



May 26, 2022

Parent

Superintendent

RE: **FINAL REPORT for In the Matter of ***, 2022-01, Alleged Violations of the Individuals With Disabilities Education Act (IDEA).**

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. *** (Parent) filed the Complaint on behalf of his ***, *** (Student), a student who is in the seventh grade at *** School in the *** School District (District). Complainant alleges the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq. The District allegedly:

- (1) Violated the IDEA when it changed Student's educational placement to a remote setting for failure to follow the District's mask mandate;
- (2) Failed to implement Student's IEP in the remote setting from the beginning of the 2021-2022 school year until the time the mask mandate was lifted; and
- (3) Denied Student a free appropriate public education (FAPE) because Student's IEP team did not determine Student's least restrictive environment.

A. Procedural History

1. On March 24, 2022, the Montana Office of Public Instruction (OPI) received the signed Complaint from the Complainant.
2. The District did not receive a copy of the Complaint. The address listed on the Complaint for the District was not valid. OPI provided the March 28, 2022 Notice of Filing to the parties enclosing a copy of the Complaint and allowing three days for service on the District. The Complaint was deemed filed on March 31, 2022.
3. OPI's Early Assistance Program (EAP) attempted to resolve the issues in the Complaint.
4. On April 7, 2022, the OPI'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 and Scope of Proceedings to the District. The Complaint proceeded to investigation.

5. The District requested a one-day extension to file its response. The extension was granted on April 20, 2022. The District's Response was received on April 22, 2022.
6. An investigator was appointed to investigate the Complaint.
7. The investigator conducted interviews with the parent, advocate, special education director, principal of the online school and special education teacher at the online school.
8. The Parent submitted additional email documentation on May 19, 2022. That same documentation was submitted via mail and received on May 23, 2022.
9. The Parent requested the investigator contact the doctor and conduct an interview. The investigator did not interview the doctor, because it was not relevant. The doctor did not participate in the IEP meetings or provide any additional information beyond the medical note presented to the IEP team.

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, April 7, 2021, to April 7, 2022, are included strictly for background information.

C. Findings of Fact

Background

1. Complainant has standing to file this Complaint pursuant to ARM 10.16.3661.
2. On August 23, 2021, the school board of trustees adopted Policy 1905, which states in part:

Beginning August 24, 2021, given that trends in the number of active COVID-19 cases in County leading up to the start of the school year show a "high" rate of transmission as defined by the Centers for Disease Control (CDC), the Board of Trustees directs the Superintendent to implement a requirement for face coverings to be worn in all district buildings and indoor-spaces.¹
3. Student enrolled in the District in August 2021.

¹ Policy 1905, https://docs.google.com/document/***, (retrieved on May 22, 2022).

4. The Parent did not go through the District's process of requesting an exemption as provided in Policy 1905.
5. Student was thirteen years old and in seventh grade at the time the Complaint was filed.
6. Student had received special education services in both California and Wyoming prior to the family's move to Montana at the start of the 2021-2022 school year.
7. Student had received special education services under the categories of multiple disabilities, autism, and speech language.
8. Previously, when Student resided in California, Student was also eligible under the category of Other Health Impaired (OHI) with a diagnosis of attention deficit hyperactivity disorder (ADHD).
9. The IEP team met on September 2, 2021, to review the IEP from Wyoming and determine if revisions were needed to Student's Wyoming IEP or if the District would accept and implement the Wyoming IEP, but no final decisions were made.
10. The Wyoming IEP was silent on the use of masks in school.
11. The IEP team discussed the need for additional evaluations to determine if Student was eligible under the OHI and Emotional Disturbance (ED) because of anxiety.
12. At the meeting, the parent presented a medical note from a doctor. The medical note stated, "[Student] is exempt from wearing a face mask due to medical conditions which are exacerbated if forced to wear a mask. [Student] is not to wear a mask."
13. The medical note did not list any specific information pertaining to Student about what medical conditions Student had that prevented Student from wearing a mask nor any impacts if Student was required to wear the mask.
14. The District did not believe there was sufficient justification for a mask exception or accommodation on Student's IEP based only on the medical note from the doctor.
15. The IEP team discussed Student's needs and considered Parent's concerns. The IEP team ultimately determined that Student did not need a mask exception or accommodation on the IEP. The IEP team considered this a learning opportunity for Student, and they would work on increasing Student's tolerance for wearing a mask.
16. The IEP team proposed an accommodation of mask breaks where Student would get to remove the mask for a period of time when Student was not with other students or was in a separate location. The frequency of mask breaks would decrease over time as Student grew accustomed to wearing a mask.
17. Parent insisted that the mask requirement was detrimental for Student but could not provide sufficient justification to persuade the IEP team that Student could not wear a mask at school.
18. Another IEP meeting was held on September 9, 2021, to attempt to determine what school Student would attend and whether Student would be required to wear a mask.
19. The Parent provided no additional information regarding Student or individualized, specific reasons why Student could not wear a mask at school.

20. Parent was informed that if Student attended District Middle School, Student would be required to wear a mask while in school, if the transmission rates warranted the continuation of the District's mask mandate.
21. Parent was informed that Student could also attend the District's online *** School (School) which would eliminate the mask requirement. All students in the District had the choice to enroll in the online School.
22. The Prior Written Notice (PWN) noted that the District did not take a position on whether the online School or the District Middle School was the best program for Student; that was a decision to be made by the family.
23. Parent, believing that he had no choice, decided that Student would attend the online School and Student was enrolled at the online School on September 13, 2021.
24. An IEP meeting was held on September 21, 2021, to discuss programming at the online School. The IEP from Wyoming was implemented until a new IEP was developed.
25. The online School used a combination of virtual and in-person learning. The in-person learning was primarily outside where masks were not required.
26. Parent informed School that Student would participate in online classes but would not attend in person learning if Student was required to wear a mask.
27. The IEP from Wyoming was implemented until November 17, 2021, when Parent signed consent to the IEP developed on September 9, 2021.
28. In the online School, special education services were provided in the morning, with academic classes completed in the afternoon.
29. Student rarely participated in online special education services. Student logged on twice to work with the special education teacher and five times with the speech clinician.
30. Student was more consistent in participating in social studies, reading and science classes in the afternoon; Student would not log on to math class.
31. The supplementary aids and services outlined on the IEP were implemented.
32. Additional strategies were used to increase Student's engagement in online classes, including periodic reminder calls, a weekly agenda, opportunity for daily meetings with teachers, math class recordings, and technology shortcuts to ease access and to allow late participation in class.
33. Student was provided individualized in-home training in how to log on to online services. Student had access to a Chromebook and appropriate internet services.
34. Student regularly participated and engaged in outside activities with classmates and appeared to enjoy the activities.
35. Student's participation in online classes and in-person opportunities decreased after winter break in December 2021.
36. After the winter break, the in-person opportunities were now indoors where masks were required.
37. School met with Parent and Advocate in November 2021 and January 2022 to discuss ways to increase Student's engagement in online classes. Numerous emails, telephone calls and other strategies were attempted to address Student's lack of involvement in online classes.

38. Student's progress was limited because of Student's lack of engagement in online learning.
39. On February 14, 2022, the determination was made that masks were no longer required in District schools. Parent sought to reenroll Student in District Middle School starting on February 14, 2022.
40. Parent stated that Student lost a year of learning, because the Student could not attend District Middle School. Parent further stated that the online School did not do enough to keep Student engaged, and because of Student's disabilities, Student needed someone to ensure he was signed in and participating in online classes.
41. An IEP meeting was held on March 21, 2022, and consent for services was signed on March 22, 2022.
42. Student has been attending District Middle School and has been making progress on goals.

D. Analysis and Conclusions

Issue 1: Did the District violate the IDEA when it changed Student's educational placement to a remote setting for failure to follow the District's mask mandate?

Once a student is determined eligible for special education and related services under the IDEA, it is the obligation of the district to convene an IEP team meeting to develop and implement an IEP, an *individualized* education program, designed to meet the student's needs. 34 C.F.R. § 300.323 (*emphasis added*). A student's IEP team makes the determination as to what services, modifications or supports are necessary and which of those must be included in the IEP. 34 CFR 300.320(a)(4). 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." *Andrew F. v. Douglas County School District*. RE-1, 69 IDELR 174, 137 S.Ct. 988, 999-1002 (2017). The primary function of an IEP is to develop a plan to achieve academic and functional advancement. *Andrew F.*, 137 S.Ct. at 991. 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*, 24 IDELR 756, 93 F.3d. 1458 (9th Cir. 1996). The IEP must be implemented, as written, including all required components. 34 CFR § 300.323(c).

The OPI does not have jurisdiction over the development or implementation of the District's face covering policy. The OPI, through the IDEA state complaint process, is determining whether the District was in compliance with the requirements of the IDEA and implementing Montana law. The U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS) has emphasized that during the COVID-19 outbreak no IDEA requirements were waived. *Return to School Roadmap: Children with Disabilities under IDEA* (OSERS August 24, 2021). The OPI's supplemental guidance on when masks are required in schools and what should be considered for students with disabilities states in part:

Students protected under the ADA and IDEA have additional protections regarding access to education. If a student's IEP team determines the student is unable to wear a mask due to his or her disability, the IEP must be reviewed to ensure the student has access to instruction as set out in the IEP and what accommodations are necessary to satisfy the mask requirement.

The school district cannot unilaterally change the student's placement, if the IEP team determines the student cannot wear a mask due to a disability.

If a student is placed in remote learning solely because of his or her inability to wear a mask in school, the student has a skill deficit that is prohibiting him or her from accessing the regular education environment. Therefore, the student's IEP must include a measurable annual goal and data collection methods to teach the skill of wearing a mask. (34 CFR 300.320(a)(2)(i); 34 CFR 300.114(a)(2)).

*Special Education and COVID-19, State Guidance, Personal Protective Equipment.*²

Student transferred from a Wyoming School District in August 2021. The District required face coverings to be worn in district buildings and indoor spaces. (Board of Trustees Policy 1905). IEP meetings were held on September 2 and 9, 2021, to review the out of state IEP and determine if additional services or supports were needed. The IEP team discussed Student's anxiety and proposed additional evaluations to determine if Student had additional needs. Parent provided a medical note from a doctor that indicated Student could not wear a mask because it would exacerbate medical conditions. There was no additional information, specific to Student, about why Student could not wear a mask. The IEP team proposed an accommodation that would give Student mask breaks at various times during the day, but Student would need to wear a mask at school pursuant to District Policy 1905. Parent, relying on the doctor's note, asserted that Student should be exempted from wearing a mask at school.

The District was prepared to meet Student's needs and provide FAPE at the District Middle School but indicated that Student would be required to wear a mask if Student attended District Middle School. Although the District suggested the District online School as an option for Student, it was not the placement decision of the IEP team. The District online School was an option available to all students. Parent ultimately chose to enroll Student in the online School because the majority of programming was virtual, and Student would not be required to wear a mask. The PWN specifically noted that the District did not state a preference for the Middle School or online School; it was within the Parent's discretion to choose which program was best for Student. Parent had the option to have Student attend the District Middle School, and the IEP team would meet again to consider accommodations to the mask requirement. Other than the note from the Doctor, there was no additional information provided about why

² <https://opi.mt.gov/Educators/School-Climate-Student-Wellness/Special-Education/COVID-19-Special-Education-Information#9384510892-personal-protective-equipment---updated-8182021>, (retrieved on May 22, 2022).

Student would be harmed by wearing the mask. The decision to attend the online school was not an IEP team placement decision but was a decision by the Parent.

Therefore, the District is not in violation of the IDEA. Student attended the online School because Parent chose to enroll Student in the online School. The IEP team did not make an educational placement decision for virtual learning based on refusal to follow the District's mask mandate.

Issue 2. Did the District fail to implement Student's IEP in the remote setting from the beginning of the 2021-2022 school year until the time the mask mandate was lifted?

At the beginning of the school year, each public agency must have an IEP in effect for each student with a disability. 34 CFR 300.323(a). When a student transfers from another state the district must continue to provide Student with a FAPE, including services comparable to those described in the Student's IEP from the prior district until the district conducts an evaluation (if determined necessary) and develops, adopts, and implements a new IEP (if appropriate). 34 CFR 300.323(f).

The definition of FAPE specifically references the provision of special education and related services as provided in conformity with an IEP. 34 CFR § 300.17. The Ninth Circuit in *Van Dyun v. Baker School District*, 502 F.3d 811, 47 IDELR 182, *amended* (9th Cir. 2007), adopted the materiality standard for failure to implement an IEP. "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Van Dyun* 502 F.3d at 823. Therefore, if a material failure to implement is found, it may be considered a denial of FAPE. Minor variations in the implementation of the IEP does not automatically mean that the student was denied FAPE. See *T.M. v. District of Columbia*, 75 F.Supp. 3d 233, 64 IDELR 197 (D.D.C. 2014). 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*, 2010 WL 1049297, 370 F. App. 202, 55 IDELR 61 (2nd Cir. 2010).

The District implemented Student's Wyoming IEP until November 17, 2021, when Parent approved the IEP dated September 9, 2021. After that date, the online School implemented the September 9, 2021, IEP. The special education services and other supports were provided to Student while attending the online School. Student had a Chromebook and internet access to join the online classes. The School provided Student with individualized in-home training on how to log on to online classes. Numerous strategies including periodic reminder calls, a weekly agenda, opportunities for daily meetings with teachers, math class recordings and technology shortcuts to ease access and to allow late participation in class were implemented to increase Student's engagement. Still, Student had limited participation and engagement in special education services. The online School continued to meet with Parent and try other strategies to encourage Student's engagement with online classes. Although Student had limited participation in the special education services provided in Student's IEP, that was because of Student's lack of engagement in the online programming and not because of a failure to implement the IEP.

Therefore, the District did not fail to implement the IEP, and the District is not in violation of the IDEA.

ISSUE 3: Did the District deny Student a free appropriate public education (FAPE) because Student’s IEP team did not determine Student’s least restrictive environment (LRE)?

Students who are eligible for special education services are entitled to a free appropriate public education (FAPE). 34 C.F.R. § 300.101. Districts are obligated to provide a FAPE to students within their jurisdiction who have been determined eligible for special education services. ARM 10.16.3122(1). The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was “reasonably calculated to allow the child to make progress appropriate in light of the child’s circumstances.” *Andrew F.* 69 IDELR 174, 137 S. Ct. 988, 999-1002 (2017). The Court in *J.L. v. Mercer Island School District*, 592 F.3d 938, 953, 55 IDELR 164 (9th Cir. 2010), held that a procedural violation may be a denial of FAPE when it resulted in the loss of an educational opportunity, infringed on parents' opportunity to participate in the development of the IEP, or deprived the student of an educational benefit. A failure to provide behavioral and other supports that does not allow the student to receive educational benefit may be a denial of FAPE. *Dear Colleague Letter* (OSEP August 1, 2016).

The IDEA’s LRE provision requires that:

1. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
2. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

34 CFR 300.114 (a).

The continuum of alternative placements to be considered to meet the needs of children with disabilities range from a regular classroom to more restrictive placements that can include residential placements, depending on the individual needs of the child. 34 C.F.R. § 300.115 (a). The U.S. Department of Education, Office of Special Education and Rehabilitative Services issued a *Return to School Roadmap: Development and Implementation of Individualized Education Program in the Least Restrictive Environment under the Individuals with Disabilities Education Act* (September 30, 2021). The Department, in addressing LRE

stated, “Prior to the COVID-19 pandemic, for schools that did not offer virtual instruction to all children, special education and related services provided virtually in the child’s home was generally considered one of the most restrictive environments, as it typically provided little or no opportunity for the child to be educated with nondisabled peers. Virtual learning provided during the pandemic may be deemed less restrictive if it is available to all children and provides the child with a disability, meaningful opportunities to be educated and interact with nondisabled peers in the regular education environment. (Question G-3, Page 39). Additionally, in addressing whether a local education agency (LEA) must provide virtual instruction upon a parent’s request, the Department provided, “If virtual instruction is available to all students in an LEA, the LEA must ensure that a child with a disability whose needs can be met through virtual learning has an IEP implemented that provides all the services and supports necessary for the child to receive FAPE through such service delivery.” (Question G-2, Page 38).

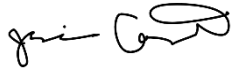
Student’s IEP provided for special education services to address needs in math, reading, social/emotional/behavioral, and speech and written expression. Student’s special education services were provided online. Student also had repeated opportunities to participate with peers at in person learning sessions that were outdoors and did not require masks. Student frequently participated in those in person opportunities with peers. However, while Student attended the online School, Student participated in only seven sessions (two special education and five speech) of special education services. The services were offered and available, but Student did not log on to these services. Repeated attempts were made by School staff to increase Student’s engagement and participation in online classes. Although the strategies were not successful, the Student had repeated opportunities to access special education services.

Student’s LRE did not change when the Parent registered Student in the online School; the location of services changed. Student’s placement continued to be general education with pull out for special education services. The services discussed at the September 9, 2021, IEP meeting, were the same services Student received at the online School. The only change was how the services were provided. The online School met Student’s LRE. See 34 CFR 300. 114 (a)(2). The online School for Student was not the choice of the IEP team. It was a decision made by the Parent, considering what was in the family’s interests. The IEP was properly implemented and was reasonably calculated to allow Student to make progress in light of Student’s circumstances. Student was provided with opportunities to participate in the online program, but Student’s lack of engagement was not a denial of FAPE. There was no evidence of procedural violations that would rise to the level of a denial of FAPE.

Therefore, the District did not deny Student a FAPE.

E. Disposition

The District did not violate IDEA or implementing Montana law; therefore, no corrective action by the District is required. There is no right to appeal of this Final Report. ARM 10.16.3662(13).



Jessie Counts
Senior Manager Student Support Services

- c: Mandi Gibbs, Dispute Resolution/EAP Director (via File Transfer only)
- John Gorton, School Improvement/Compliance Unit Manger (via File Transfer only)
- *** School District Attorneys (via File Transfer only)