



December 19, 2022

Sent via US Mail and/or SMFTS

Parents

District

RE: **FINAL REPORT** for In the Matter of ****, 2022-07

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. **** (Complainants) filed the Complaint on behalf of their son, **** (Student), a sixth grader in **** Public Schools (District). Parents 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 provide Student an opportunity to participate in cross county and other nonacademic activities in violation of 34 CFR 300.117.
2. Denied Student a free appropriate public education (FAPE) by failing to provide Student with an individualized education program (IEP) reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

Procedural History

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint filed by the Parent on October 11, 2022.

2. The Parent did not provide the District with a copy of the Complaint as required by ARM 10.16.3662(3).
3. The OPI Dispute Resolution Office issued a Notice of Filing Complaint on October 17, 2022 which included a copy of the Complaint for the District. Because the District had not been provided with a copy of the Complaint, to determine the filing date, the OPI Dispute Resolution Office added three days from the date the Complaint was mailed to the District, or October 20, 2022.
4. The Early Assistance Program (EAP) attempted to assist the parties in resolving the dispute without success. On November 2, 2022, the OPI Dispute Resolution Office requested the District's written response to the Complaint.
5. On November 4, 2022, OPI notified the parties that a complaint investigator had been appointed to conduct the complaint investigation.
6. The District submitted a written response to the issues in the Complaint on November 14, 2022.
7. The District submitted a supplemental response on November 15, 2022.
8. The Complainant submitted a rebuttal to the District's response on November 17, 2022.

Investigatory Process

The investigator reviewed the following records:

- The original letter of complaint and all supporting documentation;
- The District's original response and supplemental response to the Complaint;
- The Complainants' rebuttal to the District's response;
- The Student's special education records relevant to this investigation;
- The District's responses to written questions presented by the investigator; and
- Video clips of the Student provided by the Complainants.

The investigator interviewed the Complainants on two occasions and spoke with them on a third occasion. The Student was observed during a Zoom meeting with the Complainants.

The investigator interviewed the Student's current and previous special education teachers. Counsel was present for the interviews.

The investigator interviewed the Autism consultant retained by the District to work with and on behalf of the Student and other students.

The Complainants declined to permit an interview with the Student's private speech language pathologist.

OPI provided the Complainants and the District the opportunity to submit additional information for consideration during the complaint investigation.

Applicable Federal Regulations, State Statutes or Rules

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|--------------------|-----------------------------------|
| 34 C.F.R. §300.17 | Free Appropriate Public Education |
| 34 C.F.R. §300.101 | Free Appropriate Public Education |
| 34 C.F.R. §300.117 | Nonacademic Settings |

Relevant Time Period for Investigation

Pursuant to 34 C.F.R. § 300.153(c) and ARM 10.16.3662, OPI has the authority to investigate alleged violations of IDEA and Montana special education laws that occurred within one year prior to the date the complaint was filed. In accordance with this limitation, the investigation and any findings of noncompliance will be limited to the period of time commencing October 20, 2021, through October 20, 2022. Additional information beyond this timeframe was considered for the purpose of fully investigating the Complaint.

Findings of Fact

1. The Student attends seventh grade within the District and is eligible for services under the IDEA in the category of Multiple Disabilities with Autism, Speech-Language Impairment, and Other Health Impairments. The Student is primarily nonverbal and requires assistance throughout his day. *September 14, 2021 IEP.*
2. The Student’s sixth grade IEP dated September 14, 2021, remains in effect this school year. The Complainants and District have been unable to come to an agreement with respect to an IEP for the 2022-2023 school year. *November 14, 2022 District Response and November 17, 2022 Rebuttal.*
3. The Student transitioned into middle school at the start of the 2021-2022 school year. Relevant contents of the September 14, 2021 IEP include:
 - a. The Student was last reevaluated in September 2018.
 - b. Parents: The Student needs to learn to read, improve writing, and do simple math.
 - c. School: The Student continues to work at a level well below his peers as a result of his disability. He continues to require a 1:1 para at all times. PE is concerning because he does not interact with peers and does not understand team/group activities. The Student likes to be active.
 - d. Consideration of special factors documented that the Student has communication needs, but the Student does not require assistive technology devices or services.

- e. Each goal contained multiple short-term objectives. Measurable Annual Goals are reproduced below verbatim:
- i. Math – two goals:
 - 1. [Student] will improve his subtraction skills
 - 2. [Student] will improve his problem solving and addition skills.
 - ii. Occupational therapy – two goals:
 - 1. [Student] will independently complete various manual dexterity tasks to improve functional shoulder, arm, and hand control for greater success with fine motor tasks and classroom/home manipulatives as measured by observation and record taking.
 - 2. Provided verbal and visual cues, [Student] will tie his shoes in 3 of 4 sessions per therapist observation/data collection.
 - iii. Physical therapy – four goals:
 - 1. [Student] will perform a ten-second modified plank hold once per week for two consecutive weeks to demonstrate improvement in sustained core activation necessary for his school day.
 - 2. [Student] will be able to perform 10 jumping jacks once per week for two consecutive weeks to demonstrate improvement in coordination for keeping up with his peers in recess and PE.
 - 3. [Student] will be able to perform two sets of 50 trampoline jumps for two consecutive weeks, demonstrating improved activity tolerance.
 - 4. [Student] and his team members will plan and execute a program including activity and ankle weight use twice weekly to discourage bouts of unexpectedly running off during his school day.
 - iv. Reading – one goal:
 - 1. [Student] will improve his reading skills.
 - v. Self-Help/Independence – three goals:
 - 1. [Student] will reduce the amount of times he runs from the classroom by 50% (no more than 2 times). He will do this with 70% accuracy in 7/10 opportunities as measured by special education staff.
 - 2. [Student] will be able to successfully transition within subject area and between classrooms with 70% accuracy in 7/10 opportunities as measured by special education staff.

3. [Student] will independently advocate for himself in an appropriate manner i.e. sign language, verbal, etc. with 60% accuracy in 6/10 opportunities. This will be measured by special education staff and data tables.
- vi. Speech-Language – two goals:
 1. [Student] will improve his expressive and receptive skills to effectively communicate his wants and needs.
 2. [Student] will improve his social communication skills to effectively interact with others.
- vii. Written Expression – one goal:
 1. [Student] will improve his writing skills.
- f. Progress reports were to be provided quarterly to the parents.
- g. Supplementary Aids and Services included:
 - i. 1:1 para at all times including getting on and off the bus.
 - ii. Sensory diet, space and time set aside for movement and activities (headphones, running, sensory manipulatives, etc.).
 - iii. Frequent breaks throughout the day to allow for movement/energy release.
 - iv. Pre-teaching for any change in routine.
 - v. [Student] is participating in cross county and supervision must be present with him for safety reasons.
- h. Extended school year was necessary for the Student.
- i. The Complainants and the District agreed that an evaluation was unnecessary at that time.
- j. Prior Written Notice (PWN) included in the IEP indicated that occupational therapy (OT) services would be discontinued per occupational therapist recommendation. However, the IEP contained two OT goals.
- k. The Complainants signed approval of the IEP on September 14, 2021.
- l. The IEP contained the following notes:
 - i. Parents want [Student] to run cross country and they have agreed to be at practice with him until district can hire someone to run with him.
 - ii. Parents set the goal of having [Student] be active at least 20 minutes during his PE time. Parents want him in a title Math class eventually.
 - iii. Parents want him to learn how to tie his shoes.
 - iv. Parents want him to have a lock on his locker like his brother.

- v. Parents want para present at least 1x per week during his speech time.
 - vi. Parents want a private area for him to work, they stated that he can work better 1 on 1 but they do want him with his peers as much as possible.
 - vii. [Student] can have no milk or ice-cream due to severe lactose intolerance, but he can have cheese and butter.
 - viii. Parents do not want fidget toys of any kind.
 - ix. Parents want him to learn to type as well.
4. On September 16, 2021, the OPI Montana Autism Education Project (Project) visited the Student at school at the request of the Complainants and the District. A report was issued, detailing observations and recommendations. Salient points from the report include:
- a. The Student was cooperative with schoolwork and transitions.
 - b. The Student would benefit from the use of a 3-ring binder for organization, including an IEP at a glance, schedule, communication, social development and peer interactions, academic program, speech, OT, PT, and data collection.
 - c. It was highly recommended that school staff know the Student's receptive and expressive abilities in communication. The evaluator did not observe a focus on improving communication exchanges throughout his day.
 - d. It was highly recommended that communication be targeted and addressed throughout the school day.
 - e. Tell the Student what to do as opposed to what not to do.
 - f. Observed the para say, "Don't throw your marker." Assume behavior is communication.
 - g. The Student is 12 years old and working on first grade level academics. He has been in school more than six years, and he is on the first grade level, why? It may be instruction, or it may be ability.
 - h. An important piece of the Student's educational program is training the paraeducators to understand the concepts of teaching and learning. This takes time.
 - i. It was highly recommended that a variety of literacy activities be scheduled for the Student. The evaluator recommended the Edmark Reading Program Functional Words.
 - j. Create structure for the Student so he knows what he is going to do, how long it will take, how he knows when he is finished, and what he does next. This is the

Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) method.

- k. The Student had an adult with him most of the time, even just sitting across from him at his desk. He was constantly talked to or being told what to do. This can be hard on anyone. After a while, the Student may stop “listening.”
 - l. Visual supports are an accommodation in the environment. It can replace the need for an adult.
 - m. The Student needs time to process before he can respond.
 - n. Do not repeat a verbal cue over and over.
 - o. During lunch time, the para sat very close to the Student to supervise him. She prompted him constantly on eating and chewing. Please communicate among team members and work towards the most natural, typical lunch time, like eating with other kids.
 - p. The Student’s mother requested that he be in the general education classroom for social studies and science. Be clear with the purpose of including him in these classes. Know the purpose.
5. The Complainants requested that the District consult with an Autism Consultant. *December 3, 2022 Interview*. The District contracted with the requested independent Autism Consultant to “consult on [Students] IEP services and to help develop a program that would allow him to make progress in light of his circumstances.” *District’s November 14, 2022 Response*. According to the Autism Consultant, she observed the Student for one half day and continues to consult with his team. *December 13, 2022 Interview*.
6. The District produced a series of handwritten staff notes commencing September 17, 2021, through December 17, 2021, containing brief descriptions of the activities in which the Student was involved. (The District provided no handwritten progress notes from December 18, 2021, to March 22, 2022.) *District Response, Exhibit 2*. Examples of the majority of entries included:
- a. September 17, 2021: We did 2 laps on the track and tossed a ball in the gym.
 - b. September 22, 2021: We reviewed our first eight sight words and did a couple of worksheet (sic). And was our focused on word today.
 - c. September 23, 2021: We did worksheets in the teachers (sic) lounge and did sight words on the iPad.
 - d. October 11, 2021: Worked on a project.
 - e. November 30, 2021: Worked on a map for India – in progress still.
 - f. December 1, 2021: We finished our notes for chapter 3 about self-esteem.

7. In December 2021, the District began using a Daily School to Home Communication Sheet, which included information on a form template about communication skills, OP/PT notes, math, Edmark reading, writing, and staff comments. The special education teacher typically signed the forms. The final form provided for this investigation was dated September 6, 2022. *District Response, Exhibit 2.*
8. The IEP team met on February 24, 2022, and amended the Student's September 14, 2021 IEP. The IEP team notes are summarized in relevant part below:
 - a. "Amending some IEP goals".
 - b. Complainants questioned why the Student was getting straight As, yet no work was coming home to prove learning.
 - c. "Amend IEP that there is an agreed upon need for an evaluation report at this time."
 - d. IEP would be amended to reflect the supplemental aid and service to provide a para for agreed upon extra-curricular activities that include cross country, track, and golf.
 - e. Complainants wished to amend math goals to include counting money, telling time, and seasons throughout the year.
 - f. Complainants requested quarterly progress meetings and team agreed.
9. The Complainants signed consent for the IEP amendments on March 15, 2022.
10. The Complainants were concerned that the Student was not being sufficiently challenged in school. *December 3, 2022 Interview.* In the spring of 2022, the Complainants started providing private tutoring for the Student with a Masters-level teacher and speech-language therapy with a private speech language pathologist. The Complainants report that the Student made more progress in the private sessions than in the previous years of school. The Complainants signed a release of information permitting the District to exchange information with the private speech language pathologist. The private teacher's reports were shared through the Complainants, but no direct contact with the private tutor was permitted, and the tutor's identity is not known to the District.
11. At the request of the Complainants, the District proposed a reevaluation using the Evaluation Plan, Notice of Intent to conduct an Evaluation or Reevaluation and Permission for Evaluation or Reevaluation form. The District sought consent to conduct assessments in academic achievement, classroom-based assessment, communication, observations, and physical. There is no indication in the Evaluation Plan or in the IEP Notes that the team considered or proposed an Assistive Technology assessment. The Complainant added a handwritten note to the form that an Assistive Technology assessment was not needed. The Complainant

signed consent on March 15, 2022. No Prior Written Notice accompanied this proposal to evaluate. *District Response, Exhibit. 7.*

12. The District reported on the outcome of all testing in a May 10, 2022 Evaluation Report.

Salient points are summarized below:

- a. After reviewing the data collected it is clear that [Student] requires replacement curriculum at this time to focus on developing reading, writing, and math skills. He does best with hands-on learning such as manipulatives and pictures. Frequent review of material is helpful even with skills that he has mastered. He would benefit from more work on language development of various forms in order to increase his ability to advocate for himself.
 - b. Results of the speech and language assessment completed in May of 2022, as well as current speech and language therapy data, reveal that [Student] would benefit from activities targeting vocabulary development of nouns, verbs, and attributes. He would also benefit from one-on-one articulation therapy to improve the clarity of his speech. In the general education classroom, he would benefit from working in an environment that supports a total communication approach (verbal, sign, visuals/pictures, AAC (Proloquo2go)) which guides him to initiate communication through requesting, commenting, asking/answering questions, etc.
 - c. [Student] would benefit from instruction on how to cut his food independently. OT goals that focus on Activities of Daily Living would be best as well as continuing with PT services. Encouraging more peer interactions would also be good for [Student] to further encourage his language development.
 - d. Recommendations included the Student receiving all of the services that he has previously received.
 - e. May 10, 2022 Evaluation Report notes documented that the Complainant wanted to wait until the beginning of the 2022- 2023 school year to write a new IEP. District staff suggested that the Evaluation Report be tabled until outside evaluation, hearing test, and summer programming are complete.
 - f. The team agreed that the current IEP does not address all of [Student's] needs. [Student] needs a comprehensive IEP.
 - g. Participants signed the Evaluation Report on September 27, 2022.
13. On September 1, 2022, the Student's IEP team convened for the purpose of drafting a new annual IEP. The contents of the proposed IEP are summarized below: (*District Response, Exhibit 10.*)

- a. The Student benefits from replacement curriculum and instruction in the resource room.
- b. In Consideration of Special Factors, the team documented that the Student has communication needs and requires an assistive technology device or service.
- c. The Student's communication skills are significantly below the level of his same-age peers as he is not independently initiating communication verbally or with his AAC device.
- d. Each goal contained multiple short-term objectives. Measurable Annual Goals are reproduced below verbatim:
 - i. Communication – one goal:
 - 1. [Student] will increase his level of independent communication.
 - ii. Math – four goals:
 - 1. [Student] will become familiar with clocks and telling time.
 - 2. [Student] will improve his money counting skills.
 - 3. [Student] will improve his 1:1 correspondence. Once this is mastered addition and subtraction will be introduced.
 - 4. [Student] will increase his understanding of “fewer” and “most.”
 - iii. Occupational therapy – one goal:
 - 1. [Student] will identify and access appropriate tools to complete requested tasks.
 - iv. Physical therapy – two goals:
 - 1. [Student] will improve his core strength.
 - 2. [Student] will improve his coordination.
 - v. Reading – one goal:
 - 1. [Student] will improve his reading skills.
 - vi. Self-Help/Independence – two goals:
 - 1. [Student] will increase his level of independence throughout the day.
 - 2. [Student] will improve his phone skills.
 - vii. Social/Emotional/Behavioral – two goals:
 - 1. [Student] will demonstrate appropriate behavior during instructional time.
 - 2. [Student] will show understanding of emotions.
 - viii. Speech-Language – 3 goals:

1. [Student] will improve his speech articulation skills.
 2. [Student] will improve his receptive vocabulary skills.
 3. [Student] will improve his expressive vocabulary skills.
- ix. Written expression – one goal:
1. [Student] will develop his writing skills.
- e. The IEP contained an extensive list of Supplementary Aids and Services for the Student, reproduced verbatim:
- i. Services provided – Absences excused when he tutor (sic) appointments or private therapy
 Start Date - 09/28/2022
 Location - Middle School Office
 Duration-As Needed for the duration of this IEP
 - ii. Services provided - Extended Time (General Education - Science, PE, Music)
 Start Date - 09/28/2022
 Location - Resource Room and General Education Classroom
 Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher
 - iii. Services provided - Visual aids ([Student] works best with visual representations of material such as pictures/2-3D models)
 (General Education- Science, PE, Music)
 Start Date - 09/28/2022
 Location - Resource Room and General Education Classroom
 Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher
 - iv. Services provided - Help getting on and off the bus (para will assist)
 Start Date - 09/28/2022
 Location - Bus loop
 Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher
 - v. Services provided - Sensory diet, space and time set aside for movement and activities (noise canceling headphones, running, sensory manipulation etc.)
 Start Date- 09/28/2022

Location - Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher

- vi. Services provided - Frequent breaks throughout the day to allow for energy release
Start Date - 09/28/2022

Location- Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher

- vii. Services provided – [Student] participates in extracurricular activities and district assigned supervision must be present for safety

Start Date - 09/28/2022

Location - Extracurricular

Duration - As Needed for the duration of this IEP as determined by Special Education Teacher

- viii. Services provided – [Student] will have the ability to buy items from the school store when it is open.

Start Date - 09/28/2022

Location-School Store

Duration - As Needed for the duration of this IEP as determined by Special Education Teacher

- ix. Services provided - Multi-step instructions broken down and given one at a time

Start Date - 09/28/2022

Location - Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher

- x. Services provided - Option for Pass/fail grading in General ed classes

Start Date - 09/28/2022

Location - General Education Classroom

Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher

- xi. Services provided - 1:1 Para for supervision and safety during school hours (General Education - Science, PE, Music)

Start Date - 09/28/2022

Location - Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher

- xii. Services provided - AAC Device

Start Date - 09/28/2022

Location - All academic and non-academic environments throughout his entire school day

Duration - As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher

- xiii. Services provided - Visual Schedule

Start Date - 09/28/2022

Location - Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by Special Education Teacher

- xiv. Services provided - Picture representation for preferred items such as snack, bathroom, water

Start Date - 09/28/2022

Location - Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by Special Education Teacher

- xv. Services provided - Quiet structured work area (General Education - Science, PE, Music)

Start Date - 09/28/2022

Location - Resource Room and General Education Classroom

Duration - As Needed for the duration of this IEP as determined by Special Education Teacher

14. The Complainants were unwilling to sign consent to implement the September 1, 2022 IEP, until the conclusion of this state complaint investigation. *December 3, 2022 Interview*. The Complainants expressed significant concerns with the language in the Supplementary Aids and Services area that gives the general education teachers and/or the special education teachers total discretion over the provision of a service rather than basing the service on the Student's educational needs.

15. The District attached an IEP amendment page to the September 1, 2022 proposed IEP. The District documented 11 IEP amendments with no start dates, no Prior Written Notice, and no parental consent. District Response, *Exhibit 10*. Examples of the amendments included,
- a. "Update with more details."
 - b. "Amendment is needed in order to revise and add information to all IEP parts."
 - c. "Update for new meeting."
16. When asked about the purpose, timing, and consent for these IEP amendments, the District indicated that the amendments were documented in error. The District acknowledged that the Complainants had not yet been informed of the error, as the District only communicates with the Complainants in meetings or via certified mail.
17. The District issued the following Progress Reports during the period of time relevant to this investigation, describing the Student's progress toward IEP goals.
- a. November 1, 2021 Progress Report: Progress toward IEP goals and significant discrepancies between the September 2021 IEP and the Progress Report are described below: (*District Response, Exhibit 3.*)
 - i. Math: The Progress Report contained a completely different Present Levels of Academic Achievement and Functional Performance than what is in the most recent IEP. The Progress Report contained a single goal for math that is entirely different than the most recent IEP. No progress is reported on the second math goal contained in the September 2021 IEP.
 - ii. Reading: The Progress Report contained a completely different Present Levels of Academic Achievement and Functional Performance as compared to the most recent IEP in September 2021. The Progress Report included a goal for reading that is entirely different than the most recent IEP.
 - iii. Self-Help/Independence: The Progress Report contained a completely different Present Levels of Academic Achievement and Functional Performance than that of the September 2021 IEP. It included three goals, none of which were in the September 2021 IEP.
 - iv. Speech-Language: The Progress Report contained a substantially different Present Levels of Academic Achievement and Functional Performance as compared to the September 2021 IEP. The Progress Report contained two annual goals, one of which was the same as the September 2021 IEP, and the other goal was substantially different from the September 2021 IEP.

- v. Written Expression: The Progress Report contained a completely different Present Levels of Academic Achievement and Functional Performance than the most recent IEP. The measurable goal in the Progress Report was also not in the September 2021 IEP.
 - vi. Occupational Therapy: The Progress Report combined the Occupational Therapy Present Levels of Academic Achievement and Functional Performance within the Related Service area of Self-Help/Independence. The goals also appear to be combined in the same section. It does not align with the September 2021 IEP.
 - vii. Physical Therapy is the only area of the September 2021 IEP for which progress was reported on the same goals in the November 2021 Progress Report. Although the Present Levels of Academic Achievement and Functional Performance in the Progress Report is not aligned with the September IEP, the goals were the same.
 - viii. The November 1, 2021 Progress Report documented that the Student met 6 out of 12 goals.
- b. As part of this investigation, the District was asked about the discrepancy between the November 1, 2021 Progress Report and the September 2021 IEP. The District indicated that progress was reported on the 2020 IEP in error as opposed to the then current 2021 IEP. *December 12, 2022 email correspondence.*
- c. January 14, 2022 Progress Report: Progress toward IEP goals in the September 2021 IEP and the Progress Report are described below: *(District Response, Exhibit 4.)*
- i. Math: The goals align with the September 2021 IEP. The Student was expected to meet both goals.
 - ii. Occupational therapy: The goals align with the September 2021 IEP. The Student was expected to meet both goals.
 - iii. Physical Therapy: The goals align with the September 2021 IEP. The Student was expected to meet two goals and met the other two goals.
 - iv. Reading: The goal aligns with the September 2021 IEP. The Student was expected to meet this goal.
 - v. Self-Help/Independence: The goal aligns with the September 2021 IEP. The Student was expected to meet all three goals.

- vi. Speech-Language: The goals align with the September 2021 IEP. The Student was expected to meet both goals.
 - vii. Written Expression: The goal aligns with the September 2021 IEP. The Student was expected to meet the goal.
 - viii. In summary, the Student met two goals and was expected to meet the other 13 goals by the end of the IEP.
- d. March 15, 2022 Progress Report: Progress toward IEP goals in the September 2021 IEP and the Progress Report are described below: *(District Response, Exhibit 5.)*
- i. Math: The goals align with the September 2021 IEP. The Student was expected to meet both goals.
 - ii. Occupational therapy: The goals align with the September 2021 IEP. The Student met both goals.
 - iii. Physical Therapy: The goals align with the September 2021 IEP. The Student was expected to meet two goals and met the other two goals.
 - iv. Reading: The goal aligns with the September 2021 IEP. The Student was expected to meet this goal.
 - v. Self-Help/Independence: The goal aligns with the September 2021 IEP. The Student was expected to meet all three goals.
 - vi. Speech-Language: The goals align with the September 2021 IEP. The Student was expected to meet both goals.
 - vii. Written Expression: The goal aligns with the September 2021 IEP. The Student was expected to meet the goal.
 - viii. In summary, the Student met four goals and was expected to meet the remaining 11 goals by the end of the year.
- e. May 20, 2022 Progress Report: Progress toward IEP goals in the September 2021 IEP as amended on March 15, 2022, and the Progress Report are described below: *(District Response, Exhibit 6.)*
- i. Math: The goals align with both the September 2021 IEP and the March 15, 2022 IEP amendment, which added two additional goals. The Student was expected to meet all four goals.
 - ii. Occupational therapy: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet the goals.

- iii. Physical Therapy: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet two goals and met the other two goals.
 - iv. Reading: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet the goal.
 - v. Self-Help/Independence: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student met two goals and was expected to meet the third goal.
 - vi. Speech Language: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet all three goals.
 - vii. Written Expression: The goal aligns with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet the goal.
 - viii. In summary, the Student met 6 of the 18 goals.
- f. November 11, 2022 Progress Report: Progress toward IEP goals and significant discrepancies between the September 2021 IEP and the Progress Report are described below: (*District Response, Exhibit 17.*)
- i. Math: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet all four goals.
 - ii. Occupational Therapy: The goals align with the September 2021 IEP as amended on March 15, 2022. Both goals were met.
 - iii. Physical Therapy: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet three of the goals. The fourth goal addressing use of ankle weights to “discourage bouts of unexpectedly running off during the school day” had not yet been started because the Student was no longer eloping from staff. However, the previous Progress Report in May 2022 indicated that the Student had already met two of these goals.
 - iv. Reading: The goal aligns with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet the goal.
 - v. Self-Help/Independence: The goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet two goals and met a third goal. However, the previous Progress Report in May 2022 indicated that the Student had already met two of these goals.

- vi. Speech-Language: Two of the goals align with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet all three goals.
- vii. Written Expression: The single goal aligned with the September 2021 IEP as amended on March 15, 2022. The Student was expected to meet the goal.
- viii. In summary, the Student met three goals, was expected to meet 14 other goals, and one goal was not started.

18. The District reported that the Complainants also received daily progress reports and all data collected on the Student's performance on a regular basis. *December 12, 2022 Interview.*

19. Throughout this investigation, Complainants expressed concern about the lack of opportunity for the Student to participate in cross country, as he enjoys running.

20. With respect to the paraprofessional to assist the Student in cross country, the District indicated that it had posted the cross-country paraprofessional position on multiple occasions. The following is a list of the dates and locations of the posting as provided by the District: *(District Response, Exhibit 9)*

21-23 History of Posting for XC Para

July 9, 2021 to **Current**: MS SPED Para Posting on OPI

June 2, 2022 Extracurricular Posting to All Staff 9:24 AM

August 7, 2022 to **Current**: MS SPED Para Posting and XC Para on Thrillshare/Live Feed/Facebook.

August 17, 2022 to **Current**: MS SPED Para and XC Para Posting on OPI

August 29, 2022 MS SPED XC Para posting around the building.

Aug 31, 2022 Extracurricular Posting List to All Staff. 7:52 AM

Sept 2, 2022 to **Current**: MS SPED Para Posting and XC Para on Frontline

Sept 6, 2022 Extracurricular Posting List to All Staff. 11:20 AM

Sept 7, 2022 to **Current**: MS SPED Para Posting and XC Para on Thrillshare/Live Feed/Facebook.

Sept 20, 2022 MS XC Para (SPED) Posted to class of 2023, 2024 at 3:52 PM

Sept 21, 2022 Extracurricular Posting List to All Staff. 11:20 AM

Oct 3, 2022 MS XC Para (SPED) Posted to class of 2023, 2024, 2025 at 12:52 PM

Oct 13, 2022 Extracurricular Posting List to All Staff. 8:34 AM

Oct 17, 2022 Extracurricular Posting List to All Staff. 2:20 PM

21. The Complainants also expressed concern about the District's refusal to allow the Student to participate in Friday school, described by the Complainants as additional educational time for students who are not working at grade level, which the Student was unable to do. Complainants requested that the Student be able to attend Friday school, but were told no. *December 3 and 10, 2022 Interviews.*
22. During an interview with school staff, the special education teacher and case manager indicated that Friday school was only available to students who are failing classes. When asked by the complaint investigator whether students who were not at grade level could attend Friday school, the answer was "no," stating Friday school was only for failing students. *December 12, 2022 Staff Interview.*
23. Upon request, the District provided a copy of the District's Friday School Day for Students Plan. The Plan stated, in relevant part:
- Required Attendance Determination
[District] has determined that students in grades 5-12 are at risk of failure or considered non proficient if their current grade is 59% or below in any content areas/classes. For students who are at-risk for failure or who are considered non proficient, Friday will be considered a required day of school. Therefore, it will be counted as an attendance day.
24. The Complainants expressed a great deal of concern and frustration that the Student received the majority of his education from paraprofessionals who lack the training to work with a primarily nonverbal student with Autism.
25. The Student's schedule as provided by the District indicated that the Student receives instruction from a special education teacher for approximately 60-90 minutes per day. The remainder of the day, the Student engaged with paraprofessionals or other service providers for speech, OT, or PT.
26. The District indicated that the special education teacher is present during all instruction by the paraprofessionals, but is assigned to work with other students as well. The District also indicated that although the paraprofessionals have not received two years of higher education, they have received formal training from the Autism Consultant. *December 12, 2022 Interview.*
27. As part of this investigation, the District's Autism Consultant was also interviewed regarding the Student's needs and progress throughout the 2021-2022 and the beginning of the 2022-2023 school year. *December 13, 2022 Interview.* Salient points are summarized below.
- a. The consultant observed the Student for one half day.

- b. The consultant provided two half days of training to the paraprofessionals. Not all paraprofessionals attended both sessions. It is more likely that each paraprofessional received one-half day of training.
- c. The paraprofessionals working with the Student do not have a universal skill set for teaching. They need more training.
- d. Within the first 30 seconds of working with the Student, it was clear that communication was a primary educational need.
- e. The Student understands much more communication than he can produce.
- f. An assistive technology evaluation as part of a comprehensive reevaluation would have been helpful to find ways for the Student to produce communication, determine whether the Student needs a functional versus academic curriculum, and also determine his least restrictive environment.
- g. The District team and the private tutors see the Student's educational needs and potential similarly. Having observed videos of the tutoring sessions, the private tutor appears more confident in working with the Student, which makes the District look weaker. This is not because the District and tutors have a markedly different approach or understanding of the Student's needs.
- h. The IEP proposed (but not yet signed) for the 2022-2023 school year is more aligned with the Student's educational needs than last year's IEP.

Conclusions

1. The overarching purpose of the IDEA is to ensure that students with a disability have FAPE available to them, including special education and related services that meet the unique needs of individual students. 34 C.F.R. § 300.1.
2. The FAPE standard was set by the hallmark United States Supreme Court decision in the *Rowley* case. The Court held that an IEP must provide a "basic floor of opportunity." Determining the "contours of an appropriate education must be decided on a case by case basis." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 102 S.Ct. 3034, 553 IDELR 656 (1982).
3. The *Rowley* Court established a two-part test to decide whether FAPE was provided:
 - a. Has the state (i.e., public agency) complied with the procedures set forth in the IDEA?

- b. Is the IEP developed through IDEA's procedures reasonably calculated to enable the child to receive educational benefit?
4. The Supreme Court clarified the FAPE standard in the *Endrew F.* case. The Court made it clear that "[t]o meet its substantive obligations under the IDEA, a school must offer an IEP reasonably calculated to enable the child to make progress appropriate in light of the child circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 69 IDELR 174 (2017).
5. Under the IDEA, the primary vehicle for providing FAPE is through an appropriately developed IEP that is based on the individual needs of the child. *Dear Colleague Letter*, 115 LRP 53903 (OSERS 2015).
6. The content of a child's IEP is determined through the comprehensive evaluation/reevaluation process. *34 C.F.R. §§ 300.304(b), 300.303, and 300.305(a)(2)(B)*.
7. The IDEA defines evaluation to mean the procedures used to determine whether a child has a disability and the nature and extent of the child's needs for special education and related services. *34 C.F.R. § 300.15*.
8. An evaluation under the IDEA serves two purposes: identifying students who need specialized instruction and related services because of an IDEA-eligible disability and helping IEP teams identify the special education and related services a student requires. *71 Federal Register 46548*.
9. A reevaluation must be conducted once every three years subject to limited exceptions and meet the requirements for comprehensive evaluations contained in 34 C.F.R. §§ 300.304 through 300.306. *34 C.F.R. § 300.303(a)*. Pursuant to 34 C.F.R. § 300.305(a)(2)(i)(B), in a reevaluation, the district must examine whether a child continues to have such a disability and the educational needs of the child. A reevaluation at least once every three years provides an IEP team the opportunity to understand a student's current educational needs for IEP planning purposes.
10. It is possible for a school and parent to agree that a reevaluation is unnecessary. *34 C.F.R. § 300.303(b)(2)*. "In determining whether a reevaluation is needed, the parent and the public agency must consider the child's educational needs. . ." *71 Federal Register 46640*. The District and Complainants originally agreed that no reevaluation was needed. The IEP Notes did not contain any information to explain why no reevaluation was needed or how the decision was reached.

11. The District has a continuing responsibility to propose and request parental consent for a reevaluation if it determined that the child's special education needs warrant a reevaluation. *71 Federal Register 46641.*
12. With respect to the Student, there were many reasons to conduct a comprehensive reevaluation in addition to the fact that his three year reevaluation was due in the fall of 2021. The Student had just transitioned to middle school where the staff were unfamiliar with his current educational needs, the Student was functioning educationally at a first grade level, the Student had limited means to communicate, and his assistive technology needs were not known. According to the Autism consultant, finding a way for the Student to express communication was a paramount concern. A comprehensive reevaluation, including Assistive Technology, would have helped the team determine the Students assistive technology needs, the contents of the Student's IEP, and assisted with team decisions regarding whether the Student's education would focus on a functional curriculum. The need for a reevaluation was more evident when you consider the fact that a short time later in February 2022, the Complainants requested a reevaluation and the District agreed that a reevaluation was necessary. Also, an important consideration, the Student did not meet his Speech-Language communication goals as anticipated in the over one year period of time the 2021 IEP was in effect.
13. The District's failure to propose a three year reevaluation at the time it was due and seek the Complainants' consent in September 2021 represents a substantive violation of the District's duty under the IDEA that continued until the present, as the Student has not yet received an Assistive Technology evaluation to address the Student's need to develop expressive communication skills, which was a primary concern of the Autism Consultant. In this case, the information that could have been obtained through a comprehensive reevaluation was critical to development of an appropriate IEP and likely contributed to the growing tension between Complainants and school staff. Without current information on the Student's Assistive Technology needs and his capacity to develop expressive communication skills, the September 2021 IEP was not reasonably calculated to result in educational benefit in light of the Student's unique circumstances.
14. In developing the IEP, parents are part of the IEP team and have a right to meaningful input. *34 C.F.R. § 300.321.* However, parent input does not mean "acquiesce." "[T]he IDEA does not require districts simply to accede to parents' demands without considering any suitable alternatives." *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 31 IDELR 132 (8th Cir. 1999).

15. Regarding the September 2021 IEP, once consent was obtained to implement the IEP, the District has an obligation to provide all IEP services in conformity with the IEP. *34 C.F.R. § 300.17(d)*. Further, the Student has the right to participate with nondisabled peers to the maximum extent appropriate pursuant *34 C.F.R. § 300.117*. Specifically, the September 2021 IEP stated that the Student would participate in cross country with District supervision at all times. The District indicated that it was unable to hire a paraprofessional to provide the required supervision. The Student was not able to participate in cross country, resulting in services not being provided in conformity with the IEP. Although the District provided a list of its efforts to hire a paraprofessional, staff shortages do not serve as justification to disregard an IEP service. Even for positions that are difficult for a district to fill, a district is not free to waive qualifications or forgo providing an IEP service. *S.S. v. Bellflower Unified Sch. Dist.*, 2021 WL 4805277, 79 IDELR 201 (C.D. Cal. 2021) and *Memorandum to State Directors of Special Education*, 81 IDELR 287 (OSEP 2022). The failure to provide the Student with the opportunity to participate in an extracurricular activity included in his IEP represents a procedural violation of IDEA. The District must ensure that services are provided in conformity with the IEP.
16. If the IEP team cannot reach consensus as was the situation with the September 2022 IEP, the school district must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program. *34 C.F.R. § 300.503(a)*. *Letter to Richards*, 55 IDELR 107 (OSEP 2010). In other words, the District must propose FAPE based on the unique needs of the Student after reasonable attempts to reach consensus have failed. In this case, the Complainants and the District did not always agree on what the Student needed in order to receive FAPE. After careful consideration of the Complainants' input, the District had an obligation to propose FAPE, even if that looked different than Complainants' requests.
17. The Complainants have the right to refuse consent. *ARM 10.16.3505*. Although the Complainants retain the power of consent, the District has an ongoing obligation to provide FAPE. In this case, the District proposed a new annual IEP in the fall of 2022, incorporating information from the reevaluation that occurred in March 2022. The Complainants filed this Complaint soon after the District's proposal and expressed their intent to wait until the outcome of the complaint investigation before determining whether to offer their consent for the new IEP. There is no violation of the Student's right to FAPE in this situation. It was reasonable for the District to continue to implement the 2021 IEP as amended in March 2022, in the interim.

18. According to the Complainants, one of the main points of disagreement with the proposed September 2022 IEP was the discretion to determine when/if supplementary aids and services would be provided to the Student by the language that stated: "As Needed for the duration of this IEP as determined by General Education Teachers & Special Education Teacher."
19. This level of discretion is not consistent with the requirements for the mandated contents of an IEP. The IDEA requires that supplementary aids and services be documented with specificity, including the projected date for beginning the services, and the anticipated frequency, location, and duration of those services. *34 C.F.R. § 300.320(a)(7)*. Providing teachers with the discretion to determine whether the Student would receive any of those supplementary aids and services is contrary to the IDEA. The District must amend its IEP proposal in this respect.
20. An IEP must be reviewed periodically. *34 C.F.R. § 300.324*. Each IEP for the Student indicated that progress would be reported on a quarterly basis. The District provided quarterly progress reports, but at least one of those reports was based on the wrong IEP. The District acknowledged its error. This procedural error does not rise to the level of a denial of FAPE, especially in light of the fact that a daily communication note was provided to Complainants.
21. Regarding the Complainants' concerns about Friday school and the District's exclusion of the Student, the District's Friday School Plan does not limit the opportunity to failing students only but includes students in grades 5-12 that are at-risk of failure or considered nonproficient. The Student has the right to participate in extracurricular and nonacademic activities consistent with *34 C.F.R. § 300.117*. It is critical for the IEP team to determine if the Student can benefit from this service, keeping in mind the obligation to provide supplementary aids and services if Friday school is determined appropriate for the Student.

Decision

1. Whether the District failed to provide Student an opportunity to participate in cross country and other nonacademic activities in violation of *34 C.F.R. § 300.117*.

OPI finds the District in violation. Participating in cross country and other nonacademic activities was included in the Student's IEP. Therefore, the District was obligated to provide an opportunity for the Student to participate.

2. Whether the District denied Student a free appropriate public education (FAPE) by failing to provide Student with an individualized education program (IEP) reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.


OPI finds the District in violation. The Student's 2021 IEP was not based on current evaluative data and did not address all areas of educational need. The District lacked a clear understanding of the Student's communication needs and how to meet those educational needs.

Corrective Action

1. The District shall provide all special education teachers, case managers, and administrators with 3 hours of training on the IEP process under IDEA, specifically focusing on comprehensive evaluations, IEP development, progress reporting, IEP review, and revision. The District shall comply with the following conditions:
 - a. The training shall be conducted by an independent professional with expertise in IDEA compliance and IEPs. The name and credentials of the trainer shall be provided to the OPI EAP Director by January 30, 2023.
 - b. The training shall be completed by March 15, 2023.
 - c. The District shall submit evidence of completion, including sign-in sheets with the name of all participants, date(s) of training, and copies of all training material to the OPI EAP Director by April 1, 2023.
2. The District shall provide an Assistive Technology evaluation for the Student consistent with the following:
 - a. The District shall propose the Assistive Technology evaluation using the evaluation plan form and provide the Complainants with the name and credentials of the evaluator(s) in writing and seek the Complainants' consent within 15 days of the date of this Final Report. The District shall allow Complainants 15 days to provide consent to the evaluation plan.
 - b. If the Complainants decline to consent to the evaluation, the District shall not be obligated to provide one at this point in time, and the District shall provide a copy of the evaluation plan and additional documentation to the OPI EAP Director to satisfy compliance with this corrective action. The Complainants' declination does not alleviate the District of its future obligation to comprehensively evaluate the Student as needed.
 - c. If consent is obtained, the District must ensure that the Assistive Technology evaluation is completed within 30 days. The evaluation report team shall convene within 15 days of when the evaluation is complete. The District shall provide a copy

of the evaluation report to the parent and submit a copy to the OPI EAP Director within 5 days of the evaluation report team meeting.

- d. Within 15 days of the evaluation report team meeting, the District must reconvene the IEP team to review the results and revise the IEP if determined appropriate by the IEP team. Evidence of a properly convened IEP team meeting and any proposed changes shall be submitted to the OPI EAP Director within 5 days of the IEP meeting.
3. The District shall reconvene the Student's IEP team within 15 days of the date of this Final Report for the purpose of revising the language in the Supplementary Aids and Services section of the IEP to reflect a duration of service that is based on Student need rather than staff discretion.
 - a. Evidence of a properly convened IEP team meeting and proposed changes shall be submitted to the OPI EAP Director within 30 days of the date of this Final Report.
 - b. If the Complainants decline consent, the District is relieved of this obligation at this point in time. The Complainants' declination does not alleviate the District of its future obligation to specify the duration of service in IEPs based on a student's educational need rather than staff discretion.
 4. The District shall provide the necessary supervision and support consistent with the Student's IEP to permit participation in extracurricular activities in his IEP like cross country, track, golf, or other sports. If needed, the District shall reassign a current district employee to provide the supervision until a dedicated staff person can be retained. Evidence of coverage for this position shall be submitted to the OPI EAP Director by March 1, 2022. The IEP team is encouraged to make decisions regarding the Student's extracurricular activities based on educational and functional needs.



JP Williams
State Director of Special Education

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