



September 29, 2023

Sent via US Mail and/or SMFTS

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THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT for** In the Matter of [REDACTED], 2023-06, 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] (Complainant) filed the Complaint on behalf of her son, [REDACTED] (Student), a student in the [REDACTED] Public Schools District (District). The Complainant alleges the District violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., the Family Educational Rights and Privacy Act (FERPA), 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 Complaint alleges the following issue:

Whether the District provided the Complainant with the opportunity to inspect and review educational records relating to her child that were collected, maintained, or used by the District under Part B of the IDEA in conformity with 34 C.F.R. § 300.613.

Procedural History

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint filed by the Complainant on August 4, 2023.
2. The OPI Dispute Resolution Office issued a Notice of Filing Complaint on August 9, 2023, to the District and Complainant. Parties were notified of the opportunity to engage in informal resolution through the Early Assistance Program (EAP).

3. Via email on August 10, 2023, Complainant declined participation in the EAP process and informal resolution. On August 15, 2023, the OPI Dispute Resolution Office requested the District's written response to the Complaint within 10 calendar days.
4. On August 15, 2023, OPI notified the parties that a complaint investigator had been appointed to conduct the complaint investigation.
5. The District submitted a written response to the issues in the Complaint on August 25, 2023.
6. The Complainant provided a written response to the District's written response on August 29, 2023.

Investigatory Process

The investigator reviewed the following records:

- The original letter of complaint and all supporting documentation;
- The District's response to the complaint and all exhibits;
- The Complainant's response to the District's written response; and
- The education records relevant to this investigation.

The investigator offered to interview the Complainant. The Complainant submitted responses to the interview questions via email.

The investigator interviewed the District Special Education Director with counsel present via Zoom.

The OPI provided the Complainant 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. § 300.613	Access Rights
34 C.F.R. § 99	FERPA
ARM 10.16.3560	Special Education Records

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 August 4, 2022,

through August 4, 2023. Additional information beyond this timeframe was considered for the purpose of fully investigating the Complaint.

Findings of Fact.

1. By letter dated June 10, 2022, the Complainant requested a copy of the Student's education records from the principal of where the Student last attended school. The letter was placed in the principal's mailbox. The School was in the process of hiring a new principal at the time the request was received. A new principal was hired in August 2022. *District Written Response 2023.08.25 Exhibit A. & District Written Response 2023.09.27*
2. The Special Education Office was transitioning to a new location during the summer of 2022. The Student's special education records were maintained in the special education office and were part of the relocation move. The request for documents letter was received by the District Special Education Office sometime in August. The exact date was not documented. *District Written Response 2023.09.27*
3. The Complainant emailed the District Special Education Director on August 19, 2022, inquiring about obtaining a copy of the Student's educational records. The Complainant reinforced she was requesting all information that identified the Student by name, student number, or initials. *District Written Response 2023.09.27, Exhibit D.*
4. The District provided a copy of the Student's education file on September 2, 2022. The Complainant picked up the copy of the records from the District office building. After the Complainant picked up the Student's records, the District discovered two missing documents, the 2021 Evaluation Report and corresponding Evaluation Plan, and sent those to the Complainant via US Mail. *District Written Response 2023.09.27, Exhibit D.*
5. The Complainant and the District met twice after the documents were provided. On September 6, 2022, the IEP Team met to discuss the proposed IEP which had been developed in May 2022. *District Written Response 2023.08.25*
6. In a letter dated September 28, 2022, the District Special Education Director responded to the concerns Complainant had emailed the District Superintendent on September 7, 2022. It is noted in item 7 of this letter that the District acknowledged two pieces of correspondence dated June and September of 2022 which had not been provided as part of the District's original production of documents. Those additional documents were provided via email with the September 28, 2022 letter. *District Written Response 2023.08.25, Exhibit B.*

7. An email dated October 30, 2022, was sent from the Complainant to the Superintendent. In summary it requested an explanation regarding why the District had not provided the entire student record or responded to the request for records she initiated in June 2022. *District Written Response 2023.09.27, Exhibit E.*
8. The second Team meeting on November 4, 2022, was a facilitated IEP meeting. This Team meeting was a continuation of the September 2022 meeting. Enrollment documents and educational records were included as discussion topics during the facilitated IEP meeting. *District Written Response 2023.08.25, Exhibit B Prior Written Notice.*
9. Via email on November 10, 2022, the Complainant asked for a list of all the special education records that are maintained by the District and enrollment screenshots. *District Written Response 2023.09.27 Exhibit E.*
10. On November 10, 2022, the District Special Education Director sent a follow up email to the Complainant. Attached to the email was an outline of the Student's enrollment status for the 2021-2022 and 2022-2023 school years. Additionally, the District explained that evaluation summaries and reports were provided to the Complainant as part of documentation provided in September 2022. However, the District acknowledged the original photocopied file did not include the test protocols. The District offered to schedule a time with the Complainant to review the paper record including the test protocols. *District Written Response 2023.08.25, Exhibit C*
11. As part of the original Complaint document, the Complainant identified 154 documents missing from the Student's educational record. *Original Complaint Dated 2023.08.04.*

A summary of these items include:

- a. Vocabulary boards
- b. Data and data collection sheets
- c. Training, technical assistance and instructional materials
- d. Meeting requests
- e. Prior Written Notice
- f. Sign in/out sheets
- g. App user log in
- h. Provider names
- i. Intervention plans

- j. Class visual supports
- k. Curriculum
- l. Support materials created by teachers
- m. Adapted materials
- n. Grading scales
- o. Work samples and class assignments
- p. Proficiency scales
- q. State educational targets
- r. Course mapping
- s. Enrollment information
- t. Registration records
- u. Attendance records

The District indicated the missing records requested by the Complainant were items that either were never created or were not maintained for the Student. *District Written Response 2023.08.25*

- a. The following identified missing documents were not maintained specific to the Student:
 - i. Vocabulary boards
 - ii. Training, technical assistance and instructional materials
 - iii. Sign in/out sheets
 - iv. App user log in
 - v. Classroom visual supports
 - vi. Curriculum
 - vii. Support materials created by teachers
 - viii. Adapted materials
 - ix. Grading scales
 - x. Proficiency scales
 - xi. State educational targets
 - xii. Course mapping

- b. Data was collected and documentation was incorporated into the Student's special education records when required. Individual documents used to develop the record were not maintained as part of the Student's educational record:
 - xiii. Intervention plans
 - xiv. Provider names
 - xv. Work samples and class assignments
 - xvi. Data and data collection sheets
- c. Documentation regarding training, technical assistance and instructional materials used by staff, as well as training and technical assistance provided to Complainant and Student were not maintained as an educational record.
 - xvii. Training, technical assistance and instructional materials
- d. Educational records were created when required. The following records were not created.
 - xviii. Enrollment information was not required when the Student transitioned from elementary to middle school. The record does not exist.
 - xix. Registration was not required for the online program. These registration records do not exist.
 - xx. Attendance records for the 2022-23 school year do not exist. The Student did not attend school during 2022-23
 - xxi. Meeting requests were created and provided when required.
 - xxii. Prior Written Notices were not developed at the occasions listed in Complainant's list of missing records. Prior Written Notice for these instances does not exist and some items fall outside of the one-year complaint timeframe.

District Written Response 2023.08.25

Conclusions

1. The IDEA and Montana Administrative Rules incorporate the rights afforded to parents in FERPA. *34 C.F.R. § 300.612 and ARM 10.16.3560.*
2. Under the IDEA, as outlined in 34 C.F.R. § 300.613 pertaining to access rights of education records:

(a) Each participating agency **must permit parents to inspect and review** any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with the request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, **and in no case more than 45 days after the request has been made.** (*Emphasis added*).

(b) The right to inspect and review education records under this section includes:

(1) the right to a response from the participating agency to reasonable requests for explanations and interpretation of records;

(2) The right to request that the agency provide copies of the records containing information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

3. According to FERPA, *education records* mean those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution. Record means any information recorded in any way including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. *See 34 C.F.R. § 99.3.*
4. Test protocols that include personally identifiable information are educational records within the meaning of IDEA and FERPA, and, therefore, parents have the right to inspect and review them. *Letter to Price, 57 IDELR 50 (OSEP 2010).* The IDEA requires parental access to inspect and review records, which is typically not implicated by copyright law. *See 34 CFR § 300.613.* However, if a district provides copies of education records to a parent, the district may not be able to provide copies of test protocols that are subject to copyright law. If this occurs, the district is obligated to find alternative ways for the parent to inspect the records.
5. An initial request for records occurred in June 2022, which falls outside of the one year time frame of this complaint. Relevant to this Complaint, the Complainant alleges a record request was made on August 19, 2022, and email correspondence confirms the District Special Education Director received the request and was working on responding. The District provided the Complainant with a photocopy of the Student's educational record on September 2 and September 28, 2022.

6. The Complainant emailed the Superintendent on October 30, 2022, and District Special Education Director on November 10, 2022, with her concern that she had received a partial copy of the Student's record. The District responded to Complainant stating the only records missing from the photocopies provided were the test protocols which could not be copied due to copyright restrictions. On November 10, 2022, the District extended an invitation to the Complainant to inspect and review the test protocols at the District offices.
7. In order to be an "educational record," the record must be "maintained" by an educational agency, meaning the record must be kept in one location with a single record of access. *Owasso Indep. Sch. Dist. V. Falvo*, 534 U.S. 426, 36 IDELR 62 (U.S. 2002)
8. The detailed list of 154 missing documents outlined by the Complainant contains items that do not meet the definition of an educational record. Rather items such as curriculum, visual tools, grading scales, proficiency scales, and training and technical assistance materials are typically considered tools and strategies that assist districts in the implementation of educational programs. These documents are generally not maintained for a specific student and are not considered education records.
9. The Complainant's detailed list does identify documents that could be considered educational records if created, maintained, and used specific to an individual student. These included meeting requests, prior written notices, enrollment documents, registration records and attendance records. As it relates to this Student, the District indicated the records the Complainant identified as missing were never created. The documents simply do not exist for this Student.
10. Complainant's detailed list of missing documents submitted with the Complaint does not include test protocols.
11. It is clear from all the information reviewed during this investigation that by September 28, 2022, the District provided the Complainant with a photocopy of the Student's educational record excluding test protocols. Although the District had the authority to exclude test protocols in order to adhere to copyright laws, the District was required to offer the Complainant the opportunity to inspect and review the protocols included in the Student's educational record. In this case, the first time the District offered the Complainant the opportunity to review the excluded test protocols was on November 10, 2022. This is 83 days after the District acknowledged receipt of the request for the Student's educational record on

August 19, 2022. The District failed to provide the parent the opportunity to inspect and review the Student's test protocols within 45 days of the Complainant's request. After being provided the opportunity, Complainant did not inspect and review the test protocols that were a part of the Student's record.

Decision

Issue: Whether the District provided the Complainant with the opportunity to inspect and review educational records relating to her child that were collected, maintained, or used by the District under Part B of the IDEA in conformity with 34 C.F.R. § 300.613.

OPI finds the District in violation. The District failed to provide the Complainant with the opportunity to inspect and review test protocols that were a part of the educational record within the 45-day requirement imposed by 34 CFR § 300.613.

Corrective Action

By November 28, 2023, the District shall submit for approval to OPI's Early Assisatnce Program Director, an explanation of the District's practices and/or policies in providing parents the opportunity to inspect and review education records pursuant to 34 CFR § 300.613. This shall include the District's practices and/or policies in providing parents timely access to education records that are protected by copyright laws.

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.

Patrick Cates

Patrick Cates
Student Support Services Senior Manager

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