



June 6, 2019

Parents

Superintendent

RE: **FINAL REPORT for In the Matter of *****, 2019-1, 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. *** filed the Complaint on behalf of their child, *** (Student), a student who was in the fifth grade at *** School in the *** School 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. denied Student FAPE by failing to provide accommodations and modifications for Student, specifically failing to provide a sign language interpreter; and
2. failed to develop and implement an appropriate IEP when they failed to consider Student's communication and behavioral needs and provide appropriate supplemental aids and services to meet Student's needs, therefore denying Student a FAPE.

A. Procedural History

1. On April 9, 2019, the Montana Office of Public Instruction (OPI) received the signed Complaint from the Complainants regarding their child who was a fifth-grade student at *** School.
2. Since that time, OPI's Early Assistance Program (EAP) has attempted to resolve the issues in the Complaint.
3. On April 30, 2019, 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.

4. The District's written Response was received on May 10, 2019.
5. The Complainants' reply to the District's Response was received on May 28, 2019.
6. An investigator was appointed to investigate the complaint. Prior to the completion, the investigator withdrew and another investigator was appointed.
7. On May 8, 2019, another investigator was appointed to complete the investigation. The investigator conducted interviews with the Parents, special education teacher, principal and superintendent.

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 of the complaint. 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. Parents raised an issue in the Complaint concerning the failure of the District to follow the recommendations made by OPI staff in a 2015 email. That issue is outside the one-year timeframe and will not be addressed in this Final Report. Any references to facts outside of the one-year timeframe, April 9, 2018 to April 9, 2019 are included strictly for background information.

C. Findings of Fact

1. Complainants have standing to file this Complaint pursuant to ARM 10.16.3661.
2. Student is twelve years old and in fifth grade and has received special education services since the age of three from the District under the categories of multiple disabilities, cognitive delay and hearing impairment. Student has a significant hearing impairment. Student has hearing aids, but rarely wears them at school because Student will remove and damage them.
3. Student receives services in communication, math, reading, self-help/independence, social/emotional/behavioral, written expression and speech language services.
4. During the one year timeframe of this state complaint, there were two IEPs in effect, one dated October 10, 2017 and one dated September 27, 2018.
5. October 2, 2017 IEP
 - a. Student's Perspective states, "[Student's] main mode of communication is a combination of speaking paired with sign language."
 - b. School staff student strengths include, "[h]is communication skills and use of sign language continues to progress. He has recently begun teaching sign language to his classmates as part of the morning routine."

- c. Consideration of special factors, IEP team determined Student's behavior impedes his learning or that of others, Student has communication needs and requires assistive technology (AT) devices or services.
 - d. Present Levels of Academic Achievement and Functional Performance (PLAAFP) for communication: "[Student's] use of language and ability to communicate with others has improved. In language class, he is working on signing/speaking in complete sentences on tasks such as describing illustrations and photographs or illustrated flashcards using the correct sign in sign language with 90 % accuracy." The corresponding communication goal refers to using spoken words and/or sign language.
 - e. Speech and Language PLAAFP, "[h]e is requesting wanted items by using a complete sentence with sign and verbalizations that include 2 adjectives ('I want the adj. adj. ball.')
 Independently with 90 % accuracy. [Student] continues to work with the iPad app. Camp Discovery." Speech and language goals refer to answer WH questions with sign, alternative augmented communication (AAC) or verbalization.
 - f. AT PLAAFP: "During the past school year and at this present time, [Student], is using a variety of alternative communication devices. The one AAC device that has been working with the highest rate of success is visual schedules and a form of PECS¹ with sign." "PECS, sign and visual schedules are being used due to the quickness that the communication can be delivered from both [Student] and the teaching staff. However the goal is to have [Student] communicate his wants, needs and thoughts in all environments where he can functionally and easily communicate with peers and adults. Any AAC that is presented to [Student] will be a trial and error until 1 or 2 AAC devices are found that work best for [Student]. It has been determined that AAC apps like Proloquo are not fast enough for [Student] to communicate and he becomes more frustrated with them resulting in increased negative behaviors." The only AT goal refers to using a visual schedule.
 - g. Supplemental Aids and Service included, "Use of a visual schedule throughout the day, [b]ehavior support plan implemented and reviewed regularly, [a]dditional support staff to accompany [Student] throughout the day to include recess time, [c]hange of activity as needed, [a]uditory trainer."
6. September 27, 2018 IEP
- a. School Staff student strengths included: "[e]very morning, he teaches the class sign language. The class is learning to sign the Pledge of Allegiance, give greetings, and words related to feelings. Learning and teaching sign language is a great way to help [Student] feel better connected to his peers. He's able to write words that are signed to him."

¹ PECS, the Picture Exchange Communication System, developed by Andy Bondy, PhD & Lori Frost, MS, CCC-SLP is a form of ACC that uses pictures to teach functional communication.

- b. Parent's education concerns, "Helping [Student] expand his ability to communicate is their main priority."
 - c. Consideration of special factors, the IEP team determined Student's behavior impedes his learning or that of others, Student has communication needs and requires AT devices or services.
 - d. Supplemental Aids and Services included, "(a)dult supervision and assistance across all settings, interpret and assist in communication, and to assist with life skills (following a schedule of daily routines and getting to/from different locations throughout the school)." "Behavior support plan implemented and reviewed regularly." "Auditory trainer."
 - e. Communication PLAAFP, "He uses a combination of spoken words/utterances, gestures, and sign language to communicate and interact with others." "In language class he is working on expanding his repertoire of words and signs." Communication goals are answering questions but mode of communication is not stated.
 - f. Speech and Language PLAAFP, "...[Student] is using sign, gestures, word approximations and amplifier to help him understand and communicate. Speech and language goals refer to using sign, AAC app or verbalization.
 - g. There is no AT PLAAFP or goal. The supplemental aids and services indicate "AT as needed."
 - h. Self-Help Independence PLAAFP, "[h]e carries a visual schedule throughout his day which he refers to in order to determine what is going to happen next and where he is supposed to go." Self-Help Independence goals regarding using visual schedule and checklist.
 - i. Reading goals refer to "reading or signing" sight words.
7. September 27, 2018 Prior written Notice indicated it has been 5 years since Student has had a reevaluation. Concerns regarding AAC apps on iPad were discussed, decided to continue exploring options for better AAC apps and will reach out to MonTech for ideas and resources.
 8. While it appears that Student communicates through various methodologies at school including sign, verbalizations, gestures, PECS a visual schedule, and AAC devices a review of documentation provided and interviews suggest that Student's most effective and primary mode of communication has not yet been definitively determined.
 9. Monthly, during the 2018-2019 school year, the District has received outreach services from the Montana School for the Deaf and Blind (MSDB). This included sign language training for the staff.
 10. Although some staff that work with Student know some sign language and can assist Student with signing, no one is a certified sign language interpreter. In addition, no one is certified to teach sign language to Student.
 11. The District contracts with a cooperative that has been unsuccessfully seeking a sign language interpreter. The District was going to hire an interpreter starting back in July of 2015 but has still not hired one.

12. The District was going to set up an appointment with MonTech back in July of 2015 but did not do so.
13. Student has significant behavior needs that impact on learning. Student will elope to various locations, including the bathroom. Student growls, yells, spits, kicks, throws or spills objects, pinches, pulls hair, clothing, jewelry and glasses, kicks or hits staff; urinates and defecates on the walls and floor of the bathroom. Often the student places a foot or other object in the toilet and repeatedly flushes, flooding the bathroom. District staff are concerned for other students and staffs' safety at times because of Student's behavior. Managing behavior has been a primary focus for the District for a number of years.
14. Parents report that Student has never exhibited these behaviors at home or some have recently started, in part, because of what is happening at school.
15. Student's challenging behaviors have been on the increase the last two years. Student's negative behaviors occur most frequently when working with certain staff, transitions, unstructured time and work demands.
16. An OPI behavioral consultant was requested by the District and observed Student at school on September 27, 2017. A functional behavior assessment (FBA) was completed on January 26, 2018. Student's current behavior plan was last revised on September 1, 2018.
17. Student primarily receives services in a special education classroom with a 1-1 aide. Student works well with one particular aide and can have difficulties with the special education teacher.
18. Student also has other health issues requiring daily medication at school.
19. District observed that Student often has behavior issues between 10-11 a.m. most days. This is the time Student was working with the special education teacher on language and written expression.
20. The special education teacher noted a correlation between negative behaviors and when medication is wearing off before new medication is administered.
21. District believes that some of Student's behaviors are related to medication dosage and wearing off of the medication before the new dose is administered. Parents disagree and believe Student's behaviors are the personality conflicts between Student and the special education teacher and frustration when Student cannot communicate effectively.
22. There was no definitive data provided that documented the parameters of Student's negative behaviors including time of day, activities, medication, or other factors.
23. Student has a behavior plan and goals on the IEP to manage Student's behavior. Part of the plan provides that Student may request a break when needed and timeout in a specific location when behavior escalates. Under the behavior plan, when Student elopes to another location, Student will be removed if it can be accomplished in a safe manner.
24. There is also a component of the behavior plan that limits Student's time in the bathroom because of behavior issues.
25. Student exhibits inappropriate or off task behavior daily but rarely does it result in out of control behavior that cannot be managed or modified by school staff.

26. On December 6, 2018, there was a significant behavior incident at the school that lasted more than one hour. Student had a bad morning on November 30, 2018 which was shared with Mother but behavior incidents on the other days during that time frame were typical, not considered significant to warrant parental involvement or notification.
27. That day, Student was spitting at the special education teacher, threw items off the table, pulled on teacher's hair, clothing and lanyard, and remained in the bathroom for an extended period of time. While in the bathroom, the Student undressed, urinated on the floor and flooded the bathroom. The special education teacher entered the bathroom to deescalate the situation, but Student tried to hit, and pull at her and her clothing. She remained in the doorway to ensure Student's safety but also to protect herself from harm. The special education teacher did not believe Student could be safely removed from the bathroom while behavior was escalating.
28. The bathroom has been a problem area for Student and the behavior plan included a plan to limit Student's bathroom time. After a while, Student calmed down, got dressed and cleaned up but then escalated again when Student urinated on the walls, defecated on the floor and pulled on teacher's hair and clothing. The principal was called to assist and eventually Student calmed down, returned to the classroom and completed some work. Parents were notified after this incident.
29. Parents contacted the school about the incident; as a result, the special education teacher was no longer working directly with Student; a new para-educator was to be hired and trained by the existing para-educator before she left at the end of the school year.
30. Student has continued to exhibit inappropriate behaviors this year after the special education teacher was no longer directly working with Student.
31. An IEP meeting was held on April 11, 2019 to address parents' concerns. At that meeting, it was determined that a new FBA and updated behavior plan would be completed to determine how to manage Student's behaviors since the behaviors are increasing and continue to impede on learning. Also, AT and communication assessments would be completed to determine Student's communication and other needs.
32. The AT assessment is scheduled for May 30, 2019 and the behavior analyst began the FBA in May and will continue the assessment in September at the start of the 2019-2020 school year. The communication assessment had not yet been scheduled at the time of the investigation.

D. Analysis and Conclusions

Issue 1: Did the District deny Student FAPE by failing to provide accommodations and modifications for Student, specifically failing to provide a sign language interpreter?

Students who are eligible for special education services are entitled to a FAPE. 34 CFR § 300.101. Districts are obligated to provide a FAPE to students within their District who are eligible for special education services. 34 CFR § 300.17. The type of services to be provided are determined by the IEP team. 34 CFR § 300.320. The IEP must be implemented as written, including all required components. 34 CFR § 300.323(c). Minor variations in the IEP does not

automatically mean that the student was denied FAPE. See *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014). Failure to implement material parts of the IEP, however, may be considered a denial of FAPE. See *Sumter County School District 17 v. Heffernan*, 56 IDELR 186, 642 F3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 47 IDELR 182, 481 F3d 770 (9th Cir. 2007), reprinted as amended, 107 LRP 51958 (9th Cir. 2007); *Houston Independent School District. v. Bobby R.*, 31 IDELR 185, 200 F3d 341 (5th Cir. 2000), *cert. denied*, 111 LRP 30885, 531 U.S. 817 (2000); *Neosho R-V School District v. Clark*, 38 IDELR 61, 487 F App 968 (8th Cir. 2003) and *Turner v. District of Columbia*, 61 IDELR 126 (D.D.C. 2013). A review of the circumstances involved in the implementation of the IEP must be completed to determine whether FAPE was denied. *A.P. v. Woodstock Board of Education*, 370 F App 202, 55 IDELR 61 (2d Cir. 2010, unpublished).

Student has a significant hearing impairment and although Student has previously worn bilateral hearing aids, Student no longer wears them regularly because Student removes and damages them. Student, as noted on the IEPs, has communication needs and requires AT devices or services. Student uses multiple communication systems including sign language, verbalizations, gestures, PECS, AAC app and a visual schedule. None of the communication systems are exclusive and there is a dispute about Student's primary mode of communication. The IEP states under supplemental aids and services that Student needs "(a)dult supervision and assistance across all school settings to implement behavior support plan, interpret and assist in communication, and to assist with life skills." Student has had a 1-1 aide throughout the 2018- 2019 school year. Student has not had an interpreter to assist with communication. The District noted it has tried but has not been able to hire an interpreter, however, staff are trained in sign language by MSDB monthly. It is ultimately the decision of the IEP team about whether or not a sign language interpreter was needed by this Student to receive FAPE. It is not clear how "interpret and assist in communication" was provided. Parents and District disagree about Student's communication needs and how they will be addressed.

The Parents participated in the IEP team meeting where the IEP was developed. They understood that a sign language interpreter would be provided for Student since signing is the Student's primary mode of communication. The District countered with Student does not primarily rely on sign to communicate and the staff receive monthly training from MSDB outreach to learn sign and Student is improving in use and understanding of sign. Without knowing more about Student's communication needs and primary mode of communication, it is impossible to determine what special education services are necessary for Student to receive FAPE. That is, whether Student was denied FAPE for failure to provide an interpreter is a decision of the IEP team after review of the information about Student's communication and needs. That information was not available at the April 11, 2019 IEP meeting, but the IEP team made a plan to obtain the necessary information with additional assessments to be conducted this summer and fall. **The IEP team must determine Student's preferred means of communication and include the appropriate communication services, including AT as necessary, on Student's IEP to receive FAPE since communication is one of Student's main areas of need. If the IEP team determines Student requires the use of an interpreter the District will be responsible to provide that needed service.**

Issue 2: Did the District fail to develop and implement an appropriate IEP when they failed to consider Student's communication and behavioral needs and provide appropriate supplemental aids and services to meet Student's needs, therefore denying Student a FAPE?

Once a child is determined eligible for special education services, it is the obligation of the district to convene an IEP team to develop and implement an IEP designed to meet the child's individual needs. 34 CFR § 300.320 through § 300.324. As part of developing the IEP the IEP team must consider several special factors including: whether a student's behavior impedes the student's learning or that of others; communication needs of the student and in the case of a student that is deaf or hard of hearing, consider the student's language and communication needs and opportunities for communications in the student's language and communication mode; and whether or not the student needs AT devices and services. 34 CFR § 300.324(a)(2). An IEP is a written document that outlines the placement and services for a particular child to meet that child's individual needs. *Schaffer v. Weast*, 105 LRP 55797, 44 IDELR 150, 126 S. Ct. 528, 546 US 49 (US 2005). To provide FAPE, the educational program for a student must be one that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District. RE-1*, 69 IDELR 174 (U.S. 2017). The primary function of an IEP is to develop a plan to achieve academic and functional advancement. *Endrew F.* A student's unique needs are more than just mastery of academic subjects but may include social, health, emotional, physical, and vocational needs of eligible students. *County of San Diego v. California Special Education Hearing Office*, 93 F3d 1458; 24 IDELR 756 (9th Cir. 1996). The IEP must be implemented, as written, including all required components. 34 CFR § 300.323(c).

Student's behaviors can be challenging and have been increasing over the past two years. The IEP team determined Student's behaviors were negatively impacting Student's learning. Student has a behavior plan that was last revised on September 1, 2018. Staff were concerned about other students and their own safety because of Student's behaviors, yet over the course of the 2018-2019 school year staff did not review and revise the behavior plan as mandated by the IEP, schedule an IEP meeting or request additional assistance regarding how to manage Student's negative behaviors. Student was on a behavior plan that was not effective. Student, by the District's own reports, exhibited daily inappropriate and off task behaviors. When Student was on task, work was being completed and learning occurred, however, the behaviors were the primary obstacle for Student's learning and an increase in the negative behaviors had been noted the past two years. One of the dilemmas with developing appropriate behavior plans is determining what is the trigger or precursor to the behavior. Parents believe the special education teacher and the lack of an effective communication system (sign language) were the reasons for Student's negative behaviors. In contrast, the District believed the wearing off of medication was one antecedent for the negative behavior and disagreed with the Parents' communication concerns. Other triggers were work demands, transitions and unstructured time.

There was also a disagreement as to Student's primary mode of communication and AT needs. Student's October 2, 2017 IEP indicates that from Student's perspective his main mode of communication was a combination of speaking paired with sign language. However, neither the October 2, 2017 nor September 27, 2018 IEP clearly state what Student's communication needs are or what Student's primary mode of communication will be or was. Regarding AT, the IEP team determined it was necessary and the District was going to contact MonTech as far back as July of 2015. The October 2, 2017 IEP did have a goal to use a visual schedule. The September 27, 2018 IEP however, only stated in the supplemental aids and services "AT as needed," without indicating what AT would be used. Additionally, the Prior Written Notice accompanying the IEP indicated concerns regarding AAC apps on iPad and it was decided to continue exploring options including reaching out to MonTech for ideas and resources. Throughout both IEPs there was mention of using different AT, but it was clear that besides use of the visual schedule the team did not know what was effective with Student. The investigation revealed inconsistency, some teachers were using an auditory trainer or amplification system, others used PECS or an electronic AAC app on an iPad. If Student's communication and behavioral needs cannot be clearly delineated, an appropriate IEP and behavior plan cannot be developed and implemented.

The Student has continued to exhibit severe behaviors which are increasing, which negatively impact on Student's ability to learn, yet the District did not seek an updated FBA or modify the behavior plan until after the Complaint was filed.² Moreover, it cannot be determined what is Student's primary mode of communication and how Student's communication deficits impact on Student's behavior and learning. The September 27, 2018 IEP states that one of the supplemental aids and services will be "interpret and assist with communication." The Parents understood that to mean a speech language interpreter who would assist Student in learning sign language. The District understood that to mean the teacher and para-educators would assist Student with sign and other AT and alternative means of communication such as PECS and visual schedule. The investigation and review of Student's IEPs revealed inconsistency as to what primary mode of communication Student is using and what AT is necessary. Student's educational program was not reasonably calculated to enable the Student to make progress in light of Student's circumstances. **The District failed to develop and implement an appropriate IEP with regards to Student's significant behavior and communication needs, in violation of 34 CFR §§ 300.320 and 300.324, and depriving Student of a FAPE from April 9, 2018 through April 9, 2019 in violation of 34 CFR § 300.17 and § 300.101.**

E. Disposition

The District is ordered to complete the following actions.

² After the Complaint was filed, at the April 11, 2019 IEP meeting, the IEP team did make a plan on how to obtain additional information through AT, communication and updated behavior assessments in order to determine students communication and behavior needs.

1. The District shall arrange to complete AT and communication assessments on or before the first day of the 2019-2020 school year. The District shall provide a copy of the reports for the completed assessments to the OPI Dispute Resolution/EAP office. It is noted that the AT assessment is scheduled for May 30, 2019.
2. The District shall schedule an IEP meeting to develop an IEP before the first day of the 2019-2020 school year. This IEP shall include an appropriate behavior plan, documentation of student's primary mode of communication and supplemental aids and services required for Student to receive FAPE. The District shall provide a copy of the IEP to the OPI Dispute Resolution/EAP office.
3. The District shall continue to complete the FBA which the Parents consented to and the behavior analyst has begun to conduct. The behavior analyst will continue the FBA in September when school starts. The District shall provide a copy of the completed FBA and behavior plan to the OPI Dispute Resolution/EAP office by October 1, 2019.
4. The District shall schedule an IEP meeting to discuss the results of the FBA and make any necessary changes to the IEP by October 15, 2019. The District shall provide a copy of the Notice of the IEP meeting and any amendments that are made to the IEP to the OPI Dispute Resolution/EAP office by October 20, 2019.
5. The District shall develop a plan for implementation and review of the behavior plan to ensure that Student receives the necessary services to receive FAPE. The implementation plan shall include at least bimonthly reviews of the effectiveness of the behavior plan and discussion of any necessary modification through the 2019-2020 school year. A copy of the implementation plan and documentation of bimonthly reviews shall be provided to the OPI Dispute Resolution/EAP office through the end of the 2019-2020 school year.
6. The District shall promptly arrange for special education staff training by providers approved by OPI on managing challenging behaviors in children and meeting the needs of students with hearing impairments. The training shall be completed by December 1, 2019 with verification sent to the OPI Dispute Resolution/EAP office.
7. The District shall offer special education and related services adequate to compensate for the failure to provide Student a FAPE from April 9, 2018 through April 9, 2019. Compensatory services shall be determined after the required assessments are completed. The IEP team shall consider the Student's communication and behavior needs as well any necessary parent training. After consultation with Student's IEP team, the District shall submit a plan for compensatory services to the OPI Dispute Resolution/EAP office, for approval, by October 20, 2019. 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
***, School District Attorney