

September 9, 2022

Sent via US Mail and SMFTS

Parents

Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: AMENDMENT TO FINAL REPORT for In the Matter of *, 2022-05, 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. *** and *** (Complainants) filed the Complaint on behalf of their ***, *** (Student), a student who was in the fifth grade at *** School in the *** School District (District). The Complainants allege the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq. The District allegedly:

1. Failed to conduct an initial evaluation pursuant to the requirements of IDEA;
2. Failed to conduct an evaluation report team meeting and make an eligibility determination pursuant to the requirements of the IDEA; and
3. Violated the IDEA by determining that the Student was not eligible for special education and related services.

A. Procedural History

1. On June 13, 2022, the Montana Office of Public Instruction (OPI) received the signed Complaint. The Complaint was deemed filed on June 13, 2022.
2. Since that time, the OPI's Early Assistance Program (EAP) has attempted to resolve the issues in the Complaint.
3. On July 1, 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.

4. The Complainants were provided with options for submitting additional documents in support of the Complaint. The Complainants did not submit additional documents.
5. The District's written response was received on July 8, 2022.
6. An investigator was appointed to investigate the Complaint.
7. The investigator conducted interviews with the (Complainants), special education director, principal, two school psychologists involved in the assessment of the student, speech language pathologist, classroom teacher, supervisor and provider of private mental health services through the Comprehensive School Community Treatment (CSCT), an agency that worked with the student and District.

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, June 13, 2021, to June 13, 2022, are included strictly for background information.

C. Findings of Fact

Background

1. Complainants have standing to file this Complaint pursuant to ARM 10.16.3661.
2. Student was in the fifth grade at the time the Complaint was filed and attended an elementary school in the District.
3. Student had been previously diagnosed with anxiety, depression and attention deficit hyperactivity disorder (ADHD) and takes medication for ADHD.
4. Student was not previously eligible for special education services.
5. Student has received general education intervention services and supports from the District for an extended period of time, including involvement in a social skills group with the school counselor and classroom supports.

Facts Pertaining to Identification, Evaluation and Eligibility for Special Education Services

6. Student has had some minor behavior issues within the classroom this year that did not rise to the level of an office referral.

7. All incidents were effectively addressed by the classroom teacher without further repetition of inappropriate behavior.
8. Teacher spent a significant amount of time working with the Student to process the events to prevent future incidents.
9. Student, throughout the 2021-2022 school year, made extensive progress on managing and dealing with issues at school including social interactions with peers; Student needs to continue to work on those areas.
10. Many of the Student's classmates have been struggling with social interactions because of the school closures due to COVID-19 and the lack of regular contact with peers.
11. Complainants contacted the school on February 3, 2022, and requested a comprehensive evaluation be completed on the Student to determine if the Student was special education eligible.
12. On February 9, 2022, the Complainants signed consent for evaluation and the District provided the Complainants with prior written notice (PWN).
13. The evaluation was to include assessments in academic achievement, communication, classroom observations, classroom-based assessment, psychological, social/emotional and autism.
14. All evaluations were completed within the 60-day timeline.
15. The Evaluation Report did not include an assessment summary or other documentation for observations completed within the 60-day timeline.
16. Approximately a week before the meeting, the District contacted the Student's mother and briefly outlined the results of the evaluation and stated that it was unlikely that the Student would qualify for special education services, but no decision had been made; that would be the decision of the evaluation team.
17. At the start of the meeting, the evaluation report forms had been filled out with the Student's results but no final decisions were made regarding eligibility until after the second evaluation report meeting.
18. The April 11, 2022, evaluation report team meeting ("first evaluation report team meeting") was scheduled for one hour during the school day. At the end of the first hour, the classroom teacher left the meeting, with the Complainants' verbal consent to return to the classroom, because there was no one to supervise the class. The teacher was present for the majority of the meeting and shared input before departing from the meeting.
19. The District asked the Complainants if the Student's classroom teacher could leave the meeting early or did the Complainants want to schedule another IEP meeting.
20. The Complainants verbally agreed to continue the meeting and allowed the Student's classroom teacher to return to her classroom.
21. The speech language pathologist was not present at the first evaluation report team meeting. Complainants were aware that the speech language pathologist could not attend the initial IEP meeting because of other commitments and an offer was made to reschedule the meeting when the speech language pathologist was available. Complainants agreed verbally that the meeting could continue without the speech language pathologist's

presence. The results of the testing were shared at the meeting and the speech language pathologist was available if Complainants had any questions about the testing.

22. During the first evaluation report team meeting, the District staff described the results from all of the assessments, including speech and language; Complainants were provided with a copy of the evaluation report.
23. Complainants indicated that the Student had expressed some suicidal ideation and self-harm at home.
24. Student was then referred for assistance by the school to the Comprehensive School Community Treatment (CSCT) program, a private agency that works with the District to provide mental health and other services to children and adults in the area.
25. After completing the intake process with CSCT, the Student was determined to qualify for CSCT services.
26. CSCT has two programs for school age children; one is for students who are struggling in the school environment and the other is Home Support Services (HSS), which is designed for students who have more issues in their home environment.
27. It was determined that the HSS program was a better fit for the Student, because the issues and concerns were primarily home based. Student received HSS services until the end of the school year and then discontinued services.
28. At the end of first evaluation report team meeting, the evaluation report team decided to not make an eligibility determination regarding the Student but to hold a follow up meeting with middle school staff and determine eligibility after additional assessments were completed.
29. Complainants signed a 30-day extension of evaluation on April 19, 2022, to obtain additional information to better determine the Student's educational needs. The extension states, "Additional tests are being proposed for attention (time on-task observations), autism (ADOS-2) and academic skills (CTOPP-2, KeyMath3)."
30. The April 19, 2022, extension extended the timeline for completion of the assessments and the evaluation report team meeting to May 16, 2022.
31. The additional assessments were completed within the 30-day extension.
32. In the interim, the Student had more minor behavior incidents involving other students at recess that sometimes spilled over into the classroom.
33. One incident occurred in physical education and the Student spent half a day in the principal's office.
34. This behavior was not repeated and there were no additional office referrals.
35. Because of scheduling conflicts with team members, the second evaluation report team meeting was scheduled for June 3, 2022.
36. The second evaluation report team meeting was also scheduled for one hour.
37. At the second evaluation report team meeting, the two school psychologists, speech language pathologist and other team members went over the additional assessments and answered questions.

38. At the second evaluation team meeting, with the Complainants' verbal permission, the classroom teacher came late to the meeting, a middle school teacher, middle school principal, the speech language pathologist, and one of the Complainants had to leave after the first hour of the meeting. The District offered to reschedule another meeting; however, the Complainants verbally agreed to continue the meeting without the presence of those team members.
39. There was no written excusal of team members at the first or second evaluation report team meeting.
40. The team did not complete eligibility checklists in all suspected areas of disability or document the eligibility criteria within the evaluation report.
41. There was agreement among the evaluation report team members that the Student met the criteria for other health impairment, an IDEA disability. There was disagreement among the team members about whether, because of that disability, the Student needed specialized instruction to receive educational benefit in the general education curriculum.
42. Complainants asserted that because of the Student's disability, the Student needed specialized instruction to receive educational benefit. The other team members concluded there was no evidence the Student needed specialized instruction.
43. Student was at or above grade level in all subject areas. Student was completing challenging math work, and though the Student sometimes struggled with the work, the Student was completing the work successfully.
44. Student's social skills were being addressed through a social skills work group with other regular education students; Student had shown enormous growth the last year in social skills, focus and self-regulation and with additional maturation and continued support, it was expected that the Student would show increased skills in those areas.
45. MAP testing indicated minimal growth the last year, in part, because the Student rushed through the assessment. Student's classroom performance and grades in all academic areas showed growth and learning of new skills.
46. The results of the MAP testing were showing minimal growth for many students due, in part, to the virtual learning required because of the COVID-19 pandemic.
47. Although the Student presented some negative behaviors at school, these behaviors were not impacting learning, and these behaviors would continue to be monitored by District staff.
48. District staff did not believe additional regular education interventions or supports were warranted beyond those services that the Student had been receiving in the classroom and social skills group, in addition to the HSS services the Student was receiving from the outside agency. Student did not need specialized instruction to receive educational benefit.
49. Student's social skills and interactions with peers at times could be challenging but maturation, growth and self-reflection this past year had shown improvement in those areas.
50. Middle school staff were present at the second evaluation report team meeting to discuss Student's program at the middle school.

51. The middle school staff provided input about what supports were available at the middle school in addition to those that Student had received. Those regular education supports could continue in middle school.
52. The PWN attached to the June 3, 2022, evaluation report provides, that Student could continue to receive general education intervention services next year and could be on a 504 Plan for supports and additional accommodations, as needed.
53. The PWN attached to the June 3, 2022, evaluation report, indicates that the team considered finding the student eligible for special education services as a student with Autism, Speech Language Impairment and Emotional Disturbance but felt that the category of OHI better captures the Student's disability related challenges.
54. Since the Student was transitioning to middle school next year, the District recommended a point person for the Student to check in with daily, a referral to the middle school counselor, and monthly meetings to review how the Student was doing and if additional regular education services or supports were needed.
55. The school psychologist explained to Complainants that Child Find was an ongoing affirmative obligation that required the District to continue to monitor the Student, and if the need for special education services was suspected, the District would seek consent to evaluate and determine, at that time, if student was eligible for special education.
56. Complainants objected to the Student's special education ineligibility in a letter dated June 6, 2022, outlining their reasons why they believe the District erred and that Student was eligible for special education services.
57. Complainants were seeking accountability because of promises made by the District that were not met. They were seeking special education services in math and reading, but the services were to be provided in the general education classroom.
58. Complainants were informed by the District of their right to request an independent educational evaluation (IEE) but did not do so because they do not dispute the results of the assessments conducted by the District; they believe the Student should have been determined eligible because there was educational impact.
59. Complainants were not opposed to a 504 Plan for the Student, but that process did not have the same accountability as IDEA.
60. During summer break, the Student has been receiving private counseling services and Applied Behavioral Analysis (ABA) therapy.
61. On July 13, 2022, the Complainants contacted the school and agreed to share the results and recommendations from the Student's ABA therapy.

D. Analysis and Conclusions

Issue 1: Did the District fail to conduct an initial evaluation pursuant to the requirements of IDEA?

The parent or the district can initiate a request for an initial evaluation to determine if a student is a child with a disability, as defined in IDEA, and by reason thereof, needs special education

and related services. 34 CFR § 300.301 and ARM 10.16.3320. Once the request is made, the district develops an evaluation plan outlining the assessments that will be given to determine eligibility for special education services. Parents must provide written consent on the evaluation plan for the comprehensive evaluation in all areas related to the suspected disability and must be provided a copy of procedural safeguards. 34 CFR § 300.300(a), 34 CFR § 300.504, and ARM 10.16.3321. Following receipt of parental consent for the initial evaluation, the district has 60 calendar days to complete the assessments outlined in the evaluation plan. 34 CFR § 300.301. A variety of assessments in all areas related to the suspected disability should be used in assessing student for the purpose of determining special education eligibility. 34 CFR § 300.304.

Here, the Complainants signed an evaluation plan on February 9, 2022, consenting to the initial evaluation. The initial evaluation of the Student assessed the Student in a number of areas including: academic achievement, behavioral, psychological, social emotional, behavioral, and autism. Student's suspected areas of disability included: autism, other health impairment, emotional disturbance and speech language impairment. All of the assessments were completed before April 10, 2022, within the required 60-day time frame. However, the evaluation report did not include documentation of observations that were completed within the 60-day time frame as required.

During the first evaluation report team meeting, after a lengthy discussion about the assessment results and other information about the Student's performance at school, the evaluation team determined that there were still questions about educational needs and the Student's eligibility. The District and Complainants agreed to a 30-day extension for additional assessments. The additional assessments were related to the areas of attention, autism and academic skills. The deadline for the additional assessments was May 16, 2022. The District timely completed the follow up assessments which were shared with Complainants at the second evaluation report team meeting. The evaluation report was updated and included documentation of observations.

The evaluation report did not include documentation of observations that were completed within the 60-day timeframe as required. Not doing so was in violation of 34 CFR § 300.301. However, because the parties agreed to extend the timeframe for additional assessments, and documentation of observations were included in the evaluation report at the second evaluation report meeting, prior to making an eligibility determination, the violation was remedied. No further action is required of the District.

Issue 2. Did the District fail to conduct an evaluation report team meeting and make an eligibility determination pursuant to the requirements of the IDEA?

Following completion of the initial assessments, an evaluation report team meeting is scheduled, with appropriate notice, to review the assessments results and determine eligibility for a student. 34 CFR § 300.306; 34 CFR § 300.322. Although there is a delineated timeline for completion of the assessments, there is no corresponding deadline for the evaluation report

meeting except that it must occur within a reasonable time. *Questions and Answers on Individualized Education Programs (IEPs), Evaluations and Reevaluations (OSERS, Revised June 2010)*; 34 CFR § 300.301(b); 71 Fed. Reg. 46635-46637 (Aug. 14, 2006).

The evaluation report team must include the parents, a regular education teacher, a special education teacher, administrator or designee, at the discretion of the parent or local education agency other individuals who have knowledge or special expertise regarding the child, including relevant related service providers and someone who can interpret instructional implications of educational results. 34 CFR § 300.306(a); ARM 10.16.3321. For an initial evaluation, additional evaluation report team members are required when a child is being evaluated in the following specified categories of disability:

- (a) emotional disturbance, traumatic brain injury, specific learning disability, or cognitive delay requires a school psychologist;
- (b) speech-language impairment, deaf/blindness, traumatic brain injury requires a speech-language pathologist;
- (c) autism requires a school psychologist and speech-language pathologist; and
- (d) deafness or hearing impairment requires a speech-language pathologist or audiologist;
- (e) specific learning disability requires a school psychologist, speech-language pathologist or a remedial reading teacher, each of whom is qualified to conduct individual diagnostic examinations of students

ARM 10.16.3221(6); 34 CFR § 300.308(b).

The IDEA allows for excusal of an IEP team member if certain conditions are met. 34 CFR § 300.321(e)(2). However, there is not a procedure for excusal of an evaluation report team member in the IDEA or Montana implementing law. Inherent in the evaluation report team meeting process is that the interpretation of the assessments and discussion regarding eligibility requires the team members to engage together to go through the process of determining if a child is eligible for special education. This is not something that can be accomplished by giving input to parents on individual assessments prior to a meeting. The OPI's *Special Education in Montana Guide* specifically prohibits the use of an IEP excusal form for evaluation report team meetings. *Special Education in Montana Guide*, page 113. (<https://opi.mt.gov/Portals/182/Page%20Files/Special%20Education/Guides/OneguideFINAL.pdf?ver=2021-12-14-114456-867>).

Eligibility for special education services is a two-part test. 34 CFR § 300.8. First, a student must have an IDEA recognized disability meeting the criteria in one or more of the disability categories set out in ARM 10.16.3010 through 10.16.3022. The second step is that the evaluation team must determine and document that a student needs special education because of that disability. 34 CFR § 300.8. *See also*, ARM 10.16.3007; ARM 10.16.3008. During the first step, the evaluation report team is to draft an evaluation report that includes the information necessary to address the criteria for suspected disabilities. ARM 10.16.3321(2). The

OPI's electronic forms for districts include criteria checklists that identify the criteria for each disability category and can aid the evaluation report team in this process. Although use of the checklists is not required, the required information must be included in the evaluation report.

The first evaluation report team meeting for Student was held on April 11, 2022, the sixty-first day after consent for the initial evaluation was received. A brief summary of the results were shared with the Complainants before the evaluation report team meeting. The speech language pathologist was unable to attend the meeting, and the Complainants provided verbal consent to her excusal. The results were shared with the Complainants who were provided an opportunity to ask the speech language pathologist any questions about those assessments. The evaluation report meeting was scheduled for one hour. After the hour, the classroom teacher requested to leave the meeting since there was no supervision for her students. The District offered to reschedule the meeting, but the Complainants agreed verbally that the classroom teacher could leave early and the meeting continue.

At the conclusion of the first evaluation report meeting, it was determined that there were additional concerns regarding the Student's educational needs and further evaluations were warranted. Student's eligibility was not determined at the conclusion of the April 11, 2022, meeting. An extension was signed by the Complainants providing until May 16, 2022, for completion of the additional assessments.

Due to scheduling conflicts with team members, the second evaluation report team meeting was held on June 3, 2022. After the meeting extended past the one hour scheduled for the meeting, the District requested permission from the Complainants to excuse the teacher, speech language pathologist, middle school teacher and principal or to reschedule the meeting. The Complainants verbally agreed to excusal and wanted to continue the meeting past the one-hour mark. Since the determination to be made in an evaluation report team meeting concerns the potential eligibility of a student, it is mandatory that all required members of the evaluation report team be present for the entire meeting, or if they must leave, the meeting should be rescheduled. In this case, one of the suspected disability categories was autism which requires the attendance of the speech language pathologist. The speech language pathologist was not present at the first meeting and left early at the second evaluation report team meeting. Additionally, other required team members left the second meeting after the first hour.

Undocumented verbal excusal of required evaluation report team members is insufficient and is in violation of the IDEA.

During the second evaluation report team meeting, it was determined that the Student met the criteria for other health impairment, an IDEA recognized disability pursuant to ARM 10.16.3018, because of Student's ADHD, anxiety and depression. However, the Student was found ineligible for special education because the District believed there was insufficient evidence that that Student, because of the Student's other health impairment, needed special education. The Student's evaluation report included assessments in all the suspected areas of disability; however, the team did not document the specific criteria for each suspected category of disability in the evaluation report or attach the criteria checklists. The prior written notice

attached to the evaluation report merely indicated that the team considered the disability categories of autism, speech language impairment, other health impairment, and emotional disturbance but felt that the category of other health impairment best captured the Student's disability-related challenges. The evaluation report team should have gone through the criteria for each suspected disability the Student was assessed for to determine if student would have been found eligible in those disability categories as required by ARM 10.16.3321(2).

Therefore, the District is in violation for not conducting the evaluation report team meeting and eligibility determination in accordance with the requirements of IDEA.

Issue 3: Did the District violate IDEA by determining that the Student was not eligible for special education and related services?

As set out in Issue 2 above, the second prong of the eligibility test for special education is that the student's disability must *adversely affect the student's educational performance* such that the student needs *special education*. (*emphasis added*), 34 CFR § 300.8; ARM 10.16.3007(2). Adversely affect the student's educational performance means, "that there is evidence that measures of student performance (e.g. achievement tests, grades, behavioral or developmental assessments, classroom based assessment, observations, progress monitoring, or criterion-referenced tests etc.) indicated a pattern of educational, developmental or functional attainment or achievement below the student's age or grade level based on state approved K-12 content standards that can wholly or in part be attributed to the disabling condition." ARM 10.16.3008(1). Special education is specially designed instruction, at no cost to the parents, to meet the unique needs of the child. 34 CFR § 300.39(a). Specially designed instruction is adapting as appropriate to the needs of an IDEA eligible child, the content, methodology, or delivery of instruction to address their unique needs that result from their disability and ensure access to the general curriculum so that the child can meet educational standards within the jurisdiction that apply to all children. 34 CFR § 300.39(b)(3).

Children who can benefit from regular education with accommodations or modifications or additional supports are not receiving specialized instruction but are receiving assistance in the general education curriculum. *C.M. ex rel. Jodi M. v. Dep't of Educ., State of Hawaii*, 476 F.App'x 674 (9th Cir. 2012) (*unpublished*). Students can receive accommodations and modifications to the general education curriculum, even 1-1 support or counseling, and that does not rise to the level of specialized instruction that a special education student needs to benefit from regular education. A special education student requires specialized instruction because of the disability and cannot benefit from the regular education curriculum without that specialized instruction. *D.A. v. Meridian Joint Sch. Dist. No. 2.*, 618 Fed. Appx. 891 (9th Cir. 2015) (*unpublished*). See also, *Legus v. Capistrano Unified Sch. Dist.*, 2021 WL 4843714 (9th Cir. 2015) (*unpublished*). In determining eligibility under the second prong, evaluation teams must consider progress in both academic and nonacademic areas. *L.J. by and through Hudson v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017.); *D.A. v. Meridian Joint Sch. Dist. No. 2.*, 618 Fed. Appx. 891

(9th Cir. 2015) (*unpublished*). Schools can provide a variety of supports and services to students that are not specialized instruction. *L.J. by and through Hudson v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017)

Everyone on the evaluation report team agreed the Student met the criteria for other health impairment. The disagreement was whether the Student's disability adversely affected the student's educational performance such that the Student needed specialized instruction. Complainants had the option to pursue an IEE but believed the results of the assessments were accurate. They disputed the educational impact component of the eligibility analysis.

It was significant that the Student was performing at or above grade level in all academic areas. There were some behavior concerns, but they were not significantly impacting the Student's ability to function within the school. Student had difficulty focusing because of the ADHD, but the supports in the classroom and maturation had shown improvement in that area. There were ongoing regular education intervention supports that could continue in middle school and the Student was involved in the HSS program. The team considered both academic and nonacademic progress with the Student. Student had been involved in a social skills group for a period of time and the teacher noted that many students were struggling with social skills due, in part, to COVID-19 and that the Student had made great strides this past school year in social and other non-academic skills.

Student may not have been making the amount of progress that Complainants expected, but that did not mean the Student needed specialized instruction to make progress in the regular education curriculum. The evaluation report team concluded that the regular education supports that were in place, along with the HSS services, would allow the Student to be successful without specialized instruction. The evaluation report team proposed additional monthly meetings next school year, a referral to the counselor and a point person for check in daily to ensure the Student was being successful. If additional regular education supports were needed, they could be implemented or another referral for an initial could be pursued, according to the evaluation report team.

Complainants asserted that the Student had been receiving specialized instruction all along and without that, would not receive educational benefit. They argued there was an educational impact that required specialized instruction. The supports the Student received were available to all students, not just special education students. The other members of the team agreed that the Student needed continued regular education supports, such as a continuation of the accommodations the Student had been receiving but that was not specialized instruction. Student was eligible for a 504 Plan because of the Student's other health impairment disability and could receive accommodations through that plan. The team considered the appropriate factors in determining the Student was ineligible for special education services.

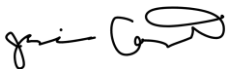
Therefore, the District did not violate the IDEA when it determined the Student's disability (other health impairment) did not adversely affect the Student's educational performance such that the student needs special education.

E. Disposition

There is evidence in the record that Part B of IDEA was not followed. Corrective actions by the District are required. There is no right to appeal of this Final Report. ARM 10.16.3662(13).

F. Corrective Action Plan

- The District shall reconvene the required members of the evaluation report team by September 15, 2022, and consider whether the Student is eligible for special education under the remaining categories of suspected disability: autism (ARM 10.16.3011), speech language impairment (ARM 10.16.3020) and emotional disturbance (ARM 10.16.3015). The evaluation team's findings on the criteria for each disability category shall be documented in the evaluation report or by using the criteria checklists and attaching those to the evaluation report.
- Within 5 days of the completion of the evaluation report team meeting, the District shall provide a copy of the evaluation report to Mandi Gibbs, OPI's Early Assistance Program Director.



Jessie Counts
Senior Manager Student Support Services

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