



November 7, 2019

Parents

Superintendent

**RE: FINAL REPORT** for In the Matter of \*\*\*, 2019-02, Alleged Violation 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). The Student currently resides within the \*\*\* District (District) boundaries but is attending a private school located within the boundaries of neighboring school district. Parent 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.

The following issues have been identified based on the Parent's complaint:

**Issue 1:** Did the District fail to meet its child-find obligations, in violation of 34 CFR § 300.111(a)(i)?

**Issue 2:** Did the District fail to conduct an appropriate initial evaluation, in violation of 34 CFR § 300.301 and § 300.304?

**Issue 3:** Did the District fail to include all required members of an evaluation team when the Independent Educational Evaluation (IEE) was reviewed in violation of 34 CFR § 300.321?

**Issue 4:** Did the District fail to consider the IEE in any decision made with respect to the provision of FAPE to the Student, in violation of 34 CFR § 300.502(c)(1)?

**Issue 5:** Did the District fail to provide the Student with a Free Appropriate Public Education (FAPE), in violation of 34 CFR § 300.17?

An additional issue was identified during the investigation process. Under OPI's general supervisory authority, this issue has been added and is discussed below.

**Issue 6:** Did the District fail to provide the Parent with an IEE at public expense or request a due process hearing when the Parent disagreed with the evaluation conducted by the District and requested an IEE, in violation of 34 CFR § 300.502(b)(1) through 34 CFR § 300.502(b)(2)?

**A. Procedural History**

1. On September 10, 2019, the Montana Office of Public Instruction (OPI) received the signed Complaint on behalf of the Parent and a copy of the Complaint was also provided to the District. The Complaint was deemed filed on September 10, 2019.
2. On September 17, 2019, OPI's Early Assistance Program Director, determined that any attempt to mutually resolve the Complaint would be futile and the OPI sent a Request for Written Response to the District. The Complaint proceeded to investigation.
3. OPI received the District's written Response on September 30, 2019.
4. OPI received the Parent's response to the District's Response on October 15, 2019.
5. An investigator was appointed to investigate the Complaint. The investigator conducted telephone interviews with the Student's Parent, school district attorney, special education director and school psychologist and reviewed all documentation received from the parties.

**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. Any references to facts outside of the one-year timeframe from September 10, 2018 to September 10, 2019 or which relate to any matters pertaining to Section 504 of the 1973 Rehabilitation Act (Section 504) or the Americans with Disabilities Act (ADA) are included strictly for background information.

**C. Findings of Fact**

The following facts have been determined, based on the documentation received and the interviews conducted.

1. Parent has standing to file this Complaint pursuant to ARM 10.16.3661.
2. Student began attending a private school at the beginning of the 2019-20 school year and was not enrolled in the District at the time the Complaint was filed.

3. Student is seven years old and is in the second grade. Student was diagnosed with Selective Mutism, Social Anxiety Disorder and Unspecified Disruptive Behavior Disorder. [Parent Response].
4. Student was enrolled in the District by the Parent on July 23, 2018, at which time staff handwrote on the enrollment application “she will need an aide per mom.” [SD Exhibit C, p. 12/380].
5. Student transferred from an out-of-state elementary school where a Section 504 plan dated March 5, 2018 was developed for the Student. The Section 504 plan provided for various accommodations and supports, including a shared paraprofessional. [SD Exhibit C, p. 129/380].
6. While attending the out-of-state elementary school, the Student was evaluated for special education services. An Eligibility Determination dated February 27, 2018 found that the Student did not qualify for special education services. [SD Exhibit C, p. 75-81/380].
7. A One on One Needs Checklist was completed by the District on September 19, 2018 for the purposes of the Student’s Section 504 plan. The checklist indicated the team did not recommend the need for a One on One aid to support the Student. [SD Exhibit C, page 45/380].
8. The Parent emailed District staff on September 24, 2018 regarding the school psychologist and speech language pathologist observing the Student for Section 504 purposes, with the condition that they were current on their training in diagnosing, managing, and supporting a child with selective mutism. [Parent Exhibit 1, p. 1].
9. The Parent believed a request for an IEP was made in person during a meeting with the superintendent on December 18, 2018.
10. On January 10, 2019 the Parent submitted a written complaint to the superintendent and the board of trustees and specifically requested that the Student be provided an IEP, which should be developed under the guidance of qualified selective mutism experts.
11. Upon receipt of the written request for an IEP from the Parent, the superintendent forwarded the request to District staff.
12. On January 13, 2019 District staff emailed the Parent confirming the District’s receipt of the request for an IEP and explained that a comprehensive evaluation must occur in order to determine eligibility. Additionally, the Parent was informed that staff was looking into the Parent’s request for a selective mutism expert to be part of the evaluation process. [Complaint, Attachment p. 1]
13. On January 21, 2019, the Parent emailed District staff and stated they were happy to have a comprehensive evaluation conducted on the Student so long as staff was familiar with, and had training in, selective mutism. The Parent further stated that “[w]e simply will not have anyone assessing [Student] who is not familiar or does not have a well-educated opinion on selective mutism and its related anxiety.” The

- Parent further indicated that it was “a good idea to wait until the [District] Psychologist can work with [Student’s private psychologist] and others now lined up to assist [Student] in overcoming [Student’s] selective mutism.” [Parent Exhibit 2].
14. District staff responded to the Parent on January 22, 2019 and stated that staff liked the Parent’s idea of holding off on starting a special education evaluation until the Parent received results from the Student’s private psychologist and the private institute. [Complaint, Attachment p. 3]
  15. The Student was excused from school at Parent request for traveling on January 24-25, 2019.
  16. From February 11, 2019 to February 20, 2019 the Student was medically excused from school for therapy treatment.
  17. An evaluation planning meeting was held on February 28, 2019, and A Referral for Comprehensive Educational Evaluation was signed by the Parent. The referral for evaluation was made by the Parent, and the specific reasons identified for the referral included anxiety and concerns that behaviors interfered with interactions with peers. Social emotional concerns were listed as possibly increasing the Student’s anxiety. The Student was identified as having emotional explosions before and after school. The Student was not transitioning onto the school bus in the morning and at school. The areas of concern for evaluation included academic, social/emotional, behavioral, communication and psychological. [SD Exhibit C, p. 123/380].
  18. An Evaluation Plan for the Student was developed and signed by the Parent on February 28, 2019. The Evaluation Plan identified the tests and other evaluation procedures to be used to assess the Student, including academic achievement, behavioral, classroom-based assessment, communication, observations, psychological, social/emotional and sensory profile. [SD Exhibit C, p. 138/380].
  19. The District evaluated the Student and completed an Evaluation Report dated April 18, 2019. [SD Exhibit C, p. 59/380].
  20. An evaluation report meeting was held on April 18, 2019 and the Evaluation Report was discussed by the team. [SD Exhibit C, p. 59/380].
  21. The Evaluation Report consisted of various assessments and observations by staff.
    - a. Classroom based assessments utilizing the Teacher Input Form were completed by the classroom teacher, PE teacher, art/music teacher, computer teacher and library teacher. [SD Exhibit C, p. 33-44/380].
    - b. The school psychologist performed a classroom observation and administered a cognitive assessment, during which time behavioral observations were made. A Comprehensive School Community Treatment Counselor (CSCT) was present during the assessment. The school psychologist administered the Comprehensive Test of Nonverbal Intelligence (CTONI-2) and the Wechsler Intelligence Scales for Children (WISC-V). The Behavior Assessment System

- for Children (BASC-3) was completed by the Parent, classroom teacher and library teacher and scored by the school psychologist.
- c. The school psychologist completed and signed a Psycho-Educational Report on March 22, 2019. The Report included the reason for referral, background information, behavioral observations, an overview of the tests administered and assessment procedures, and a summary. [SD Exhibit C, p. 154-159/380].
  - d. The special education teacher completed an Academic Evaluation Report dated April 15, 2019. The Report set forth the results of the Kaufman Test of Education Achievement – Third Edition. The Student scored average or above average in all areas and was found to be performing on or above grade level in all academic areas. [SD Exhibit C, p. 151-153/380].
  - e. The Speech Language Pathologist (SLP) administered the Clinical Evaluations of Language Fundamentals (CELF-5), Test of Narrative Language (TNL), Test of Problem Solving (TOPS-3).
  - f. A record review was conducted by the special education staff as part of the evaluation.
22. Based on the testing conducted, the Evaluation Report concluded that the Student did not qualify for a speech language impairment, as the Student scored within the average range in the areas of expressive language, receptive language, narrative skills, and critical thinking skills. [SD Exhibit C, p. 66/380]
  23. Based on the testing conducted, the Evaluation Report concluded that the Student did not meet Other Health Impairment (OHI) disability criteria. “While she has been diagnosed with selective mutism, based on the assessments completed during the evaluation the condition does not adversely affect the student’s educational performance.” [SD Exhibit C, p. 69/380].
  24. Prior Written Notice dated April 19, 2019 was provided to the Parent that the Student was found not to require special education services based on the information from the assessments. [SD Exhibit C, p. 72/380].
  25. On April 24, 2019, the Parent sent an email to District staff stating the Parent rejected the eligibility determination at the Evaluation Report meeting held on April 18, 2019 and requested an IEE be conducted as soon as possible by professionals trained in diagnosing, treating and managing selective mutism. [SD Exhibit C, p. 140/380].
  26. On May 6, 2019, the District sent the Parent a letter along with the District’s criteria for an IEE and provided the Parent with two possible options of organizations that could complete an IEE. [SD Exhibit C, p. 26/380].
  27. On May 7, 2019 the Parent acknowledged receipt of the IEE information by email and rejected the suggested evaluators, as “[t]here are no Selective Mutism specialists in the entire state of Montana and therefore no one qualified to evaluate [Student’s] educational needs.” [Parent Exhibit 12, p. 1]. The Parent’s first choice for an

- evaluator was the private institute but the Parent would also agree to use the recent evaluations completed by the private institute in February and March 2019.
28. On May 14, 2019 the District agreed to use the recent evaluations completed by the private institute in February and March 2019 as the IEE. [Parent Response].
  29. On May 20, 2019 the Parent provided the information from the private institute to be used as the Student's IEE, which consisted of three reports dated February 19, March 12, and March 26, 2019. [Parent Exhibit 13].
  30. On May 29, 2019, the Parent emailed District staff asking for the status regarding the Student's IEE and IEP.
  31. On June 4, 2019 District staff met to review the IEE documentation provided by the Parent. District staff determined additional information from the private institute was necessary.
  32. On June 19, 2019 District staff emailed questions to the private institute for its response.
  33. On July 2, 2019 the private institute responded to the questions that were emailed to it by the District on June 19, 2019.
  34. On July 29, 2019, an evaluation team meeting was held with the Parent to discuss the IEE, which consisted of three reports provided by the Parent and the private institute's response to the questions from the District received on July 2, 2019.
  35. The evaluation team determined that the evaluations previously conducted by the District were appropriate for the Student and that the Student did not qualify for special education and related services.
  36. The Parent disagreed with the school team's finding regarding the Student's eligibility. The evaluation team acknowledged that the Parent and the school were at an impasse regarding the Student's eligibility for special education.
  37. A Prior Written Notice dated August 9, 2019 informed the Parent that the District reviewed the information from the private institute as the IEE and determined that the Student did not require special education and related services.

#### **D. Analysis and Conclusions**

**Issue 1:** Did the District fail to meet its child find obligations, in violation of 34 CFR § 300.111(a)(i)?

Child find is the affirmative, ongoing obligation of state and local school districts to identify, locate, and evaluate all children with disabilities residing within a district's jurisdictional boundaries that are in need of special education and related services. 34 CFR § 300.11(a)(1)(i).

As part of the child find process, a district proposing to conduct an initial evaluation to determine if a student qualifies as a child with a disability must obtain informed consent from the parent before conducting the evaluation. 34 CFR § 300.300(a)(1)(i).

In July of 2018, the Student was enrolled in the District with an existing Section 504 plan. The initial discussions at the beginning of the 2018-19 school year between the Parent and District staff pertained to the Student's Section 504 plan and the services set forth on the plan. An issue surfaced regarding whether the Student needed the 1:1 assistance set forth on the 504 plan. The school believed that the Student did not need as much assistance as was identified on the Section 504 plan, while the Student's Parent firmly believed the services were needed. The Student's 504 plan was amended in September of 2018 and 1:1 assistance was removed.

The Parent was unhappy with the changes made to the Student's 504 plan and believed that several requests for a special education evaluation were made to District personnel. The Parent believed they requested an evaluation and an IEP in September 2018, although District staff had no recollection of such a request, as the discussions at that time focused around the Student's 504 plan. The Parent indicated that a request for an IEP was made orally during a meeting with the superintendent on December 18, 2018. The Parent submitted a written request for an IEP in a complaint to the superintendent and board of trustees dated January 10, 2019.

Upon receiving the written request for an IEP, District staff sent an email to the Parent on January 13, 2019 which explained the need for a comprehensive evaluation.

On January 21, 2019, the Parent emailed District staff and stated that they were happy to have a comprehensive evaluation conducted on the Student so long as staff was familiar with and had training in selective mutism. The Parent also indicated that it might be a good idea to wait until the school psychologist could work with the Student's private psychologist and others knowledgeable about selective mutism.

From January 21, 2019 to February 28, 2019, when an evaluation planning meeting was held and parental consent was received for an evaluation, the Student travelled to visit the private psychologist and participated in intensive therapy at the private institute. The Student was absent 10 school days during this time. The District set up the evaluation team meeting date a week after the Student and Parent returned from their travels.

The Evaluation Report was completed on April 18, 2019 and was discussed at an evaluation team meeting on April 18, 2019. The Evaluation Report meeting was held 49 days after the date the Parent signed consent for the District to conduct the special education evaluation which is within the 60 day time frame allotted for an initial evaluation. 34 CFR § 300.301(c)(1)(i).

The District acted within a reasonable period of time to hold an evaluation planning meeting after it was clear to District staff, based on the Parent's written request for an IEP, that the Parent was requesting an IDEA evaluation. Further, there were email discussions between the Parent

and District staff regarding waiting on the evaluation until the Student returned from the visit with the private psychologist and participated in therapy at the private institute. The District did not fail to meet its child find obligations. **There were no violations of Part B of the IDEA.**

**Issue 2:** Did the District fail to conduct an appropriate initial evaluation in violation of 34 CFR § 300.301 and § 300.304?

Each district "must conduct a full and individual initial evaluation before providing special education and related services to a child with a disability." 34 CFR § 300.301(a). The evaluation must include all existing evaluation data, classroom observations, and information provided by the parent. 34 CFR § 300.305.

A student's evaluation under the IDEA must meet specific requirements. The requirements at issue are set forth below, along with the Parent's concerns and the specific findings.

**Requirement:** Districts must ensure that the assessments and other evaluation materials are implemented in the way in which they were intended and administered by trained and knowledgeable personnel. 34 CFR § 300.304(c)(1)(iii) through 34 CFR § 300.304(c)(1)(v).

**Parent Concern:** The Parent believes that the presence of the Comprehensive School Community Treatment Counselor during the Comprehensive Test of Nonverbal Intelligence (CTONI-2) assessment invalidated the test results and that the testing results would have been different had the counselor, front loading, rewards or sliding not been used in the testing process. [Parent Response, p. 3].

**Finding:** No information indicated that the administration of the CTONI-2 assessment did not follow the test instructions or that having another adult present invalidated the testing results. The testing was performed to determine the Student's intellectual abilities. When compared to other testing that occurred regarding both the Student's intellectual and academic abilities, the CTONI-2 test results appropriately reflected the Student's abilities as being in the average and high-average range.

**Requirement:** Assessments and other evaluation materials must include those tailored to address specific areas of educational need. 34 CFR § 300.304(c)(2). Further, assessments must be selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the students aptitude or achievement level or whatever other factors the test purports to measure. 34 CFR § 300.304(c)(3).

**Parent Concern:** The Parent believed that the District erred when it administered the CTONI-2, a non-verbal assessment to the Student as part of the evaluation process. "If this child did not have a need for 'special education or related services' then why use a non-verbal test? Had [the District] used a verbal test, a more true to life scenario, especially without the aide present, the results would have been vastly different. It seems clear that the testing was designed to hide problems and not identify them." [Parent Response, p. 3].

**Finding:** The CTONI-2 was administered by the school psychologist, based on his professional judgement and is a test that he administered on numerous occasions. The testing was administered in order to determine the Student's intellectual abilities, and did so appropriately.

**Requirement:** The evaluation must be sufficiently comprehensive to identify all the student's special education and related services needs whether or not commonly linked to the disability category in which the child is classified. 34 CFR § 300.304(c)(6).

**Parent Concern:** The Parent believes the Student meets the criteria under the disability categories for social emotional disturbance, other health impairment, and speech language impairment. [Parent Response, p. 3-4].

**Finding:** The evaluation planning team developed the Evaluation Plan, which the Parent signed, and identified the tests and other evaluation procedures that would be used to assess the Student. Included in the testing was social/emotional, and the BASC-3, a rating system to evaluate the behavior of the Student, was used. School staff rated the Student in the average range, while the Parent rated the Student at a clinically significant level in the area of internalizing problems and on the subtest for aggression. The testing results did not reflect a need for the evaluation team to look at the disability category of serious emotional disturbance. The Evaluation Report looked at the suspected disability areas of other health impairment and speech language impairment and found that the Student did not meet the eligibility requirements for those disability categories.

The District did not fail to conduct an appropriate initial evaluation. **There were no violations of Part B of the IDEA.**

**Issue 3:** Did the District fail to include all required members of an evaluation team when the IEE was reviewed, in violation of 34 CFR § 300.300.306(a)(1).

A school district must ensure that a group of qualified professionals and the parent of the child determine whether the child is a child with a disability. 34 CFR § 300.306(a)(1).

At the meeting held on July 29, 2019, the Parent attended with an advocate. In addition, the school psychologist, principal, superintendent, classroom teacher and special education teacher were in attendance. [Parent Document IEE Minutes].

Neither the IDEA nor the District's IEE policy require the attendance of an evaluator who conducted an IEE at an evaluation meeting where the IEE evaluation is discussed. While the District's Procedures and Criteria for Conducting an Individual Education Evaluation at public expense, provides that an independent evaluator is required to participate in any IEP team meeting in person or via telephone conference to discuss the results of the IEE, the requirement to be available only applies to the independent evaluator; the District is not required to invite the evaluator to the evaluation team meeting.

While the independent evaluator is not required to be in attendance when reviewing the IEE, there must be qualified professionals in attendance who can interpret the evaluation data for the purpose of determining if a child is a child with a disability under the IDEA. 34 CFR § 300.306(c)(1). The private institute utilized the Child Behavior Checklist and the Selective Mutism Questionnaire, both of which were completed by the Parent. [SD Exhibit C, p. 48-50/380]. Additionally, the private institute provided an overview of the Student's treatment history, including the Student's attendance at a 4-day group-based intensive treatment program where the Student was paired 1:1 with a highly skilled and trained staff member. [SD Exhibit C, p. 51-53/380]. Both the school psychologist and classroom teacher personally observed the Student in the classroom and school settings and were able to interpret the evaluation data received from the private institute.

The District included all required members of the evaluation team when the IEE was reviewed. **There were no violations of Part B of the IDEA.**

**Issue 4:** Did the District fail to consider the IEE in any decision made with respect to the provision of FAPE to the Student, in violation of 34 CFR § 300.502(c)(1)?

If a parent shares an evaluation obtained at private expense, the district must consider the results of that evaluation when making decisions involving the provision of FAPE to the child (provided that the IEE meets district criteria). 34 CFR § 300.502 (c)(1); *Letter to Zirkel*, 74 IDELR 142 (OSEP 2019).

With respect to the facts of this complaint investigation, the District and the Parent agreed that the reports provided by the private institute would be utilized as an IEE. The District determined additional information would be helpful and emailed questions to the private institute on June 19, 2019 which were responded to by the private institute on July 2, 2019. An evaluation team meeting was held on July 29, 2019, at which time the team considered the IEE. After reviewing and considering the IEE, the school team determined that the Student was not eligible for special education services. Prior Written Notice was provided to the Parent dated August 9, 2019.

The District did not fail to consider the IEE in any decision made with respect to the provision of FAPE to the Student. **There were no violations of Part B of the IDEA.**

**Issue 5:** Did the District fail to provide the Student with a FAPE, in violation of 34 CFR § 300.17?

In order to qualify as a "student with a disability" and receive a FAPE under the IDEA, a student must:

- Meet the definition of one or more of the categories of disabilities;
- The disability adversely affects the student's educational performance; and
- Need special education and related services as a result of his disability or disabilities.

34 CFR § 300.8.

The definition of special education includes specially designed instruction, which is defined as adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR § 300.39(b)(3). A student is not entitled to receive related services, such as the 1:1 assistance of a paraprofessional, unless the student first qualifies for special education services.

In this matter, the District is in agreement with the Parent that the Student was diagnosed with several impairments, including selective mutism and anxiety. Where the District and Parent are in disagreement is whether the Student's disabilities adversely affect the Student's educational performance and whether the Student needs special education and related services as a result of the disabilities.

The District followed the required procedures in determining the Student did not qualify for special education services. The District did not fail to provide the Student with a FAPE, as the Student did not qualify for an IEP. **There were no violations of Part B of the IDEA.**

An additional issue was identified during the investigation process. Under OPI's general supervisory authority, this issue has been added and is discussed below.

**Issue 6:** Did the District fail to provide the Parent with an IEE at public expense or request a due process hearing when the Parent disagreed with the evaluation conducted by the District and requested an IEE in violation of 34 CFR § 300.502(b)(1) through 34 CFR §300.502(b)(2)?

Parents have the right to an IEE at public expense if they disagree with an evaluation conducted by the district, unless the district demonstrates in a due process hearing that its own evaluation of the child was appropriate. 34 CFR § 300.502(b)(1) through § 34 CFR 300.502(b)(2).

On April 24, 2019, the Parent sent an email to District staff stating the Parent rejected the eligibility decision at the Evaluation Report meeting held on April 18, 2019 and requested an IEE be conducted as soon as possible by professionals trained in diagnosing, treating and managing selective mutism. On May 6, 2019, the District sent the Parent a letter along with the District's criteria for an IEE and provided the Parent with two possible options of organizations that could complete an IEE. The Parent and the District later agreed to utilize the private institute's reports as the IEE, along with additional questions and answers received by the District. The IEE that was reviewed by the evaluation team on July 29, 2019 consisted of a parent-initiated evaluation at private expense that was shared by the Parent.

The District provided the Parent with the required information for a publicly funded IEE in a timely manner, but a publicly funded IEE has not occurred. The Parent continues to have the right to receive an IEE at public expense, utilizing the District's IEE criteria, should the Parent elect to do so. **There were no violations of Part B of the IDEA.**

**E. Disposition**

The Student was not denied FAPE; there was no evidence in this record that Part B of IDEA was not followed. No corrective action by the District is required.

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Dick Trerise, Assistant State Director, Special Education  
Student Support Services Division

c: Mandi Gibbs, Dispute Resolution/EAP Director  
\*\*\*\*, School District Attorney