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OFFICE OF PUBLIC INSTRUCTION
STATE OF MONTANA

Putting Montana Students First **A+**



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THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of [REDACTED], 2023-02

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. [REDACTED] (Parents) filed the Complaint on behalf of [REDACTED] (Student), a seventh grader at [REDACTED] (School) in the [REDACTED] (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 C.F.R. Part 300 and ARM 10.16.3007 et seq. The District allegedly denied Student a Free Appropriate Public Education (FAPE) by:

Issue 1. Failing to provide the Student opportunities to use a standing frame during the summer of 2022 extended school year (ESY) services; and

Issue 2. Failing to provide student school nursing services during the summer of 2022 ESY services.

Procedural History

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint filed by the Parents on March 20, 2023.
2. The OPI Dispute Resolution Office issued a Notice of Filing Complaint on March 21, 2023, to the District and Parents.
3. The Early Assistance Program (EAP) attempted to assist the parties in resolving the dispute without success. However, the EAP determined that any attempt to mutually resolve the matters alleged in the Complaint would be futile.
4. On March 22, 2023, the OPI Dispute Resolution Office issued a Request for District Response requesting the District prepare and submit its response within 10 calendar days, notifying the parties that a complaint investigator had been appointed to conduct the complaint investigation and requesting the District provide requested documents along with its response as a part of the investigation.
5. On April 3, 2023, the District submitted a written response to the issues in the Complaint. The District did not provide the requested documentation. On April 7, 2023, the complaint investigator notified the District-- through the District's Legal Counsel-- that OPI did not receive the requested documentation.
6. On April 10, 2023, the District submitted the requested documentation.
7. On April 13, 2023, the Parent submitted additional information.

Investigatory Process

The investigator reviewed the following records:

- The Complaint and all supporting documentation;
- The District's Response and all supporting documentation;
- Additional materials provided by the District;
- Additional materials provided by the Parents; and
- The Student's special education records relevant to this investigation.

The complaint investigator interviewed the Parents on April 24, 2023. On April 25, 2023, the complaint investigator interviewed District personnel, including the District Nurse, District Physical Therapist, two Special Education Teachers, and the Student Services Director. The OPI provided the Parents and the District the opportunity to submit additional information for consideration during the complaint investigation.

Applicable Federal Regulations, State Statutes or Rules:

34 C.F.R. § 300.323 When IEPs Must Be in Effect

34 C.F.R. § 300.106	Extended School Year Services
34 C.F.R. § 300.17	FAPE
ARM 10.16.3324	Extended School Year Services

Relevant Time Period for Investigation

Pursuant to 34 C.F.R. § 300.153(c) and ARM 10.16.3662, the 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 March 20, 2022, through March 20, 2023. Additional information beyond this timeframe was considered for the purpose of fully investigating the Complaint.

Findings of Fact

Background

1. The Student was found eligible for special education services under the categories of Multiple Disabilities, Cognitive Delay, Visual Impairment, and Orthopedic Impairment. The Student was 11 years old and attending seventh grade in a District middle school at the time the Complaint was filed. *March 25, 2022 IEP.*
2. The District was not able to hire a physical therapist or a nurse during summer of 2021 ESY services. Student did not receive nursing or physical therapy (PT) services during the summer of 2021 ESY services. The District acknowledged this was a denial of Student’s FAPE. *Email, June 22, 2021.* Student was provided compensatory services by adding 20 minutes a week of direct service in physical therapy throughout the 2021-2022 school year and provided student with two additional hours of ESY services each day during summer of 2022 ESY services. *March 25, 2022 IEP.*

March 25, 2022 IEP

3. “[Student] is unable to verbalize [their] strengths and interests but it is clear to those around [them] that [Student] loves music and to socialize with peers and staff... If [Student] has had enough or is ready for something else, [they] will let you know with a frown or sad face. [Student] is very active and loves to be on the ground moving around. [They] will kick [their] legs, roll from side to side, and sit up and rock for long periods of time.” *March 25, 2022 IEP.*
4. The Parents’ concerns included, in part: "COVID has been difficult as [Student's] interactions were cut down on so many levels especially being in a closed room with [their] class over the

years. [Student] also, lost a lot of gains because [Student] was unable to access and benefit from in person education. It shows this in [Student's] progress reports of not meeting previous years' goals... [Student] has not progressed as usual because [Student] was unable to access FAPE and services for several months including ESY, which are all written in [Student's] IEP... The concern of not having the services for ESY again based on a staff shortage, is a huge concern for us as this is not best for [Student's] individual needs as in standing or [their] overall care." *March 25, 2022 IEP.*

5. School Staff concerns included: "[Student] requires a modified curriculum in a specialized classroom adapted to meet [their] physical and educational needs. [Student] has educational needs in the areas of communication, self-help and independence, sensory/motor and cognition. [Student] is non-verbal and is currently working on incorporating a switch to greet peers and staff throughout the day. [Student] also uses a switch to activate sensory items independently, such as a vibrating pillow and light up fans." *March 25, 2022 IEP.*
6. The IEP team convened on March 25, 2022, to develop Student's annual IEP. Relevant portions consisted of the following:
 - a. Student's special education services were in the areas of communication, self-help/independence, social/emotional/behavioral, and sensory-motor. Each of these services were to be provided for 510 minutes per week in a special education setting. IEP goals included four goals for communication, three goals for self-help/independence skills, four goals for sensory-motor skills, two goals for social/emotional/behavior skills. All of these goal areas, except self-help/independence, were addressed during the 2022 ESY program.
 - b. The related services documented in the March 25, 2022 IEP were all to be provided from March 26, 2022, to February 15, 2023, in a special education setting and included:
 - i. School health/nursing services, 520 minutes per week;
 - ii. Transportation, 1 minute per week;
 - iii. Orientation and mobility, 30 minutes per week;
 - iv. Other (included transfers, toileting, escort to and from bus and classrooms, transfers in and out of equipment, feeding, dressing, grooming), 2000 minutes per week;
 - v. Occupational therapy, 20 minutes per week; and

- vi. Physical therapy, 20 minutes per week.
 - c. The supplementary aids and services that were documented in the March 25, 2022 IEP included:
 - i. Providing wait time for Student;
 - ii. Communicate what is happening around the Student;
 - iii. Adaptive positioning for sitting and/or standing;
 - iv. School-based physical therapist will provide staff education and training to support Student's adaptive positioning and transitions;
 - v. Visual supports;
 - vi. Nursing staff for G-tube; and
 - vii. Paraprofessionals for grooming, dressing, toileting, transfer, ambulation, and eating assistance.
 - d. The Student qualified for extended school year services (ESY) due to profound and significant disabilities. There were no additional details noted in the ESY section about what services would be provided during ESY.
- 7. Student also had an emergency health care plan which included Student specific emergency procedures for the Student's peanut allergy, G-tube dislodgement, and a seizure disorder. All of the emergency procedures required staff to implement a set of emergency and/or observational actions, and to contact the Nurse, if they were not present at the time.
Emergency Healthcare Plan, March 25, 2022.
- 8. The IEP team reconvened on April 5, 2022, and April 8, 2022, to continue developing Student's annual IEP. The April 8, 2022 IEP notes included information about the physical therapy services to be provided to the Student:
 - a. "[Student] receives the related service of school based physical therapy to support [Student's] adaptive positioning and transitions to allow for improved access to [Student's] school environment. [Student] utilizes a wheelchair that is propelled by an adult for [their] primary mobility around school environment. [Student] completes adaptive standing positioning for 40 minutes daily as able with recent attempts to increase [their] standing tolerance to 60 minutes as able as agreed upon by [Student's] family, staff, and PT. [Student] also utilizes adaptive sitting positioning and positioning on a mat on the floor for position changes and access to [Student] school activities

- with peers. [Student] is dependent on adults for [their] transitions and positioning and personal care needs, and staff continue to receive education and training regarding these needs.”
- b. “School based physical therapist is typically in [Student’s] classroom setting weekly to provide support to [Student] and staff regarding [Student’s] positioning and transition needs and is available by email or phone daily. Staff provides adaptive positioning and change of positions embedded throughout [Student’s] school day to support [their] access to the school environment to participate in activities with peers as well as support [Student’s] physical health.”
 - c. “It is recommended to the IEP team that school based physical therapy services are to continue to be provided through collaborative strategies including consultation, skilled observation, staff training/education, direct service specific to adaptive positioning and staff training for positioning and transitions, and cooperative sessions with related service providers for a minimum of 60 minutes per month. At least 50% of [Student’s] service minutes will be direct for management of [Student’s] adaptive positioning and transitions. School based physical therapist will also provide consultative services to staff before the end of the school year in preparation for ESY services.”
 - d. “In terms of [Student] sitting and standing, we need to build in times during [Student’s] day, where it would be a natural time for [Student] to be sitting versus standing alongside of [their] peers. We want to make it mirror what typically developing peers would have to the greatest extent we can.”
9. The Parents approved Student’s March 25, 2022 IEP on April 22, 2022, with the following exceptions: "We are signing with exceptions that if the modified communication log with all Related Services does not clarify and or is unclear of what service minutes are provided then we will need to reconvene to discuss other options. With the unknown of summer school and the previous denial of FAPE we are signing with exceptions until we know how ESY will be staffed accordingly to provide FAPE for [Student] covering regular hours as well as including compensatory and recovery services." *March 25, 2022 IEP.*

ESY 2022

10. On May 19, 2022, the Parent emailed the Special Education Director regarding physical therapy services during ESY: "...if [Student] has mostly consultative/collaborative and some direct services, why is it different for ESY? Can the new staff at [ESY] be trained before school gets out on positioning and equipment needs, as that is what we do throughout the

entire year??? If... [Student is] transported over there earlier, then why can that not be something we can work through?... Like I said in the meeting when we talked about ESY, [Student] will miss June 13-17 which is the first week and we can have some more time to work things out. I cannot see [Student] spending from 9-2 in just [their] chair, as that it not appropriate for [Student's] health and well-being."

The Special Education Director responded to the Parent: "At this time, I do not know who [Student's] teacher will be for ESY but I will let you know just as soon as I do. It is reasonable for the staff to be trained on [Student's] positioning and transitioning prior to the school year being done. I will have the staffing completed next week. I can attend a meeting to discuss this further as well." *Email, May 19, 2022.*

11. On June 1 and June 6, 2022, the Special Education Coordinator emailed the Parent that the Student's compensatory education services for 2021 ESY would end at 2 p.m. and the nursing services would end at noon: "...so we'll have to plan accordingly, as well as you needing to bring [Student's] lunch." *Emails, June 1 and June 6, 2022.*

On June 6, 2022, the Parent provided the District with a nutrition plan for the 2022 ESY summer program from the Student's medical provider. The physician's orders included scheduled procedures for the Student to receive a water bolus via syringe at 10 a.m. and 1:30 p.m. *Progress Note, June 6, 2022 and Email, June 6, 2022.*

On June 9, 2022, the Parent responded: "I meant the pt (*sic*) portion and [Student] being positioned in other chairs and [their] stander. As far as the nurse goes, [Student] needs a water feed at 1:30 depending what time [Student] eats lunch. I also always bring [their] food but they would feed [Student] correct? The nurse knows there is a sliding scale if [Student] does not finish [their] feed. Just want some clarity. Hope this makes sense." The Special Education Coordinator responded: "The PT situation is covered and equipment will be taken care of...That's all fine. The only issue is the nursing services that end at noon. [Student] can eat with the other students at noon. You will have to come at 1:30 for the water feed, or wait until [Student] gets home after 2."

The Parent replied: "Well i [*sic*] would like for [Student] to eat with everyone else. [Student] needs the water at 1:30 so that means eating at 12, however now you are saying for [their] services for ESY, that includes nursing, that they cannot support [Student] after 12. So, I am at a loss on what to do..." The Special Education Coordinator responded: "Because there is no nurse beyond noon, you more than likely will have to wait to water feed at home. We can adjust when we feed [Student] accordingly based on the need for [their] water feed. Also, the

PT, has already met with [Student's] teachers to go over [their] positioning needs, so I believe we are good to go on that front. If [Student] has to wait for a water feed at home, what time would you suggest we feed [Student]?" *Email, June 9, 2022.*

12. The Student "...can't have the water bolus too close to or too far away from the meal." The Special Education Director indicated that adjustments were made to ensure proper timing between lunch and providing the water bolus. *Special Education Director, Interview.* On June 24, 2022, the Parent raised concerns about the miscommunications about how services were to be provided, the lack of staff to implement the services, and that the compensatory education services being offered from the previous year's ESY program could not be implemented and therefore requested a one-to-one aide for Student. *Email, June 24, 2022.*
13. On June 27, 2022, the Special Education Director communicated with the Parent and clarified the issue with the stander: "The stander cannot be utilized without having a PT to adjust the stander. If I said otherwise, that was my mistake." *Email, June 27, 2022.*
14. On June 28, 2022, the District issued a Prior Written Notice (PWN) that detailed its refusal to provide a 1:1 aide for the 2022 ESY services. The PWN detailed the following:
 - a. "On June 24, 2022 the District received email correspondence from [Parent] outlining parental concerns related to the delivery of services for [Student] during Extended School Year. [Parent] requested that a 1:1 aide be "added to [Student's] IEP that has knowledge of [Student's] medical and educational needs for continuity and consistency of services for [Student] to be able to have full access to all of [Student's] IEP including ESY services." At this time, the District is unable to convene an IEP team meeting with all of the required members due to the end of the regular school year and employment contracts for staff.
 - b. Other options considered and the reasons these options were rejected included: "The District has hired staff for the 2022 Extended School Year. Based on the number of students registered to attend ESY, the District can provide 1:1 support for [Student] during ESY for all of [Student's] ESY services. The District does not have the authority to add a 1:1 aide for [Student] without the team determining if that level of support is necessary. Further, the District cannot hire additional staff for the ESY session. Staff who have voluntarily agreed to work during ESY are existing employees. Additional staff cannot be hired specifically for ESY based on the collective bargaining agreement."
 - c. Other factors relevant to the District's refusal to take action included: "[Parent]

contends that [Student] is not receiving a FAPE during ESY due to the limited availability of a school nurse during the day and [does] not have a physical therapist to provide PT services as outlined in the IEP. [Parent] has requested an update to the Health Plan and IEP based on the staffing for ESY. Due to all of the reasons listed above, the District will not update a Health Care Plan or the IEP based on circumstances specific to ESY. Further, [Parent] stated that the inability for [Student] to access [their] stander during ESY based on the unavailability of a PT is a denial of FAPE which will result in compensatory services being owed. It is the District's position that a FAPE is being provided for [Student] during ESY based on training and planning that coordinated services prior to the beginning of ESY. The District will assess whether or not [Student's] academic or functional progress was impacted by the inability to be placed in [their] stander for the duration (6 weeks) of ESY. At that time, the team can determine whether or not compensatory services are appropriate." *Prior Written Notice, June 28, 2022.*

15. Parents submitted two letters to the District dated July 7, 2022. One from Student's primary care pediatrician and another from a private physical therapist with recommendations for standing each day.
16. The Student's 2022 ESY services were provided from June 14, 2022, to July 28, 2022. The daily schedule included a morning routine, instruction on ESY goals, outside break, free time, sensory time, bus ride, lunch and social time, position change to mat or table, sometimes a nap, and end of day routine before leaving on the bus. The Student attended 19 out of 26 possible days of ESY services.

The 2022 ESY program was staffed with a special education teacher, a registered nurse, and three paraprofessionals. The Special Education Teacher was absent for five days and a substitute teacher was provided during each of these absences. *2022 ESY Program and Staff Schedules.*

17. On July 28, 2022, the District issued progress report for the 2022 ESY program that indicated some regression was noted by the speech language pathologist on three out of four of Student's communication goals that had been met in June, possibly due to new staff and new environment during ESY. *ESY Progress Report, July 28, 2022.*
18. Progress on measurable annual goals that include adaptive positioning was reported as follows:
 - a. In the Self/Help/Independence goal "[Student] did very well when responding to staff

and faculty during ESY when transitioning was occurring for [Student] to “sit up” for changing or [their] chair, to “we are position changing” for you. As staff you were able to distinguish the muscle change when he was ready to be moving positions at 45-50% of the time.” *ESY Progress Report, July 28, 2022.*

- b. In the Social/Emotional/Behavioral goal “During ESY [Student] enjoyed laying on his mat and listening to music during position changing at almost 70% of the time. Music time staff was always present as [Student] was extremely active. Classmates and peers would come over and join him in listening to a story from a chapter book.” *ESY Progress Report, July 28, 2022.*

19. The District’s physical therapist educated the ESY staff regarding Student’s position change needs and equipment use on June 2, 2022. During summer of 2022 ESY services, “...staff were provided a [H]oyer lift as needed to help with transfers, changing table and screens for privacy during personal hygiene, and mats for positioning in supported sitting or laying down. [Student] also used his personal wheelchair. A standing frame was not utilized by ESY staff as there was not a school based physical therapist available to monitor and make adjustments as needed for proper positioning in the standing frame. [Student] had opportunities for position changes and access to switches and other things to address ESY goals in these position options.” *Letter from District’s Physical Therapist, March 28, 2023.*
20. The District’s physical therapist agrees with the benefits of standing for Student, explaining “[a]s a physical therapist, I do not dispute the physiological benefits of standing for a child with a medical diagnosis such as [Student]. [Student] is provided with a standing frame in the school year to support his access to his educational environment such as his toothbrushing goal during this school year and to be standing when other students are standing in [Student’s] classroom. This activity also provides the physical benefits of standing as outlined in the letter by his community based physical therapist. ESY is a shortened day for part of the summer break from the school year and not all goals addressed during the school year are addressed during ESY.” *Letter from District’s Physical Therapist, March 28, 2023.*
21. The District’s Licensed Physical Therapist provided the reasons the standing frame was not utilized by the ESY staff: “...there was not a licensed physical therapist available to monitor and make adjustment as needed for proper positioning in the standing frame. There is a concern for safety of the student and liability on the prescribing physical therapist and the school district if there was improper positioning that led to possible injury to the student or staff during its use.” The standing equipment needed to be relocated to another location for the ESY services; when the Student started the ESY program, the District’s Physical Therapy

staff were off contract and not available to “assess that all movable parts of the equipment is in the proper position to provide support for proper alignment of the body of the student.”

Physical Therapist Statement, April 26, 2023.

22. The District Physical Therapist described the different movable components of a standing frame: “It has the foot rests that are adjustable, the knee pads, the lateral supports, the hip supports, the headrests, the harness—all of those parts are in, are movable parts that the staff, that during the school year, the staff were educated on how to make sure that they are in their correct position for proper alignment. But if any concerns arise, then a physical therapist is needed...part of our licensed training to ensure that a student is safe in the standing frame. And if there was no physical therapist available during the ESY time, then it was determined that it’s not safe for the student to have the standing frame.” According to the District Physical Therapist, the standing frame’s safety is determined by “the physical therapists in our department.” *District Physical Therapist Interview, April 25, 2023.*

23. The District’s Registered Nurse provided the reasons the administration of the water bolus via syringe was a health procedure that could not be delegated to non-licensed health professional within the schools. “...the District Registered Nurses are not a constant presence in the building to provide appropriate supervision for delegating tasks, nor do any school staff meet the qualification specified, nor are District RNs willing to accept the liability it puts upon their personal license.” The District’s Nursing Department indicated: “...nurses have a 30-minute window in complying with doctor’s orders, so having [Student] receive the water bolus once [Student] gets off the bus would be appropriate...would not recommend filling a student’s stomach with water and then putting [them] on a bus.” *District Position Statement on Delegation; Email, May 1, 2023.*

During interviews the District’s Registered Nurse clarified that nursing procedures- such as G-tube feeding- is not delegated in the District. Food, medicine, and water are all considered G-tube feeds. *District Registered Nurse Interview, April 24, 2023.*

24. A registered nurse was available and present until noon each day of the 2022 ESY program to conduct the needed healthcare procedures for the Student. *Medication/Treatment Administration Record.* The nursing service logs indicated that between June 16, 2022 and July 28, 2022, the registered nurse provided Student with services during the morning sessions of ESY. *Nursing Logs.*

25. From noon until 2 p.m., a registered nurse was on call to provide emergency services each day of the summer 2022 ESY Program. *Timesheet for ESY Employees.*

26. During interviews, the Parent noted that during the summer of 2022, they frequently went to the afternoon ESY session to provide the 1:30 p.m. health procedure; but could not recall the exact dates: "I remember going to the class a ton of times to administer the water bolus and then take [Student] home but can't remember the specific dates. Some days I didn't go and [Student] would ride the bus home." *Parent Interview, April 24, 2023.*

The Special Education Teacher stated they did not recall that the Parent came to the school during ESY to administer a 1:30 water bolus feed to the Student. The Special Education Teacher surmised that the Parent "...may have picked [them] up a couple of times, but typically [they] went home on the bus." *Special Education Teacher Interview, April 24, 2023.*

27. The District added 20 minutes of physical therapy direct service minutes to Student's March 21, 2023 proposed IEP to account for the physical therapy services Student did not receive during ESY 2022. *Prior Written Notice, April 20, 2023.*

Conclusions

1. The overarching purpose of the IDEA is to ensure that students with a disability have available to them a Free Appropriate Public Education (FAPE), including special education and related services that meet the unique needs of individual students and prepare them for further education, employment and independent living. See 34 C.F.R. § 300.1(a). IDEA defines FAPE as special education and related services that are: (a) provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state education agency, including the requirements of this part; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) *are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.* 34 C.F.R. § 300.17 (emphasis added).
2. 34 C.F.R. § 300.323(a) requires that at the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP as defined in § 300.320.
3. A district must make all special education and related services available to a student in accordance with the student's IEP. 34 C.F.R. § 300.323(c). The IDEA does not specifically address the issue of missed special education and related services which results in a failure to implement the IEP.
4. The Ninth Circuit in *Van Duyn v. Baker School District 5J*, 502 F.3d. 811 (9th Cir. 2007) (*amended*) adopted the materiality standard to determine when a failure to implement an IEP

would result in a denial of a student's FAPE. "...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." *Id.* at 822.

5. The Ninth Circuit further clarified "... that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id.* "We also emphasize that nothing in this opinion weakens schools' obligation to provide services 'in conformity with' children's IEPs." *Id.*
6. OSEP has encouraged public agencies to consider the impact of a provider's absence on a student's progress and performance and determine how to ensure the continued provision of FAPE in order for the child to progress and meet the annual goals in the IEP. *Letter to Clarke* (OSEP, March 8, 2007). "Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis." *Id.*
7. 34 C.F.R. § 300.106 and ARM 10.16.3324 require that each public agency must ensure that extended school year services are available as necessary to provide FAPE to a Student. ESY services must be provided only if a child's IEP team determines, on an individual basis, and in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. The term ESY services amounts to special education and related services that are provided to a child with a disability beyond the normal school year of the public agency. The ESY services must be in accordance with the child's IEP, at no cost to the parents of the child, and must meet the standards of the state education agency.
8. "Extended school year services are provided to maintain identified skills and prevent or avoid substantial loss of previously acquired or emerging skills or behaviors." OPI, *Special Education in Montana*, May 17, 2023 (Page 128 Question 1). IEP teams shall use recoupment and regression as the criteria for determining eligibility for ESY services. ARM 10.16.3324(2). The Student's IEP team determined that the Student required ESY services during the summer of 2022, due to the Student's profound disabilities, in order to receive a FAPE.
9. Montana law requires parental consent to the IEP prior to its implementation. ARM 10.16.3505(2). If a parent and a district cannot agree on the IEP but can agree on certain IEP services or interim placement, the student's IEP would be implemented in areas of agreement and the student's last agreed upon IEP would be implemented in the areas of disagreement until the disagreement is resolved. ARM 10.16.3505(2)(b).

10. Parents signed the March 25, 2022 IEP on April 22, 2022, with exceptions, specifically, that if the modified communication log with all related services does not clarify and/or is unclear of what service minutes are provided, then the IEP team would need to reconvene to discuss other options. Further, Parents wanted assurance ESY would be staffed accordingly to provide FAPE during both the regular and extended compensatory services portion of the day. The IEP team did not meet again to discuss these concerns or make any additional changes to the IEP. Parents' exceptions were not exceptions to services that would require the District to implement a previously agreed to IEP, but instead they were requests for further clarification.
11. The 2022 ESY services provided to the Student included nursing services provided by a registered nurse. The registered nurse was on site and available to provide the Student with the necessary health services as described in the March 25, 2022 IEP. The compensatory services provided in the afternoon included the availability of on-call nursing services for emergency needs. Based on standards of medication administration and the professional judgements of the District's registered nurses, the District elected to not provide the water bolus feeding that was included in the June 6, 2022 doctor's orders. The Parent chose to administer the water bolus feeding.
12. The 2022 ESY program did not provide the Student with opportunities for using a standing frame as the District did not have a licensed physical therapist available to adjust the standing frame once it had been relocated to the site of the ESY services. The District's Physical Therapist did, however, provide ESY staff with training regarding Student's position change needs and equipment use and Student was provided the opportunity for adaptive positioning and access to switches and other things to address ESY goals. Student made progress on the goals worked on during the 2022 ESY services that incorporated position changing.
13. The Student's IEP did not provide details on the use of a standing frame and adaptive positioning specific to ESY. Student's IEP only stated in the IEP notes that the District Physical Therapist would provide consultative services to staff before the end of the school year in preparation for ESY services. There were multiple communications between the District administration and the Parent about the Student being able to use a standing frame during the ESY program demonstrating that the District did intend to provide use of the standing frame during ESY. The District was not able to provide the use of the standing frame because it did not have a physical therapist available during the summer to adjust it and ensure proper positioning during use. Although the District failed to provide Student use of

the standing frame during ESY, it was not a material failure to implement Student's IEP and therefore, did not deny Student a FAPE.

Decision

Issue 1: Whether the District failed to provide Student opportunities to use a standing frame during the summer of 2022 extended school year (ESY) services, which denied Student a FAPE.

OPI finds no violation. The lack of physical therapy services during the summer of 2022 ESY and specifically the use of the standing frame was not found to be a material failure to implement Student's IEP and did not rise to a denial of FAPE. **However, this does not diminish the District's obligation to provide services in conformity with Student's IEP.** The District added 20 minutes of direct service minutes in physical therapy to Student's March 21, 2023 proposed IEP to account for the physical therapy services Student did not receive during ESY 2022.



Issue 2: Whether the District failed to provide student school nursing services during the summer of 2022 ESY services, which denied the Student a FAPE.

OPI finds no violation. The District had a registered nurse available to perform the needed health care procedures during the 2022 ESY session. During the afternoon ESY compensatory education session, the District had a registered nurse on call for any emergencies. The afternoon water feeding was scheduled to occur at the end of the session, and it was determined that this procedure could be delayed until the Student arrived at home.



JP Williams

State Director of Special Education

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