timeframe for the initial evaluation. *Special Education in Montana*, p 50, Question 24. Districts have a statutory obligation to ensure the student is assessed. *N.B. v. Hellgate Elementary School District*, 108 LRP 51033, 50 IDER 241 541 F3d 1202 (9th Cir. 2008).

District was not obligated to rely on outside reports to determine special education needs, but they had an obligation to timely evaluate Student and develop an IEP. It has been almost nine months since the Parent signed consent for the reevaluation. The District was requesting additional assessments in order to determine additional eligibility categories and develop present levels of performance for Student's IEP which has still not been developed. Given these

³ The District reported that all assessments were scheduled to be completed before the start of the 2018-2019 school year.



facts, the District did not complete the reevaluation of the student in a reasonable timeframe.

Issue 3: Did the District fail to hold an IEP meeting to develop an IEP for Student and fail to make special education or related services available to the Student pursuant to an IEP?

Children who are entitled to special education and related services are those students who meet the qualification for one or more of the disability categories and need special education and/or related services because of that disability. 34 CFR § 300.8(a)(1). After a child is determined eligible for special education services a meeting to develop an IEP, “a written statement for each child with a disability that is developed, reviewed and revised in accordance with §§ 300.320 through 300.324” (34 CFR § 300.22) must occur within 30 days. 34 CFR § 300.323(c). As soon as possible, thereafter, the special education and related services outlined in that IEP must be made available to the student. 34 CFR § 300.323(c).

“Experience has demonstrated that the 30-day timeline for conducting a meeting to develop an IEP is a reasonable time to provide both public agencies and parents the opportunity to ensure participants can be present at the IEP Team meeting.” 71 Fed. Reg. 46,680 (August 14, 2006). When a District fails to follow the procedures set forth in the IDEA to develop an IEP, the purpose of the IDEA is not served and it may result in a denial of FAPE. *W.G. v. Target Range*, 18 LRP 1648, 18 IDELR 1019, 960 F.2d 1479 (9th Cir. 1992).

Student was determined eligible for special education and related services on October 31, 2017, therefore, the Student’s IEP team should have met to develop an IEP for Student by December 1, 2017. The IEP team met on December 5, 2017. The District created a document (not an IEP form) which the meeting participants signed and which had notes from the meeting. The very minimal notes indicate that the team agreed an IEP could not be developed without information about current levels. Therefore, no IEP was developed at the December 5, 2017 IEP meeting or has been developed to date. The District’s explanation for the delay was that Student was hospitalized in November of 2017, so academic assessments which were needed to develop IEP goals could not be completed by the December 5, 2017 IEP meeting and the Academy did not have a representative participate at the December 5, 2017 IEP meeting as planned or provide requested information regarding Student’s current levels or achievement and performance.

Although it would have been helpful for the Academy to participate in the IEP meeting and provide information, this does not explain the unreasonable delay in meeting to develop an IEP. The academic assessments were completed by the end of December, but no subsequent IEP



meeting was scheduled. The video recording of the December 5, 2017 IEP meeting indicated that Parents and District verbally agreed to hold off on development of the IEP and that the District would provide tutoring services until additional assessments were completed. This agreement was not documented nor were the parameters or timelines clearly specified. This purported agreement does not meet the requirements of IDEA for development of an IEP.

Although Student was determined eligible for special education services on October 31, 2017, Student's IEP team still has not met in order to develop an IEP and Student has not received any special education services pursuant to an IEP. Once Student was eligible for services, it is the obligation of the District within 30 days to schedule an IEP meeting for the IEP team to meet to determine the special education and related services that the Student needs. The unreasonable delay in development of the IEP because questions arose about whether Student was eligible under the additional categories of TBI or CD was not consistent with the requirements of 34 CFR 300.323. Student was found eligible for special education services and the IEP team should have met and developed an IEP for Student based on what they knew Student's needs were at that time. IEPs can always be amended if necessary. Additionally, while the District has the option to obtain its own evaluation rather than rely on the IEE, District cannot use that to delay development and implementation of the IEP. District had the academic assessments completed by the end of December 2017, that assessment information was used by the staff to determine tutoring services, yet it was not used by the IEP team as present levels to develop IEP goals. The District has waited to develop an IEP for more than nine months because they claimed they needed additional assessments that have still not been completed.

Moreover, although Parents may have been pleased with Student's progress that did not change the District's affirmative responsibilities to comply with the IDEA timelines. **The District did not hold an IEP team meeting to develop an IEP for Student in violation of 34 CFR § 300.323(c)(1). The District has never developed an IEP for Student and has not made any special education or related services available to the Student in accordance with an IEP in violation 34 CFR § 300.323(c)(2).**

Issue 4: Did the District fail to provide FAPE to the Student?

The primary goal of IDEA is 'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services' *J.L. v. Mercer Island Sch. Dist.*, 110 LRP 3468, 53 IDELR 280, 592 F.3d 938 (9th Cir. 2010) (quoting 20 U.S.C. § 1400(d)(1)(A)). A FAPE includes special education and related services that



is reasonably calculated to allow the child to receive some educational benefit. 34 CFR §§ 300.320 to 300.324. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 553 LRP 7494, 553 IDELR 656, 102 S. Ct. 3034, 458 US 176 (1982). A district must offer an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances“. *Andrew F. v. Douglas County School District RE-1*, 117 LRP 9767, 69 IDELR 174, 137 S. Ct. 88 (2017). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA," *M.L. v. Fed. Way Sch. Dist.*, 103 LRP 13466, 394 F.3d 634 (9th Cir. 2005) (*citing Rowley*, 458 U.S. at 206-07). While some procedural violations can be harmless, procedural violations that substantially interfere with parental participation in the IEP, prevent educational opportunity, or deprive educational benefits are a denial of FAPE. *M.C. v. Antelope Valley Union High School District*, 117 LRP 11142, 69 IDELR 203, 862 F. 3d 840 (9th Cir. 2017). Districts are obligated to provide a FAPE to students within their District who are eligible for special education services. 34 CFR § 300.17. The components of the IEP must be developed by the IEP team at a meeting. 34 CFR § 300.320(a).

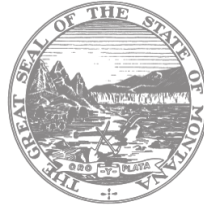
See Issues 2 and 3 which are incorporated herein by reference. This Student was a special education student who was entitled to special education and related services. Student has not been offered any special education services. No IEP, a basic requirement for FAPE, was ever developed for this Student.

District relies on Student’s successful completion of coursework allowing early graduation as evidence of educational progress. Although Student was making progress in credit recovery to allow early graduation, Student was not provided with special education services that were reasonably calculated to provide educational benefit. Student was determined eligible for special education services on October 31, 2017, yet Student still does not have an IEP nor has Student been offered any special education services.

On this record, there were a number of procedural errors that rise to the level of denial of FAPE. Student was denied an educational opportunity and deprived of educational benefits. **In particular, Student was denied FAPE because District failed to timely and comprehensively evaluate Student and develop an IEP and make special education or related services available to the Student in accordance with an IEP.**

Disposition

The District is ORDERED to take the following actions:



1. The District shall arrange to complete all assessments for which Parents signed consent on November 20, 2017 on or before the IEP meeting which must be held before August 23, 2018.
2. The District shall schedule an IEP meeting to develop an IEP before the first day of school on August 23, 2018. This IEP shall include appropriate transition services since Student is 16 years of age. The IEP shall be fully implemented upon receipt of the parents' consent.
3. The District shall promptly arrange for special education staff training by the OPI in **identifying and performing timely comprehensive assessments, timely development and implementation of an IEP, child find and FAPE requirements.** The training shall be completed by December 10, 2018 with verification sent to the Dispute Resolution Office.
4. The District shall offer special education and related services adequate to compensate for the failure to provide Student a FAPE from December 1, 2017 through August 10, 2018. Compensatory services shall include compensatory education for Student in keeping with this Final Report and any recommendations from the IEP team. After consultation with Student's IEP team, the District shall submit a plan for compensatory services to the OPI Dispute Resolution office by September 10, 2018. Compensatory services, which may include transition services, may be continued after Student graduates, if that were to happen. All compensatory services must be offered to Student to be completed within one year of this report.

Frank Podobnik, Division Administrator
Special Education Division

c: Mandi Gibbs, Dispute Resolution/EAP Director
Dale Kimmet, School Improvement/Compliance Unit Manger