



March 10, 2020

Parent

District

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: FINAL REPORT: In the Matter of *, 2020-01, Alleged Violation of the Individuals with Disabilities Education Act (IDEA).**

Dear *** and ***:

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) filed the Complaint on behalf of her child, *** (Student). The Student currently resides within the *** School District (District) boundaries. 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 conduct an appropriate initial evaluation in violation of 34 CFR § 300.301 and § 300.305?

Issue 2: Did the District fail to hold a meeting to develop an Individualized Education Program (IEP) within 30 days after the determination that the Student needed special education and related services, in violation of 34 CFR § 300.323(c)(1)?

Issue 3: Did the District fail to include all required members of an evaluation team and an IEP team at meetings in violation of 34 CFR § 300.321 and § 300.325(a)(2)?

Issue 4: Did the District fail to ensure that Least Restrictive Environment (LRE) was considered by the IEP team when discussing the Student’s educational placement, as required by 34 CFR § 300.114 through § 300.116?

Issue 5: Did the District fail to provide the Parent with prior written notice before the District proposed to change the identification, evaluation, placement of the Student or the provision of a Free Appropriate Public Education (FAPE) to the Student in violation of 34 CFR § 300.503(a)(1)?

Issue 6: Did the District fail to provide the Student with FAPE, in violation of 34 CFR § 300.17?

A. Procedural History

1. On January 10, 2020, the Montana Office of Public Instruction (OPI) received a 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 January 10, 2020.
2. OPI received the District’s written Response on February 6, 2020.
3. OPI received the Parent’s response to the District’s Response on February 14, 2020.
4. An appointed investigator conducted telephone interviews with the Student’s Parent, school district attorney, superintendent, special education director and principal 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 January 10, 2019, to January 10, 2020, 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. The Student attended the District's schools from kindergarten through the eighth grade. [Parent Response 2/12/20]
3. While attending the District's schools, the Student had a history of saying or thinking "shocking things" due to mental health issues, but never acted on his thoughts. [Parent Response 2/12/20; Parent Complaint 1/7/20; Private Counselor Letter 12/31/19]
4. During the 2018-19 school year, Student was in the eighth grade, attended the District's middle school and had a 504 plan. The 504 plan allowed the Student to:
 - a. Have weekly contact with a counselor at school as needed to discuss his thoughts; and
 - b. Excuse himself from class when feeling angry. [Parent Response 2/12/20]
5. During the 2018-19 school year, the Student followed his 504 plan and only talked to the school counselor regarding his thoughts. [Parent Interview]
6. During eighth grade, the Student received the ***Award***. [Parent Interview; Parent Response 2/12/20]
7. During the 2018-19 school year, the Student received seven major write ups for tardies, fighting, hitting or tripping other students, breaking a school calculator, disrupting the classroom, and being rude to staff. The Student received two minor write ups for kicking and punching other students. The Student was suspended for 1.5 days. [IEP Meeting Minutes 12/6/20; Student Referral Report]
8. During the summer between the 2018-19 and 2019-20 school years, the Student's ***. [Counselor Letter 12/31/19]
9. The incident resulted in exacerbating the Student's depressive symptoms, including the tendency to make statements about harming himself, other people, animals, etc. [Private Counselor Letter 12/31/19]
10. For the 2019-20 school year, the Student's class had the option of attending a neighboring school district's high school for ninth grade or remaining at a school in the District. [Parent Interview; Superintendent Interview]
11. The Student elected to attend the neighboring school district's high school for the 2019-20 school year as a ninth grader:
 - a. The Student chose the neighboring school district, because it provided face-to-face accelerated classes. [Parent Complaint 1/7/20; Parent Interview]; and
 - b. The District's offer for accelerated classes was through on-line courses. [Parent Interview]
12. The Student had the same 504 plan in place while attending the neighboring school district's high school. [Parent Complaint 1/7/20]
13. On September 12, 2019, the Student followed his 504 plan and spoke with the school counselor. The Student informed the school counselor of certain thoughts he was having. [Parent Complaint 1/7/20; Parent Interview] The Student told the counselor:
 - a. He found a cat while on his way to catch the school bus and was about to "finish the job" when he was interrupted by the cat's owner;
 - b. He had killed and tortured several animals in the past;

- c. He believed he was destined to move on and kill people and couldn't change the future;
- d. The Student enjoyed the medical classes he was taking and wanted to help people, but he couldn't because he could hurt them; and,
- e. ***.

[Incident Statement from Neighboring District 9/19]

14. After the Student spoke to the school counselor on September 12, 2019, the school resource officer (SRO) took the Student to a psychiatric facility, where the Student's Parent picked him up. [Student Discipline Card 9/12/19]
15. The neighboring district instituted an emergency suspension on September 12, 2019, effective from September 13, 2019, to September 26, 2019, or until a due process hearing took place. [Student Discipline Card 9/12/19]
16. The Parent requested a Section 504 manifestation determination and an IDEA evaluation from the neighboring district, neither of which occurred. [Evaluation Report Prior Written Notice 11/18/19]
17. On or about September 12, 2019, the Superintendent received a phone call from the administration of the neighboring school district and was informed that the Student's right to the out-of-district attendance was being revoked due to the incident that occurred on September 12, 2019. [Parent Complaint 1/7/20; Parent Interview; Superintendent Interview]
18. After receiving the phone call from the neighboring district regarding the Student, the Superintendent reviewed the Student's psychological report in his education file, which increased his concerns regarding the Student's attendance at school. [Superintendent Interview]
19. Upon the revocation of the Student's attendance at a neighboring school district in mid-September, the Parent contacted the superintendent for the District, who referred the Parent to the District's special education director. [Parent Interview; Superintendent Interview]
20. The Parent contacted the special education director at the end of September and stated she wanted to have the Student back in the District's school. [Parent Interview]
21. The Student was not allowed to attend a District school because of the concerns regarding the Student's mental health and the safety of other students. [Principal Interview]
22. An on-line school option was verbally agreed to by special education director for the District and the Parent pending a special education evaluation:
 - a. The Parent chose the on-line program, with approval from the District. [Parent Interview; Special Education Director Interview];
 - b. The on-line program with an out-of-state high school began for the Student in mid-October 2019. [Emails];
 - c. The District provided a computer to the Student for the on-line program and paid the tuition for the on-line program. [Special Education Director Interview];
 - d. No district staff has been involved in the on-line program for the Student. [Principal Interview];

- e. The District will provide the Student with credit towards graduation when the Student satisfactorily passes a class. [Principal Interview]; and,
 - f. The Student has not completed any courses and has not received credit for classes during the 2019-20 school year. [Parent Interview; Principal Interview].
23. The Parent met with the special education director towards the end of September 2019. At the meeting, the special education director informed the Parent:
- a. The District would like to have a neuropsychological evaluation completed; and
 - b. The District would like to have the school psychologist evaluate the Student. [Parent Interview].
24. On September 30, 2019, the Parent signed the Referral for Comprehensive Educational Evaluation and the Evaluation Plan. [Parent Interview]
25. The Parent arranged for a neuropsychological evaluation with the Student's private provider. [Parent Interview]
26. The testing for the neuropsychological evaluation was completed in November 2019 by a private provider, but the final report has not been issued. The Parent was informed by the private provider that the results of the neuropsychological evaluation are similar to the results in the Student's previous neuropsychological evaluation that occurred approximately a year previously. [Parent Interview]
27. The District finalized the Student's Evaluation Report on November 18, 2019. The information set forth in the Evaluation Report was compiled from information received from the following individuals:
- a. School psychologist;
 - b. School nurse;
 - c. Private psychologist;
 - d. Parent; and,
 - e. Student.
28. An evaluation team meeting was held on November 18, 2019, during which the Evaluation Report was discussed:
- a. The following individuals attended the meeting: Parent, Student, Student's private mental health counselor, Student's great grandmother, family advocate, school psychologist, principal, special education director and superintendent. [Evaluation Report];
 - b. A special education teacher and a general education teacher did not attend the team meeting. [Special Education Director Interview; Evaluation Report];
 - c. It was anticipated that the new neuropsychological report would be available later in the day on November 18, 2019. The report would be reviewed and considered when received;
 - d. The District offered to pay for the Student's placement in a therapeutic setting to address his needs, which the Parent declined;

- e. The private mental health counselor stated the Student has had disturbing thoughts but had not acted out on his thoughts and the lack of action by the Student was a predictor of his future behavior; and,
 - f. The evaluation team determined the Student met the disability category of Emotional Disturbance.
29. The Evaluation Report dated November 18, 2019, found:
- a. The Student's academic performance was not a concern and the Student should continue to engage in challenging academic opportunities commensurate with the Student's abilities;
 - b. The Student had no physical conditions that limited the ability to access education;
 - c. Under the Academic Achievement section, implications for educational planning stated:
 - i. The Student continued to need to be challenged academically; and
 - ii. Accommodations should be made for his social, emotional, and moral development through an accommodation plan to address the Student's major depressive disorder, ADHD and anxiety disorder;
 - d. Under the Assessment Summaries for Psychological, the 2018 neuropsychological testing conducted by a private provider determined that the Student's full-scale IQ score had a 95% change of falling between 119 and 129, which classified the Student's general cognitive functioning in the Very High Range;
 - e. Under Assessment Summaries for Social Emotional the implications for educational planning stated pursuant to the 2018 neuropsychological report:
 - i. The Student should be provided access to the counselor, through an accommodation plan when attending school; and
 - ii. The Student should be excused from absences and accommodated to make up work when the Student had medical or therapeutic appointments during school time.
 - f. Under the Observations section, the observations occurred during the school psychologist's assessments, and also included the observations of the private provider during the 2018 neuropsychological evaluation. The implications for educational planning stated that the Student's presentation in the assessment sessions was remarkable for significant concerns, "particularly his assessment of empathy, and reports of impulses to hurt animals and people. He and his family are encouraged to continue to seek therapy to help him cope with these aggressive and violent impulses."
 - g. In the area of social/emotional, the evaluation team agreed that the Student's inappropriate statements and perceptions adversely affected educational performance:
 - i. The Student's 504 plan was not sufficient to address the atypical nature of statements made to the school counselor and individual programming involving a therapeutic component was necessary; and

- ii. The Student was found eligible for special education services under the disability category of emotional disturbance.
30. An IEP team meeting was held on November 26, 2019:
- a. The following individuals attended the meeting: Parent, Student, parent advocate, school psychologist, superintendent, special education director and school principal. [Parent Interview; Special Education Director Interview; Superintendent Interview];
 - b. A special education teacher and a general education teacher did not attend the team meeting. [Special Education Director Interview];
 - c. The Parent's perceptions of the Student's educational needs were that he needed to go to school and be in a classroom environment, preferably at the District's school. [IEP Meeting Minutes 11/26/19]; and,
 - d. The Student wanted to go to accelerated programs or advanced placement classes. [IEP Meeting Minutes].
31. The draft IEP discussed at the November 26, 2019, IEP meeting provided that:
- a. The Student's behavior impeded the Student's learning or the learning of others;
 - b. Three social/emotional/behavioral goals were proposed which provided:
 - i. The Student will identify impulsive behaviors and potential consequences in real and/or simulated situations when behaviors in the educational setting are consider negative 85% of the time as measured by observation and records;
 - ii. The Student will identify impulsive/inappropriate verbalizations for the school setting in four out of five trials during his the social/emotional counseling minutes; and
 - iii. The Student will practice through role-play and improve appropriate social skills in his therapeutic setting in four out of five trials as measured by the mental health professional;
 - c. The special education services identified on the draft IEP consisted of social/emotional/behavioral services in the special education setting for 10 minutes per week:
 - i. The Parent's advocate asked about the 10 minutes per week and felt that it was not sufficient to meet the Student's needs. [IEP Meeting Minutes 11/26/19]; and
 - ii. The school psychologist explained to the advocate that the 10 minutes a week was not for therapy but was for progress monitoring of the Student's outside therapy that was offered by the District as part of its offer of FAPE. [IEP Meeting Minutes 11/26/19];
 - d. The draft IEP was not fully developed, including identifying the accommodations, supplementary aids and services, and LRE for the Student; and,
 - e. Consensus was not reached by the team and another meeting was scheduled for December 6, 2019, to discuss programming possibilities and information regarding the Student's present levels. [IEP Meeting Minutes].
32. A second IEP team meeting was held on December 6, 2019:

- a. The following individuals attended the meeting: Parent, Student, parent advocate, school psychologist, special education director, and school principal. [Draft IEP 12/6/19; Special Education Director Interview];
 - b. A special education teacher and a general education teacher did not attend the team meeting. [Special Education Director Interview; Draft IEP];
 - c. Certain options discussed for placement were limited due to religious affiliations. [IEP Meeting Minutes 12/6/19];
 - d. The Parent asked for information directly related to whether the Student could return to the District school if he met particular goals on the IEP but did not feel she received an answer. [Parent Interview; IEP Meeting Minutes 12/6/19]; and,
 - e. The District continued to verbally offer an out-of-state private therapeutic residential placement for the Student, which the Parent declined. [IEP Meeting Minutes 12/6/19].
33. It is the Parent and private mental health counselor's position that the Student should be attending the District school as his LRE:
- a. The Student's mental health team does not recommend a residential placement for the Student. [Private Counselor Letter 12/31/19];
 - b. The Student's past behavior is indicative of his future behavior, and the Student has never acted on his thoughts or statements. [Private Counselor Letter 12/31/19];
 - c. The Student is not likely to be aggressive or violent at school. [Private Counselor Letter 12/31/19];
 - d. With ongoing counseling and accommodations, the Student is able to cope and attend regular classes. [Private Counselor Letter 12/31/19]; and,
 - e. To not allow the Student to attend regular classes appears to be detrimental to the Student and not in his best interest. [Private Counselor Letter 12/31/19].
34. It is the District's position that a residential treatment facility is the appropriate placement for the Student where the Student could receive treatment and education:
- a. The regular classroom setting at the District's school is an insufficient placement for the Student with his current level of disability; and
 - b. District personnel lack the necessary training and expertise to properly address the Student's social and emotional needs. [District Response 2/6/20].
35. The Student has been receiving educational services by accessing an on-line program in a homebound setting since mid-October 2019. [District Response 2/6/20; Emails]:
- a. The Student has been taking three classes through the on-line program. [Parent Interview];
 - b. The Parent believes an on-line program is not appropriate for the Student, as he doesn't have the attention span to sit and work on his own. [Parent Interview];
 - c. The Parent believes the Student's depression has worsened, as he has no social interaction outside of his family. [Parent Interview];

- d. The Parent believes the Student is falling behind in school, as he has not been doing the schoolwork through the on-line program. [Parent Interview];
 - e. The Parent believes that the Student has lost his ninth grade year due to only receiving an on-line educational program, which he has not been successful at; and,
 - f. The Parent believes that the Student had the capability of graduating early with honors, but that opportunity is greatly diminished due to the educational program the Student has received during the 2019-20 school year. [Parent Interview].
36. The District believes the on-line program in a homebound setting is the LRE for the Student under the current circumstances:
- a. The District's justification for the Student's placement is the possible negative effect the Student's inclusion in the regular classroom may have on other students within the District;
 - b. The Student's statements, regarding harming animals and compulsions to harm people, constitutes a strong indication that the Student may pose a significant threat of harm to other students and staff at school; and,
 - c. Until the potential threat can be alleviated through appropriate treatment, the District asserts that the regular classroom setting is not the appropriate placement for the Student. [District Response 2/6/20].

D. Analysis and Conclusions

Issue 1: Did the District fail to conduct an appropriate initial evaluation in violation of 34 CFR § 300.301 and § 300.305?

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: evaluations and information provided by parents, classroom-based observations, including observations by teachers and related services providers. Additionally, based upon that review and input from the parents, it must be determined what if any additional information is necessary to determine whether the child is a child with a disability under IDEA and the educational needs of the child. 34 CFR § 300.305(a)(2). If additional information is necessary, the district is responsible for gathering that information, and it cannot suggest or refer a parent to an outside provider to obtain that information on their own. *N.B. v. Hellgate Elementary School District*, 541 F.3d 1202, 50 IDELR 987 (9th Cir. 2008); *Union School District v. Smith*, 20 IDELR 987, 15 F.3d 1519 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994).

The Evaluation Report, under the Observations section, discussed the Student's presentation during the assessment sessions, but there was no discussion in the Evaluation Report that the Student was observed in the classroom by teachers and related service providers. At the time the evaluation was conducted, the Student was receiving homebound instruction from the District, consisting of an on-line educational program, which was the Student's learning environment and

classroom. However, no observations were identified in the Evaluation Report that discussed the required observations.

Further, while the Student attended the District's schools for his entire school career, other than a few weeks at the beginning of the 2019-2020 school year when he attended a neighboring school district, the Evaluation Report failed to contain any input or information from individuals within the school setting who were knowledgeable about the Student, such as the school counselor, prior classroom teachers and administrators.

Lastly, at the evaluation team meeting on November 18, 2019, a new neuropsychological evaluation being conducted by a private provider was discussed, and it was anticipated the evaluation would be available that afternoon. While the District verbally requested a neuropsychological evaluation during the meeting between the special education director and the Parent when the Student returned to the District, the Parent initiated the neuropsychological evaluation. The report has not been finalized or considered by the IEP team, and there is no indication that the District took steps to acquire the necessary parent release, to follow up on the status of the report, or to facilitate the payment for the report. If the District had requested the neuropsychological evaluation, it was the District's responsibility to ensure it was done at District expense.

The District failed to conduct an appropriate initial evaluation in violation of 34 CFR § 300.301 and § 300.305. **There were violations of Part B of the IDEA.**

Issue 2: Did the District fail to hold a meeting to develop an IEP within 30 days after the determination that the Student needed special education and related services, in violation of 34 CFR § 300.323(c)(1)?

The IDEA requires a district: 1) to hold an IEP meeting; and 2) develop the child's initial IEP within 30 days of determining that the child needs special education and related services. 34 CFR § 300.323(c)(1). A school district's failure to develop an IEP within 30 days of an eligibility determination amounts to a denial of FAPE where it causes substantive harm to the student. *See, e.g., Gerstmyer v. Howard County Pub. Schs.*, 20 IDELR 1327 (D. Md. 1994) (finding that a district denied a child FAPE when it failed to develop an IEP for him for more than six months after it became aware that he needed an evaluation).

In this matter, the Student was found eligible for special education services on November 18, 2019. Two IEP meetings were convened. The first meeting was held on November 26, 2019, and the second meeting was held on December 6, 2019. During the two IEP team meetings, a draft IEP was discussed, but no consensus was reached by the IEP team regarding services or placement. No subsequent IEP meetings were held after December 6, 2019, the Student's IEP

was never fully developed, and prior written notice of the District's proposal for FAPE was not provided to the Parent.

While the District timely scheduled and held the IEP meetings within 30 days after the Student was found eligible for special education services, the District failed to develop the Student's IEP within 30 days. Several portions of the IEP were incomplete, including identifying appropriate special education services and service minutes, identifying appropriate accommodations and supplementary aids and services, and identifying the LRE for the Student. The District's failure to offer the Student an appropriate educational program has caused substantial harm to the Student.

The District's failure to develop the Student's IEP within 30 days after the eligibility determination resulted in a violation of 34 CFR § 300.323(c)(1). **There were violations of Part B of the IDEA.**

Issue 3: Did the District fail to include all required members of an evaluation team and an IEP team at meetings in violation of 34 CFR § 300.321 and § 300.325(a)(2)?

Pursuant to 34 CFR § 300.321(a), a school district must ensure that the following individuals participate at evaluation team and IEP team meetings:

- The parents of the child;
- Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- A representative of the LEA who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- An individual who can interpret the instructional implications of evaluation results who may be another member of the team;
- An individual who has knowledge or special expertise regarding the child at the discretion of the parent or the LEA;
- Related services personnel, as appropriate; and,
- The child, if appropriate.

A school psychologist is also required as an evaluation team member for an initial evaluation when a student is being evaluated for certain disability categories, including emotional disturbance. ARM 10.16.3321.

Additionally, whenever a school district is considering placing a student with a disability at a private school or facility, the district must ensure that a representative of the private school or

facility attends an IEP meeting. If the representative cannot attend, the district must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls. 34 CFR § 300.325(a)(2).

In this matter, the District failed to include a regular education teacher of the Student and a special education teacher when it held the evaluation team meeting on November 18, 2019, and the IEP team meetings on November 26, 2019, and December 6, 2019. Further, at both IEP team meetings, when the District made verbal offers for therapeutic placement, the District failed to ensure that a representative of the therapeutic facility was in attendance or was able to participate by another means.

The District failed to include all required members of an evaluation team and an IEP team at meetings in violation of 34 CFR § 300.321 and § 300.325(a)(2). **There were violations of Part B of the IDEA.**

Issue 4: Did the District fail to ensure that LRE was considered by the IEP team when discussing the Student's educational placement, as required by 34 CFR § 300.114 through § 300.116?

To the maximum extent appropriate, children with disabilities must be educated with children who are not disabled. The LRE provisions express a strong preference for educating children with disabilities along with their typically developing peers. A child's removal from the general education setting is permissible, and may be required, when a child cannot be educated satisfactorily in the regular education environment. 34 CFR § 300.114(a). When selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services the child needs. 34 CFR § 300.116(d).

The child's educational placement must be in conformity with LRE provisions, and the placement determination must be made on an individual basis in light of the specific components of the child's IEP. *Letter to VanWart*, 20 IDELR 1217 (OSEP 1993). Thus, the placement and LRE determination is the last decision an IEP team makes, after the development of a child's IEP. "A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement." *K.D. ex rel. C.L. v. Dept. of Education, State of Hawaii*, 58 IDELR 2, 665 F.3d 1110, 1123 (9th Cir. 2011).

When the Student returned to the District in September 2019, the District refused to allow the Student to attend general education classes at its school and instead provided the Student with homebound instruction, consisting of an on-line educational program. Although the Parent was allowed to pick the on-line program for the Student with District approval, the Parent continued to believe that the general education placement in the District's school was the LRE for the Student, but that placement was denied by the District.

At the evaluation report team meeting on November 18, 2019, the District offered to pay for placement for the Student in a therapeutic setting to address his needs, which the Parent declined. This placement was offered prior to the development of an IEP for the Student. As mentioned above, placement for the provision of educational services is the last decision made by an IEP team; it is not a decision made upon a determination of eligibility for special education services, and prior to the IEP development.

At no time during the two IEP team meetings did the District fully respond to the Parent's inquiry as to when the Student could return to the District's school. Rather, the placement options discussed by the IEP team only consisted of options outside of the District, which the Parent did not accept, and for which the District never provided prior written notice, as discussed in Issue 5.

The District continues to predetermine the Student's placement as it stated in its Response that "[i]t is further the position of the District that a more appropriate placement for [the Student] would be a residential treatment facility wherein [the Student] could receive treatment and education." The District's position was made without the benefit of an IEP team decision, and without Parent involvement.

The District failed to ensure that the LRE was considered by the IEP team when discussing the Student's educational placement, as required by 34 CFR § 300.114 through § 300.116. **There were violations of Part B of the IDEA.**

Issue 5: Did the District fail to provide the Parent with prior written notice before the District proposed to change the identification, evaluation, placement of the Student or the provision of FAPE to the Student in violation of 34 CFR § 300.503(a)(1)?

Within a reasonable time period, a district is required to provide a parent of a child with a disability with prior written notice whenever a district proposed or refused to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 CFR § 300.503(a). The prior written notice must provide sufficient detail to allow parents to participate in their child's educational services decisions in an informed way. 34 CFR § 300.503(b).

An oral offer of placement at an IEP team meeting does not satisfy the legal requirements of providing the parent with prior written notice, consisting of a formal written offer. *See Glendale Unified Sch. Dist. v. Almasi*, 33 IDELR 221 (C.D. Cal. 2000) (holding that a district's offer of multiple placement types rather than making a specific and firm recommendation constituted a procedural violation of the IDEA, which resulted in a denial of FAPE for the child).

The obligation to provide parents with prior written notice exists regardless of whether a student's parents may express an unwillingness to accept the placement being offered by the district. *See Union Sch. Dist. v. Smith*, 20 IDELR 987 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994).

As discussed in Issue 2, the District had an obligation to develop an IEP within 30 days of the eligibility determination. Along with the obligation to develop an IEP as the District's offer of a FAPE, the District had an obligation to provide the Parent with prior written notice of its offer of FAPE, but failed to do so. The District discussed various placement options at the two IEP team meetings and made an oral offer of a residential facility, which were rejected by the Parent. However, the verbal offer does not replace the requirement to provide the Parent with prior written notice of the District's placement offer.

The District failed to provide the Parent with prior written notice in a timely manner in violation of 34 CFR § 300.503(a)(1). **There were violations of Part B of the IDEA.**

Issue 6: Did the District fail to provide the Student with a Free Appropriate Public Education, in violation of 34 CFR § 300.17?

"A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. ..." 34 CFR 300.101(a). The United States Supreme Court construed the meaning of FAPE in *Bd. of Education of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 198, 207 (1982). The *Rowley* court stated: "The statutory definition of 'free appropriate public education,' in addition to requiring that States provide each child with 'specially designed instruction,' expressly requires the provision of 'such ... supportive services ... as may be required to assist a handicapped child to benefit from special education.' § 1401(17). ..." *Id.* at 201. The United States Supreme Court further defined the standard for a free appropriate public education in *Endrew F. v. Douglas County School District. RE-1*, 137 S. Ct. 988, 1001 (2017), holding that the educational program for a child with a disability must be one that is "... reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

FAPE is provided to a student through the IEP, where a school district must specify "the anticipated frequency, location, and duration of [special education] services and modifications." 34 CFR § 300.320(a)(7). Further, "[t]he amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in a manner that is clear to all who are involved." 64 Fed.Reg. 12455, 12,479 (March 12, 1999).

As discussed in Issue 5 above, a district has an obligation to provide a parent with a prior written notice of a formal offer for placement. “[A] district's failure to make a formal offer of public placement constitutes a per se denial of FAPE.” *Redding Elem. Sch. Dist. v. Goyne*, 34 IDELR 118 (E.D. Cal. 2001).

Both the Parent and District staff acknowledged that the IEP team was unable to reach consensus during the two IEP team meetings on the special education services, placement and LRE for the Student. While the IEP team process is expected to be collaborative, in this case, because the IEP team was unable to reach consensus, the District had the obligation to make the final determination regarding the Student’s IEP contents and provide the Parent with prior written notice of its offer of FAPE. *See Letter to Richards*, 55 IDELR 107 (OSEP 2010).

The District allowed the failure to reach consensus with the Parent to stop the IEP development process. The District did not meet its obligations in proposing a completed IEP which contained the anticipated frequency, location, and duration of special education services, nor did the District provide the Parent with prior written notice of its proposal.

The District failed to provide the Student with a Free Appropriate Public Education in violation of 34 CFR § 300.17. **There were violations of Part B of the IDEA.**

E. Disposition

There is evidence in the record that Part B of IDEA was not followed. Corrective actions by the District are required.

F. Corrective Action Plan

It has been determined that the District is out of compliance in violation of the IDEA. The following corrective actions are required to be completed by the District as set forth below.

1. Evaluations

- The District shall determine the following:
 - Is there a neuropsychological evaluation report pending?
 - Will the Parent consent to sharing the neuropsychological report with the District?
 - If so, the District shall request Parent’s consent for a release of information in order to contact the neuropsychologist and obtain a copy of the neuropsychological report that was initially anticipated to be completed by November 18, 2019.
 - In the event the Parent paid for the neuropsychological evaluation the District shall reimburse the Parent for the evaluation.
- The District shall report to OPI by **March 20, 2020**, on the determinations made above, as well as provide all relevant documentation, such as a signed consent for release of

information, a copy of the neuropsychological report, payment receipts, or any other relevant information that shows the District's status on this request.

- **By March 31, 2020**, the District shall convene an evaluation team meeting and shall invite the Student's mental health professionals to participate and any other individuals determined to have knowledge or special expertise about the Student.
 - The District shall ensure all required evaluation team members are present to:
 - Review and consider the neuropsychological report, if the Parent provides consent;
 - Review and consider input from the Student's private mental health providers;
 - If available, review and consider input from the neighboring school district's school counselor;
 - Review and consider input from the Student's prior teachers, counselor, and school administrators knowledgeable about the Student within the District;
 - Review the Student's previous behavioral logs;
 - Determine appropriate means to obtain required observations through the evaluation process;
 - Determine whether any additional assessments are needed such as behavioral, psychological or psychiatric assessments. If the neuropsychological report was privately obtained by the Parent and consent is not given for release of the report this will also need consideration; and,
 - Discuss and mark the appropriate boxes on the evaluation report for recommendations for consideration of the IEP team;
- **By April 3, 2020**, the District shall provide the Parent with a copy of the evaluation report and prior written notice.
- **By April 3, 2020**, the district shall provide the following information to OPI:
 - The invitation to the evaluation team meeting;
 - The minutes or notes of the meeting(s);
 - The names and positions of the individuals who attended the evaluation team meeting;
 - Prior written notice provided to the Parent; and,
 - The completed evaluation report.

2. The Student's IEP Development

- **By April 10, 2020**, the District shall convene an IEP meeting with all required members present to review the draft IEP and determine the following:
 - Appropriate measurable goals, including behavioral goals;
 - Appropriate positive behavioral interventions and supports;

- Appropriate accommodations;
- Appropriate supplementary aids and services, program modifications and supports;
- Appropriate supplementary aids and services, program modifications, and support for school personnel;
- Special education services and service time based on the goals and needs;
- Least restrictive environment including what, if any, behaviors or other areas of concern are impeding student's access to the general education setting; and,
- Educational placement
- **By April 10, 2020**, the District shall consider consulting with an expert to assist with behaviors or other areas of concerns the IEP team has identified as a barrier to the Student accessing the general education setting. The District shall report back to OPI with documentation of the basis for its decision **by April 15, 2020**.
- **By April 15, 2020**, the District shall provide the Parent with prior written notice of its offer of FAPE.
- **By April 15, 2020**, the District shall provide the following information to OPI:
 - The invitation to the IEP Team meeting;
 - The minutes or notes of the meeting(s);
 - The names and positions of the individuals who attended the IEP Team meeting(s);
 - Written notice provided to the Parent; and,
 - The fully developed and proposed IEP

3. Compensatory Education

- The District shall offer compensatory education consisting of special education and related services adequate to compensate for the failure to conduct an appropriate initial evaluation, failure of the IEP team to discuss LRE and predetermination of placement, failure to offer a fully developed IEP, and failure to provide prior written notice of the District's offer of FAPE. The IEP team shall consider the Student's social emotional behavioral needs as well as a plan for credit recovery now that the student is behind in earning credit towards graduation. 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 May 11, 2020**. All compensatory services must be offered to Student to be completed within one year of this report.
- The District shall provide a licensed teacher knowledgeable to assist Student with the current on-line program, three times a week for two hours per session beginning on **March 16, 2020**. The District shall provide transportation for Student to and from the location where the services will occur. This shall continue until the time the IEP team determines the Student's educational placement and OPI has determined that this corrective action has been satisfied.

4. Required Staff Training

- The District shall arrange for the District superintendent, high school principal, special education director and school psychologist to participate in professional development training by **June 10, 2020**, with an OPI trainer. In order to schedule the training please reach out to Dick Trerise, Assistant Division Administrator.
 - At a minimum, the training shall cover the following topics:
 - IDEA initial Evaluation requirements;
 - Evaluation report meeting requirements;
 - Developing an IEP and required IEP team members;
 - The purpose of prior written notice, including, but not limited to: when prior written notice is required; and the content of prior written notice
 - LRE and educational placement; and,
 - Responsibility to provide FAPE and educational services.
 - Participants must sign-in at the training and the original sign-in sheet shall be filed with the Early Assistance Director by the OPI Trainer along with a copy of the training materials.

5. Recommendation

If the Parent agrees, the District is strongly encouraged to consider accessing OPI IEP facilitation services. If the parties agree to use an IEP facilitator please contact Mandi Gibbs, OPI Early Assistance Program Director, as soon as possible to obtain the assistance of a facilitator.

Dick Trerise, Assistant Division Administrator
Special Education Division

- c: Jenifer Cline, Division Administrator, Special Education Division
Mandi Gibbs, Dispute Resolution/EAP Director
Dale Kimmet, OPI School Improvement/Compliance Unit Manager
***, District Special Education Director
***, School District Attorney