

June 23, 2023

Sent via US Mail and/or SMFTS



THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of [REDACTED], 2023-03, Alleged Violations of the Individuals with Disabilities Education Act (IDEA).

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. [REDACTED] (Parent) filed the Complaint on behalf of [REDACTED] (Student), a fifth grader who attended [REDACTED] (School) in the [REDACTED] Public Schools (District). Parent alleges that 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 (MCS), and corresponding regulation at 34 C.F.R. Part 300 and ARM 10.16.3007 et seq. The Parent alleges the following issues:

Issue 1. Did the District fail to consider whether Student needs assistive technology (AT) devices or services as required by 34 C.F.R. § 300.324(a)(2)(v)?

Issue 2. Did the District fail to provide an assistive technology (AT) assessment for Student in violation of 34 C.F.R. § 300.303?

Issue 3. Did the District fail to provide extended school year (ESY) services to Student as required by 34 C.F.R. § 300.106 and ARM 10.16.3324?

Procedural History

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint filed by the Parent on April 28, 2023.
2. The District was provided a copy of the Complaint as required by ARM 10.16.3662(3).
3. On May 3, 2023, the OPI Dispute Resolution Office issued the parties a Notice of Filing of the Complaint.

4. The Early Assistance Program (EAP) Director attempted to assist the parties in resolving the dispute without success and determined any attempt to mutually resolve the matters alleged in the Complaint would be futile.
5. On May 9, 2023, the OPI Dispute Resolution Office issued a Request for District Response, requesting the District prepare and submit its response within 10 calendar days and notifying the parties that a complaint investigator had be appointed to conduct the complaint investigation.
6. In a letter dated May 12, 2023, the Attorney for the District requested an extension to submit the District's response.
7. On May 16, 2023, the OPI Dispute Resolution Office issued an Extension of Time to File District Written Response, determining there was reasonable necessity for an extension due to the volume of records, extending the time to file the District's response until May 24, 2023.
8. On May 24, 2023, the OPI Dispute Resolution Office notified the Parties of a substitution of complaint investigators, appointing a subsequent complaint investigator to take over the investigation due to unforeseen circumstances.
9. The District's Response was received on May 24, 2023.
10. The Parent's reply to the District's response was received on May 30, 2023.
11. Additional documentation was submitted by the Parent and the District at the request of the Complaint Investigator.

Investigatory Process

The investigator reviewed the following records:

- The Complaint and all supporting documentation, including audiotape recording and transcript from April 28, 2022 IEP meeting;
- The District's written response to the Complaint;
- The Parent's reply to the District's Response and additional documentation submitted;
- Educational records relevant to this investigation;
- The Complaint Investigator interviewed the Parent via telephone;
- By telephone, the Complaint Investigator interviewed, the District Special Education Coordinator and Principal, with District's legal counsel present;
- The OPI provided the Parent and the District the opportunity to submit additional information for consideration during the complaint investigation; and
- Additional documentation was submitted by the Parent and the District at the request of the Complaint Investigator.

Applicable Federal Regulations and State Rules

34 C.F.R. § 300.5	Assistive Technology Device
34 C.F.R. § 300.6	Assistive Technology Service
34 C.F.R. § 300.106	Extended School Year Services
34 C.F.R. § 300.303	Reevaluations

34 C.F.R. § 300.324
ARM 10.16.3324
ARM 10.16.3505

Development, Review and Revision of IEP
Extended School Year Services
Parental Consent

Relevant Time Period for Investigation

Pursuant to 34 C.F.R. § 300.153(c) and ARM 10.16.3661, 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 April 28, 2022, through April 28, 2023. Additional information beyond this timeframe was considered for the purpose of a full investigation of the Complaint.

Timeline

To assist in understanding the procedural background in this matter, the following timeline is provided:

Date	Event
May 18, 2021	IEP Meeting
May 23, 2021	Parent signed May 18, 2021 IEP
November 22, 2021	Evaluation Report
November 22, 2021	Evaluation Meeting
February 7, 2022	IEP Meeting for interim IEP
March 22, 2022	IEP Meeting
April 28, 2022	Annual IEP Meeting
May 13, 2022	Permission to conduct AT evaluation received
May 17, 2022	IEP Meeting
May 31, 2022	IEP Meeting
June 3, 2022	Last day of school 2021-2022 school year
June 3, 2022	Progress Report
June 3, 2022	Prior Written Notice (PWN)
June 7, 2022	PWN
August 5, 2022	PWN
August 25, 2022	IEP Meeting
August 31, 2022	IEP Meeting
September 6, 2022	Parent signed August 31, 2022 IEP
September 8, 2022	PWN
September 13, 2022	Incident at school - Student suspended
September 20, 2022	Manifestation Determination Meeting
September 21, 2022	PWN
November 17, 2022	IEP Meeting
December 14, 2022	Student enrolled at Day School
February 2, 2023	IEP Amendment Meeting at Day School
March 28, 2023	Parent signed February 2, 2023 IEP Amendment

Findings of Fact

1. Student was in fifth grade during the 2022-2023 school year. Student was found eligible for special education services under the category of other health impairment (OHI). Student has been on an IEP since he was six years old and received special education services through District's schools. *November 22, 2021 Evaluation Report; Complaint.*
2. Student had an IEP dated May 18, 2021. Parent signed consent to this IEP on May 23, 2021. The IEP indicated that Student did not need ESY services. *May 18, 2021 IEP.*
3. Parent alleged that the Occupational Therapy (OT) evaluation completed in 2021 demonstrated the need for AT services. *Complaint and Interview with Parent.*
4. During the April 28, 2022 IEP meeting, the District agreed to conduct an AT assessment. *April 28, 2022 IEP Notes.*
5. The need for AT devices or services was not checked on the IEP because the need for AT devices or services had not yet been determined. *August 31, 2022 IEP; Interview with District.*
6. The District provided Parent with an evaluation plan and Parent provided consent for an AT evaluation on May 13, 2022. *Evaluation Plan.*
7. At the April 28, 2022 IEP meeting, during discussion about the AT evaluation, Parent was informed that the AT evaluation would not be completed until school resumed for the 2022-2023 school year. *April 28, 2022 IEP Notes.*
8. Additional IEP meetings were held on May 17 and May 31, 2022, because Parent still had not provided consent to the IEP. *Interview with District; IEP Notes.*
9. Throughout the multiple IEP meetings during the spring of 2022, the IEP team determined Student needed ESY services, specifically that "Student requires services for an extended period of time to support progress towards meeting his IEP goals." *May 31, 2022 Proposed IEP; IEP Notes.*
10. The May 17, 2022 IEP Notes section states "The Team discussed the ESY determination. [Special Education Coordinator] reported [Student] does meet criteria. The team discussed issues with programming and needing to make a plan specifically for [Student] such as location and staff. [Special Education Coordinator] will get more information to [Parent] at a later date. The team attempted to discuss programming and determined ESY cannot be based off this IEP (due to it not being closed and signed) as well as on the previous IEP ESY was marked not necessary. [Parent] noted [Parent] needs more time to look over goals in order to close this IEP. The team determined to make an amendment on [Student's] previous IEP to change ESY determination and mark which goals will be worked on before it expires." *May 17, 2022, IEP Notes.*
11. On May 18, 2022, the District notified Parent via email that they were not able to amend the May 18, 2021 IEP to include ESY, and that to provide ESY during the summer of 2022, the Student needed a new IEP. *May 18, 2022, Email from Special Education Coordinator.*
12. The District offered ESY services with other fourth and fifth grade students in the afternoons from 11:50 a.m. to 2:50 p.m. *May 24, 2022 Email; May 31, IEP Notes; June 3, 2022 PWN.*
13. On July 14, 2022, Parent emailed her dissent on the proposed IEP and indicated it did not provide Student with a FAPE. *July 14, 2022 Email; August 31, 2022 IEP Notes.*

14. Since Parent did not sign the IEP, Student did not receive ESY services during the summer of 2022. *Interviews with Parent and District.*
15. The AT evaluation was not conducted during the summer of 2022. *Interviews with Parent and District.*
16. Additional IEP meetings were held on August 25 and 31, 2022, and Parent signed the IEP on September 6, 2022 and agreed to have the IEP implemented immediately. *Interviews with District and Parent; August 31, 2022 IEP.*
17. The August 31, 2022 IEP Notes section states “[p]arent consent for the AT evaluation was obtained on 5.31.22 and will be completed. An ER meeting will be held to review the results of the evaluation and the IEP will be amended to reflect any recommendations by the ER team if necessary.” *August 31, 2022 IEP Notes.*
18. The District documented “[c]ontinued plans for AT evaluation to be completed by District staff” in the PWN dated August 31, 2022. *September 8, 2022 PWN.*
19. Student attended school at the District until September 13, 2022, at which time Student was suspended for inappropriate behavior. *Interview with District.*
20. A Manifestation Determination Meeting was held on September 20, 2022. Parent’s advocate indicated Student will not attend school, but they are not un-enrolling Student. *September 29, 2022 Letter from Parent’s Attorney to District’s Attorney; September 20, 2022 Manifestation Determination.*
21. Student did not return to the District after the suspension. *Interview with Parent.*
22. The District filed an expedited due process hearing request and mediation was conducted on November 22, 2022. *Interview with District; November 17, 2022 IEP Notes.*
23. As a result of the mediation, an IEP amendment was completed at a meeting on December 14, 2022, when Student was placed at a therapeutic Day School. Parent did not sign the amendment, but Student began services at Day School. *Interview with District.*
24. The District contracted with the Day School to educate Student and provided transportation. *February 3, 2023 IEP Amendment.*
25. An IEP amendment meeting was held with Parent, District staff and Day School staff on February 3, 2023. Service hours were changed, and counseling and transportation were added as related services. *Interview with Parent; February 3, 2023 IEP Amendment.*
26. Parent signed the IEP amendment on March 28, 2023. *February 3, 2023 IEP Amendment.*
27. Student completed the 2022-2023 school year at the therapeutic Day School and will be attending there for the 2023-2024 school year. *Interview with Parent.*
28. The District believed because of the refusal to receive services, Student would not be made available for the AT evaluation. The District did not attempt to contact Parent to see if Student would be made available. *Interview with District.*
29. After the Complaint Investigator interviewed the District, the District indicated it would inform the Day School of the Evaluation Plan and consent for an AT evaluation. *Interview with District.*
30. On June 1, 2023, the Day School emailed Parent requesting to schedule the AT evaluation, in collaboration with the District, prior to June 30, 2023. The AT evaluation is currently scheduled for June 28-30, 2023. *June 1-2, 2023 Emails.*

Conclusions

AT Devices and Services

1. When developing a student’s IEP, the IEP team must consider whether the Student needs AT devices and services. 34 C.F.R. § 300.324(a)(2)(v).
2. The IDEA defines an AT device as “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.” 34 C.F.R. § 300.5.
3. The IDEA defines an AT service as “any service that directly assists a child with a disability in the selection, acquisition, or use of an [AT] device.” 34 C.F.R. § 300.6.
4. AT services may include the following:
 - a. Evaluating the student's needs;
 - b. Purchasing, leasing, or otherwise providing for the acquisition of AT devices by children with disabilities;
 - c. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing AT devices;
 - d. Coordinating and using other therapies, interventions, or services with AT devices;
 - e. Providing training or technical assistance to a child with a disability or, if appropriate, the child's family; and
 - f. Providing training or technical assistance for professionals, employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the child's major life activities. 34 C.F.R. § 300.6.
5. When an IEP team determines that a student needs AT services and/or devices, the district must provide the device and/or service. *Letter to Anonymous*, 24 IDERL 854 (OSEP 1996); *Letter to Fisher*, 23 IDELR 565 (OSEP 1995); and *Letter to Naon*, 22 IDELR 888 (OSEP 1995).
6. At the Student’s April 28, 2022 IEP meeting, the District agreed to conduct an AT evaluation and discussed that it would most likely not be completed before the fall of 2022. The District developed an Evaluation Plan and Parent provided written consent to that Evaluation Plan on May 13, 2022. In the fall of 2022, the IEP team met again, and the District reaffirmed its obligation to conduct the AT evaluation.
7. Student’s August 31, 2022 IEP indicated “no” that the Student does not require AT devices or services at that time since the AT evaluation had not been completed. The District’s plan was to conduct the AT evaluation, hold the evaluation report meeting to review the results of the evaluation, and amend the IEP to reflect recommendations by the evaluation report team if necessary.
8. Parent’s allegation that the District did not consider AT needs and services prior to April 28, 2022, is outside of the scope of this Complaint.

Reevaluation

9. A district must ensure that a reevaluation is conducted if it determines that the educational or related services needs, including improved academic achievement and functional

performance of the child, warrant a reevaluation, or if the child's parent, or teacher requests a reevaluation. 34 C.F.R. § 300.303(a).

10. Neither the IDEA nor Montana law provide a specific timeframe for reevaluations. The IDEA requires that an *initial* evaluation be conducted within 60 days of receiving parental consent. 34 C.F.R. § 300.301(c)(1)(i). There is no similar time requirement set out for re-evaluations pursuant to 34 C.F.R. § 300.303. While the 60-day timeframe does not apply to re-evaluations, they must be accomplished within a reasonable timeframe. What a reasonable amount of time for a reevaluation is shall be determined on a case-by-case basis. *OSEP Letter to Saperstone*, 21 IDELR 1127 (OSEP 1994).
11. Guidance from OPI states “[a]lthough there is not a specific timeframe, the reevaluation must be conducted within a reasonable timeframe, similar to the timeframe for an initial evaluation. Once the decision is made that a reevaluation is necessary, delaying proceeding with the evaluation to determine continued eligibility for special education and related services and whether additions or modifications to the IEP are needed could result in the student not receiving a FAPE.” OPI, *Special Education in Montana*, June 19, 2023 (Page 63 Question 27).
12. Parent signed the Evaluation Plan on May 13, 2022, consenting to an AT evaluation. As of the date of this Final Report, the AT evaluation has not been completed.
13. The 2022-2023 school year began on August 22, 2022. The IEP team met on August 25 and August 31, 2022. The August 31, 2022 IEP notes section and subsequent PWN indicated that the AT evaluation would be conducted, an Evaluation Report meeting would be held and amendments made to the IEP, if necessary. Student was suspended on September 13, 2022, and Parent chose not to have Student receive any services from the District after that date. The Student was eventually placed in a therapeutic Day School on December 14, 2022. There is no indication that the AT evaluation has been discussed since the August 31, 2022 IEP meeting.
14. Although Parent had removed Student from school after the suspension and the District assumed that meant that the Student would not be made available for completion of the AT evaluation, the District still had a responsibility to communicate with Parent and see if the Student would be made available so the District could complete the AT evaluation in a timely manner.
15. After the filing of the Complaint, the District reached out to the Day School to inform them of the Evaluation Plan and the AT evaluation is currently scheduled for June 28-30, 2023.

ESY Services

16. Pursuant to 34 C.F.R. § 300.106 and ARM 10.16.3324, each public agency must ensure that ESY 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 educational agency.
17. A student's IEP must be reviewed at least on an annual basis. 34 CFR § 300.324(b). An IEP may not have a duration of more than twelve months. In making changes after the annual

IEP, for the remainder of the IEP year, the IEP team may agree to make amendments to the IEP rather than redrafting the entire IEP. 34 CFR § 300.324(a)(6); OPI, *Special Education in Montana*, June 19, 2023 (Page 85 Question 2).

18. “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*, June 19, 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, because Student requires services for an extended period of time to support progress towards meeting his IEP goals.
19. Montana law requires parental consent to the IEP prior to its implementation. ARM 10.16.3505(2). Districts shall implement an IEP as soon as the parent agrees with the proposed special education services and signs the IEP giving consent. ARM 10.16.3505(2). If parents and the school 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).
20. Student’s May 18, 2021 IEP was the IEP the District had to implement until Parent consented to another IEP. At the May 17, 2022 IEP meeting, the District indicated it would amend Student’s May 18, 2021 IEP to include ESY in order to give Parent the additional time requested to review the proposed IEP. However, this was not proper procedure, because the Student’s IEP was due for its annual review. The District subsequently notified the parent via email on May 18, 2022, that an amendment would not be possible and that they needed to work on the new IEP for Student in order to provide ESY during the summer of 2022. IEPs must be reviewed at least annually, therefore the new IEP could then be amended, if necessary, during the subsequent year timeframe or Parent could have signed the new IEP with exceptions to those areas that were going to take additional time to review.
21. The IEP team met again on May 31, 2022, but Parent refused the IEP as not providing FAPE and did not consent to any areas of a new IEP until September 6, 2022, after the ESY for the summer of 2022 concluded. Student’s May 18, 2021 IEP did not provide for ESY services. Under Montana law, the District could not provide Student with ESY services during the summer of 2022 without consent from Parent.

Decision

Issue 1: Did the District fail to consider whether Student needs assistive technology (AT) devices or services as required by 34 C.F.R. § 300.324(a)(2)(v)?

OPI finds no violation. At multiple IEP meetings during the spring and fall of 2022, Student’s need for AT devices or services were considered. This is evidenced by the IEP team determining there was a need for an AT evaluation, drafting an Evaluation Plan and obtaining Parent’s consent to conduct the evaluation.

Issue 2: Did the District fail to provide an assistive technology (AT) assessment for Student in violation of 34 C.F.R. § 300.303?

OPI finds the District in violation. Parent signed consent to the evaluation plan on May 13, 2022. Over a year has passed and the AT evaluation has still not been conducted. The District assumed the Student would not be made available for completion of the reevaluation but did not actually ask the Parent. The District did not conduct the AT evaluation within a reasonable timeframe.

Issue 3: Did the District fail to provide extended school year (ESY) services to Student as required by 34 C.F. R. § 300.106 and ARM 10.16.3324?


OPI finds no violation. Student's May 18, 2021 IEP did not provide for ESY services, and it was the IEP the District had to implement until Parent consented to another IEP. Parent did not consent to any part of a new IEP until September 6, 2022, after ESY for the summer of 2022 had concluded.

Corrective Action



The District did not conduct the AT evaluation within a reasonable timeframe. After the filing of the Complaint, the District contacted the Day School to inform them of the Evaluation Plan and coordinate the evaluation. The AT evaluation is currently scheduled for June 28-30, 2023.

The District must submit a copy of the completed Evaluation Report to OPI's Early Assistance Program Director by July 3, 2023.

Note: This Final Report is final and is not subject to appeal. ARM 10.16.3662(13). Both parties retain their right to file a due process complaint after a state complaint final report is issued on the same or different issues, provided the due process complaint meets the requirements set out in 34 C.F.R. § 300.507.



JP Williams
State Director of Special Education

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