



May 10, 2024

Sent via US Mail and SMFTS



THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of [REDACTED], 2023-11

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 fourth grade student at [REDACTED] Elementary School (School) in the [REDACTED] Public Schools (District). Complainant alleges 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 Complainant alleges the following issues:

1. Whether the District failed to appropriately address Student's behavior that impedes Student's learning or that of others in developing and implementing the IEP in violation of 34 C.F.R. 300.324(a)(2)(i).
2. Whether the District improperly used physical restraint to address Student's behavioral needs in violation of ARM 10.16.3346.
3. Whether the District failed to implement Student's IEP when it did not contact Complainant immediately when behavioral incidents occurred in violation of 34 C.F.R. 300.323(c).

Procedural History

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint from the Complainant on December 14, 2023.
2. The OPI Dispute Resolution Office contacted the District on December 15, 2023, and the District had not received a copy of the Complaint as required by the Code of Federal Regulations (CFR) 34 C.F.R. 300.153(d) and Administrative Rules of Montana (ARM) 10.16.3662(3).
3. The OPI Dispute Resolution Office contacted Complainant on December 15, 2023, to set up a time to discuss the complaint process and clarify the issues in the Complaint. Complainant scheduled a time on December 19, 2023. On December 19th, the Complainant indicated she had not sent a copy of the Complaint to the District and would also like OPI to send one to her. Complainant also declined informal resolution through the Early Assistance Program (EAP) and requested to move forward with the complaint process.
4. The OPI Dispute Resolution Office issued a Notice of Filing, Appointment of Investigator, and Request for District Response on December 21, 2023. The OPI Dispute Resolution Office provided a copy of the Complaint to the District and Complainant and three days were added to the date OPI mailed the Complaint to determine the filing date. (See Frequently Asked Questions About IDEA State Complaint, Question 13). The Complaint was deemed filed on December 24, 2023.
5. The District requested an extension of time to file a response on January 12, 2023, due to extreme weather conditions. The OPI granted an extension until January 16, 2024.
6. The District submitted a written response to the issues in the Complaint on January 16, 2024.
7. On January 22, 2024, the Complainant requested an extension to prepare an answer to the District's response. The Complaint Investigator reached out to Complainant to make sure she understood she would have an opportunity to submit additional information.
8. Complainant submitted additional information on January 31, 2024.
9. During Complainant's interview with the Complaint Investigator, she expressed interest in resolving the Complaint. On February 7, 2024, the Complaint Investigator and the Complainant each contacted the EAP Director to provide notice of the request to attempt to resolve the issues in the Complaint.

10. The District and Complainant agreed to pause the complaint process and work with the EAP to try and resolve the issues in the Complaint pursuant to 34 CFR 300.152(b)(1)(ii). The parties agreed in writing via email to the EAP Director to four separate extensions: February 7 to February 21, 2024; February 21 to March 6, 2024; March 7 to March 29, 2024; and April 1 to April 29, 2024.
11. Resolution was not successful, and on April 16, 2024, the Complainant requested that the investigation continue.

Investigatory Process

The investigator reviewed the following records:

- The original letter of Complaint and all supporting documentation;
- The District’s original response to the Complaint and all exhibits;
- The education records relevant to this investigation; and
- The additional information submitted by Complainant.

The investigator interviewed the Complainant via telephone with a friend present.

The investigator interviewed the Special Education Teacher and Special Education Coordinator, 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. 300.1	Purpose of IDEA
34 C.F.R. 300.17	Free Appropriate Public Education
34 C.F.R. 300.101	Free Appropriate Public Education
34 C.F.R. 300.106	Extended School Year
34 C.F.R. 300.114	LRE requirements
34 C.F.R. 300.320	Definition of individualized education program
34 C.F.R. 300.324	Development, review and revision of IEP.
ARM 10.16.3346	Aversive Treatment Procedures
ARM 10.16.3505	Parental Consent
MCA 20-4-302	Discipline and Punishment of Pupils

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 December 24, 2022, through December 24, 2023. Additional information beyond this timeframe was considered for the purpose of fully investigating the Complaint.

Findings of Fact

Background Information

1. The Student is 10 years old and in the fourth grade. He was first enrolled in the District for kindergarten but has been withdrawn at various times to be homeschooled. *Student Enrollment History*. The Student is a learner eligible for services under the IDEA category of Other Health Impairment (OHI). *August 18, 2023 IEP*.
2. In April of 2021, during first grade, Student was comprehensively evaluated and determined eligible for special education services under OHI because of diagnoses of attention deficit hyperactivity disorder (ADHD), post-traumatic stress disorder (PTSD), oppositional defiant disorder (ODD) and obsessive-compulsive disorder (OCD). *District Response; August 18, 2023 IEP*.

August 29, 2022 IEP Amended on May 23, 2023

3. During second grade, Student's behaviors became more dysregulated. *District Response*. The IEP team determined that Student's behavior impeded the learning of himself or that of others. *August 29, 2022 IEP amended May 23, 2023*.
4. The IEP included special education services in the areas of math, reading and social/emotional/behavioral. Students social/emotional/behavioral present level of academic achievement and functional performance (PLAAFP) provided the following:
 - a. "[Student] participated in general education activities in August of 2021 to January of 2022 with minimal adult supervision. For an undetermined reason, [Student's] behavior began to shift to avoidance and eloping in January 2022."
 - b. In February, a daily check in, check out (CICO) system was implemented to monitor areas of strengths and needs, and the team discussed partial school day.

- c. The team believed that the environment may be the trigger for behaviors and proposed smaller groups, support with transitions and offering tasks at Student's preference level to minimize behaviors.

August 29, 2022 IEP amended May 23, 2023.

5. Student's social/emotional/behavioral goal "[b]y annual IEP review date, August 2023, [Student] will show 80% positive behavior and compliance in small group settings with minimum adult support as measured by a daily 3 and/or 5 point scale. [Student] will advance and/or decrease levels based on 80% success per each quarter of school in attendance as measured by a CICO." Levels were set out in the goal based on percentage of positive behavior and compliance in small group settings and amount of adult support for half a school day. *August 29, 2023 IEP amended May 23, 2023.*
6. The team determined that Student's least restrictive environment (LRE) was a self-contained classroom due to unsafe behaviors, eloping, and Student's lack of success when he was provided full access to the general education setting. Student shows a daily pattern of aggressive behaviors that can pose a risk to Student's safety or that of others and requires alternate instruction to develop social skills. Student was on a shortened day schedule. *August 29, 2022 IEP amended May 23, 2023.* Student attended school from 12:00-3:00 at an alternative location. *District Supplemental Information.*
7. Student's LRE was to be monitored and modified per check in, check out (CICO) data or IEP team decision as identified in the social/emotional/behavioral measurable annual goals. Student's social/emotional/behavioral goals set out different levels for Student's least restrictive environment. Based on review of the data, Student would advance or decrease levels per each quarter of school. *August 29, 2022 IEP*
8. Supplemental aids and services for social/emotional/behavioral support included keeping a set routine, clear and consistent expectations, a BIP and an aversive treatment plan. *August 29, 2022 IEP amended May 23, 2023.*
9. The BIP was based on an FBA conducted on March 24, 2022, and updated on August 18, 2022. The problem behavior was identified as avoiding tasks perceived to be difficult and/or nonpreferred. Individualized interventions, desired replacement behaviors, rewards and motivators and consequences were set out in the BIP. *August 29, 2022 BIP.*
10. The crisis plan in the BIP included removing student to a safe location when exhibiting unsafe behaviors such as eloping or self-harm. There was nothing in the BIP or crisis plan

about immediate notification when Student was dysregulated. Complainant was to be contacted when efforts to regulate Student were exhausted. The BIP indicated that Student will start the school year at an alternative location and that the LRE may be reassessed based on CICO and team decision making. *August 29, 2022 BIP.*

11. There was an aversive treatment plan incorporated in the IEP that provided for the use of Crisis Prevention Institute (CPI) protocols for aversive treatment procedures. *August 29, 2022 Aversive Treatment Plan.*
12. No aversive measures were applied to Student during the 2022-2023 school year. *District Response.*
13. Student showed improvement and transitioned back to the elementary school on March 20, 2023, attending small group reading and math academic groups with the Special Education Teacher. The IEP Team met on May 23, 2023, to change Student's placement from self-contained to a small group setting in the elementary school for four hours per day. Student's goals were adjusted to address LRE, social emotional supports and progress. Additional time in a small group setting was added to support and gain social emotional skills. *May 23, 2023 IEP Amendment; PWN.*

August 18, 2023 IEP

14. The IEP team agreed to meet in May 2023 to reset the annual review date. *August 18, 2023 PWN.*
15. The social/emotional/behavioral goal was modified as follows and the levels were removed:
 - a. By annual IEP in May 2024, [Student] will show 80% positive compliance in small group settings, (ie., refraining from: verbal outbursts, profanity, and threatening language with minimal adult supports (less than one prompt) as measured by a daily data sheet across 3 consecutive data days.
 - b. By annual review date May 2024, [Student] will use appropriate language to express his needs throughout his day and/or use appropriate social skills to get his needs met in 80% of 3 out of 4 consecutive data days as measured by daily data sheet.
16. Student was scheduled for a four-hour school day in a self-contained class at the elementary school that would be increased based upon data. The LRE was to be adjusted when Student reaches 80% for 10 consecutive days. Student was on a modified school

day to increase positive opportunities and build social/emotional and or academic skills with the goal to attend a full day of school with minimal supports. *August 18, 2023 IEP; District Supplemental Information.*

17. Supplemental aids and services included utilizing CICO, ABC data, providing increased positive behavior supports, additional adult supervision and support in area of social/emotional/behavioral as indicated by the social emotional goal. *August 18, 2023 IEP.*
18. Student's IEP incorporated the August 29, 2022 Aversive Treatment Plan (with no changes) and a FAIRE plan. FAIRE stands for Functional hypothesis, Accommodations, Interaction and intervention strategies, Response Strategies, Evaluation Strategies. The FAIRE plan set out the data from the CICO and Antecedent, Behavior, Consequence (ABC) data, and hypothesized the function of the behavior: "When [Student] is prompted to complete a non-preferred task and/or is in an unstructured environment and/or transitioning from one activity to another, [Student] attempts to avoid task demand with an increased frequency of varying degrees of non-compliance, verbal disruption, hiding and eloping." *August 18, 2023 IEP.*
19. The FAIRE plan was markedly different than the August 29, 2022 BIP:
 - a. For interaction and intervention, it was very generalized and included the following:
 - i. Supplementary aids and services: "how's your engine running?" and "Zones of Regulation" and "providing increased positive reinforcement."
 - ii. Response strategies: positive behavior supports, planned verbal responses and scripted language for behaviors.
 - iii. A safety plan to address how to react to mild, moderate or severe behaviors. Mild, moderate, or severe behaviors were not defined.
 - b. Complainant was to be notified when Student exhibits moderate and/or severe behavior including, but not limited to, eloping after the event if able to regulate and/or when unable to regulate after (30 minutes). Additionally, Complainant is to be notified when Student displays verbal and/or physical disruptive behavior that interferes with learning, Student displays verbal or physical aggression that portrays self-harm and/or harm to others. This was a change from the previous BIP but still did not require immediate notification.

- c. No specific positive behavioral interventions, desired replacement behaviors, or rewards and motivators were included.
- d. Follow up included: required six weeks to determine success of alternate schedule, review of goals and progress quarterly, review of goals/accommodations/and behavior prior to school start with Parent and School staff, and monitor and communicate with Parent daily for unsafe behaviors, and weekly for progress towards goals.

August 18, 2023 FAIRE Plan.

Incident on October 17, 2023

- 20. On September 26, 2023, Complainant told Case Manager she was concerned with the current placement and requested an IEP meeting. The District proposed dates and a meeting was scheduled for October 18, 2023. *Special Ed Contact Log.*
- 21. In October, an increase in negative behaviors was observed. The Case Manager notified Complainant of the behaviors in accordance with the FAIRE plan via telephone and meetings. *District Response; Interview with District Personnel; Special Ed Contact Log.*
- 22. On October 6, 2023, Case Manager mailed an evaluation plan to Complainant seeking her consent for a functional behavior assessment (FBA). The Case Manager followed up by email on October 13, 2023, and telephone on October 16, 2023, and it was decided Complainant would sign her consent at the meeting on October 18, 2023. *Special Ed Contact Log; Evaluation Plan.*
- 23. On October 17, 2023, Student exhibited escalation and other behaviors on the bus, including punching the paraprofessional that was riding the special education bus with Student. Another student tried to protect staff and then became the recipient of the Student's aggression. The paraprofessional restrained Student because of danger to Student and others. The bus stopped and Student was transported to the School by an administrator. *Behavior Detail Report; Interview with District Personnel.*
- 24. Once at school at approximately 9 a.m., Student became escalated again and became physically and verbally aggressive towards other students and staff. Student was making threats towards self and others and began to stab himself with a pencil. The escalation continued and the counselors were called in to assist with Student. Student continued to make threats and reported possible abuse by a neighbor. *Behavior Detail Report; District Response; Interview with District Personnel.*

25. The District initially reached out to notify Complainant about the Student's behavior incidents at approximately 11 a.m. Shortly after Parent was notified, Student eloped and attempted to leave School property. The Assistant Principal had to climb the playground equipment to get Student to come down and use a CPI hold to prevent him from eloping. Student refused to walk back to the building, and the Assistant Principal and case manager had to do a CPI two-person assist to return the Student to the building. *Behavior Detail Report.*
26. After returning to the building, Student was returned to the classroom for lunch and Student continued to swear, make threats, and spit food at the Assistant Principal. *Behavior Detail Report.*
27. Pursuant to District policy and because of Student's behaviors that day, reports were filed with Montana Department of Health and Human Services (DPHHS) and law enforcement. *District Response; Interview with District Personnel.*
28. At the end of the day, Student was transported home by two administrators who described to Complainant the details of the incident and restraints used, informed Complainant that Student received a one-day suspension and that reports were made to DPHHS and law enforcement. *Interview with District Personnel.*
29. During the incident on October 17, 2023, Student was restrained three times because of risk of harm to himself and/or others. These restraints were consistent with the aversive treatment plan developed for Student. *Behavior Detail Report.*
30. The restraints were used to ensure the safety of Student and others, were not used as punishment and were applied by trained staff. *Interview with District Personnel.*

Subsequent Actions

31. The IEP Team met at the previously scheduled IEP meeting on October 18, 2023, to discuss Complainant's request to change placement back to the more restrictive alternative setting with one-on-one support. The District wanted to keep the current placement. The IEP Team discussed the severity of Student's behaviors and the Team decided to come up with a goal to help student identify his feelings and regulate strong

emotions. The Team decided to work on a plan to support Student and Complainant chose to keep Student home until it is set up. *Special Ed. Contact Log.*

32. Complainant was contacted on October 25, 2023, because Student had not returned to School. Complainant informed the District she would be homeschooling Student. *Special Ed. Contact Log.*
33. On November 15, 2023, the Complainant contacted the school about re-enrolling Student and requesting homebound services and the need for an IEP meeting before Student returned. *District Response.*
34. An IEP meeting was held on December 12, 2023, to discuss plans for Student's return to school. The delay in scheduling the meeting was to accommodate schedules. *December 12, 2023 Agenda and Schedule for Student's Return.*
35. It was agreed that Student would transition slowly back to school on January 4, 2024. There was also discussion about a comprehensive reevaluation and staff training. *District Response.*
36. Student was admitted to acute care during holiday break and was discharged on January 5, 2024. Student returned to school on January 9, 2024. *Interview with Complainant; District Response.*

Analysis and Conclusions

Issue 1. Whether the District failed to appropriately address Student's behavior that impedes Student's learning or that of others in developing and implementing the IEP in violation of 34 C.F.R. 300.324(a)(2)(i).

1. When a child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. 34 C.F.R. 300.324 (a)(2)(i). "The IEP team may also elect to address behavior through annual goals in the IEP. 34 CFR 300.324(a)(2)(i). The IEP Team may include modifications to the child's program, supports for the child's teachers or other school personnel, and any special education and related services and supplementary aids and services necessary to enable the child to advance appropriately toward attaining those behavioral goals. 34 CFR 300.320(a)(4)." *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, Question A-3 (OSEP July 19, 2022).*

2. The IEP team must consider information about a child's current functional behavioral performance provided by parents and teachers or other service providers. 34 CFR 300.321 and 300.324. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, Question A-2 (OSEP July 19, 2022). Once an IEP is developed, the IEP team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals are being achieved, and when appropriate revise the IEP. (*Id.* (citing to 34 CFR 300.324(b)(1))).
3. In general, a student with a disability should have the same length of school day as students without disabilities. However, if a student's IEP team determines a child needs a longer or shorter school day in order to receive a free appropriate public education (FAPE), then appropriate modifications should be incorporated into the IEP. Modifications must be based on the unique needs of the student. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, Question C-6 (OSEP July 19, 2022).
4. A BIP is not defined in the IDEA, but generally is understood to mean a component of a child's educational program designed to address behaviors that interfere with learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, Appendix I (OSEP July 19, 2022). A BIP generally describes the behavior that inhibits the child from accessing the learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the child's learning or that of others." *Id.*
5. 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.*, 31 IDELR 132 (8th Cir. 1999).
6. Student's August 29, 2022 IEP amended on May 23, 2023 addressed Student's behavioral needs through measurable annual goals, supplementary aids and services including a BIP and aversive treatment plan. The BIP was individualized and tailored to the unique behavioral needs of the student. The IEP Team determined Student needed a shortened school day, but LRE was tied to the behavioral goal with the overall

goal of increasing time back to a full school day and increasing time in the general education setting. The IEP Team relied upon daily behavior data and amended the IEP when the Student was successful, allowing for an increase in the amount of time Student was attending school and changing the location of services to a less restrictive setting, back to the elementary school in the spring of 2023.

7. Student's August 18, 2023 IEP, implemented for the 2023-2024 school year until Complainant removed Student from school on October 18, 2023, did not appropriately address Student's behavior that interfered with his learning or that of others. Student was placed on a shortened day schedule and his IEP provided that LRE would be adjusted if Student would "reach 80% for 10 consecutive data days" which was a higher standard than what was set out in the social/emotional/behavioral annual goals for compliance in a small group setting (80% for 3 consecutive days) and use of appropriate language (80% for 3 out of 4 data days). The reason for shortening Student's school day was to provide increased positive opportunities to build social/emotional or academic skills with the goal of attending school full days with minimal support. Shortening the day effectively decreased the number of positive opportunities and further, there was no plan for how Student would accomplish his overall goal of attending full time with minimal support or what positive services and supports would be provided to assist Student in achieving his goal.
8. Student's August 18, 2023 behavior plan or FAIRE plan was not individualized to the unique behavioral needs of the Student and did not set out positive interventions or strategies to reinforce positive behavior and prevent the behavior that interferes with Student's learning or that of others.
9. In response to Complainant's request on September 26, 2023, to consider a change of placement back to a more restrictive setting, an IEP team meeting was scheduled for October 18, 2023. Additionally on October 6, 2023, the District sought permission for an FBA, due to the increase in negative behaviors. The Team met on October 18, 2023, and discussed Student's severe behaviors and decided to make a plan to support Student. However, Complainant chose to unenroll Student from the District and homeschool Student. Student did not return to school until after the time this Complaint was filed.

OPI finds the District in violation of 34 CFR 300. 324(a)(2)(i) for not appropriately addressing behavior that impedes Student’s learning or that of others in the development of Student’s IEP for the August 18, 2023 IEP that was implemented from August 24, 2023 to October 18, 2023.

Issue 2. Whether the District improperly used physical restraint to address Student’s behavioral needs in violation of ARM 10.16.3346.

10. Montana law provides that a person employed or engaged by a school district may use physical restraint, placing hands on any student in a manner that is reasonable and necessary to quell a disturbance, provide self-protection, protect the student or others from physical injury, obtain possession of a weapon or other dangerous object, maintain orderly conduct of a student or protect property from serious harm. MCA 20-4-302(4).
11. “Aversive treatment procedures may be appropriate for an individual student who exhibits behaviors that pose a risk of physical harm to the student or others, or a risk of significant damage to property, or significantly disruptive or dangerous behaviors which cannot be modified solely through positive behavioral interventions. Aversive treatment procedures must be designed to address the behavioral needs of an individual student, be approved by the IEP team, and may not be used as punishment for the convenience of staff or as substitute for positive behavioral interventions.” ARM 10.16.3346(1).
12. Aversive treatment procedures are defined as isolation timeouts and physical restraint, other than provided in MCA 20-4-302, when the student’s IEP team determines that the frequency, intensity or duration of the restraint warrants an aversive treatment procedure. ARM 10.16.3346(2)(a).
13. A behavioral intervention plan that includes aversive treatment procedures must be in writing and include the following: a statement describing no less than two positive behavioral intervention strategies previously attempted and the results, describe the target behaviors, include short-term objectives with measurable criteria stating the expected change in target behaviors, a written description of the aversive treatment procedures, specify a time-limit for use of the aversive treatment procedure, state when the IEP team will meet to review the use of the aversive treatment procedure, designate an individual responsible for ongoing review and analysis of the target

behavior, state how parents will be informed of the progress toward short term objectives, and state whether any standard school disciplinary procedures are waived. ARM 10.16.3346(7). When the aversive treatment procedure is incorporated into the IEP, parents must be informed that their consent to the IEP includes consent to the aversive treatment plan. ARM 10.16.3346(8).

14. The IEP team determined that Student needed an aversive treatment plan. The target behaviors that would result in the use of aversive treatment procedures, included unsafe behaviors such as eloping. Aversive treatment procedures were to follow CPI protocols, and Student was to be removed to a safe location where active supervision resumes unless he is exhibiting unsafe behaviors.
15. The District did not use any aversive treatment procedures on Student during the 2022-2023 school year. During the 2023-2024 school year, the District used physical restraint on Student three times, all on October 17, 2024 when Student was dysregulated for most of the day. Student was restrained when he engaged in physically aggressive, unsafe behaviors on the bus, and twice when he eloped trying to leave School property and refused to go back into the building. The use of restraint was allowed per Student's aversive treatment plan.

OPI finds no violation. The District implemented physical restraint in accordance with Student's aversive treatment plan.

Issue 3. Whether the District failed to implement Student's IEP when it did not contact Complainant immediately when behavioral incidents occurred in violation of 34 C.F.R. 300.323(c).

16. The IDEA requires that a district implement a student's IEP. 34 C.F.R. 300.323(c). Implementation of the IEP is part of a student's free and appropriate public education (FAPE). 34 C.F.R. 300.17(d). The Ninth Circuit in *Van Duyn v. Baker School District*, 502 F.3d 811, 47 IDELR 182, *amended* (9th Cir. 2007), adopted the materiality standard for failure to implement an IEP. "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." *Van Duyn*, 502 F.3d at 822. Therefore, if a material failure to implement is found, it may be considered a denial of FAPE.
17. There is nothing in Student's August 29, 2022 IEP or August 18, 2023 IEP, amended

May 23, 2023, that required the District to contact parent immediately when behavioral incidents occurred. Student's August 18, 2023 FAIRE plan provided that Complainant was to be notified when Student moderate and/or severe behavior occurs, including but not limited to eloping, after the event if able to regulate, or when Student is unable to regulate after 30 minutes. Additionally, the FAIRE plan required Complainant to be contacted when Student displays verbal and/or physical disruptive behavior that interferes with learning or verbal or physical aggression that portrays self-harm or harm to others. There was no timeline for notification specified, the District would contact Complainant as soon as practical given the particular situation.

18. If an aversive treatment procedure is used, ARM 10.16.3346(9) requires that parents are informed no more than 24 hours after the procedure is used, in writing, or orally if in writing is not possible. ARM 10.16.3346(9).

19. The District's contact log and behavior discipline reports show that Complainant was contacted on numerous occasions regarding Student's behaviors. Specifically, with regard to the aversive treatment procedures implemented on October 17, 2023, Complainant was contacted first around 11:00 a.m. after the Student was regulated and in person by the administration who transported Student home at the end of the school day and discussed the incidents with Complainant. Additionally, there was an IEP meeting the following day where the IEP team discussed the behavior incidents and how to support Student.

The OPI finds no violation. The totality of the evidence shows that the District implemented Student's IEP as required by 34 C.F.R. 300.323(c), and the notification requirement in ARM 10.16.3346(9), with regard to informing Complainant of Student's behaviors and when aversive treatment procedures were used.

Corrective Action

It has been determined that the District is out of compliance in violation of the IDEA. The following corrective actions are required to be completed by the District as set forth below.

1. **FBA**

- The District shall continue to complete, if it hasn't already, the FBA which the Complainant consented to on October 18, 2023. The District shall provide a copy of the completed FBA to the OPI's Early Assistance Program Director **by June 14, 2024**.

2. **Behavioral Consultation**

- The District shall consult with an expert on behavior, such as a board-certified behavior analyst (BCBA), for at least three months during the school year, to assist with Student's behaviors or other areas of concerns the IEP team has identified as a barrier to the Student accessing the general education setting for a full school day. The District shall report back to OPI's Early Assistance Program Director with documentation of the details of the consultation **by June 28, 2024**.

3. **The Student's IEP Development**

- By **August 20, 2024**, the District shall convene an IEP meeting with all required members present to review Student's IEP and determine the following:
 - Appropriate behavioral goals;
 - Appropriate positive behavioral interventions and supports;
 - Appropriate accommodations;
 - Appropriate supplementary aids and services, program modifications and supports;
 - Appropriate supplementary aids and services, program modifications, and support for school personnel;
 - Updating and/or revising the FAIRE (behavior) plan and aversive treatment plan; and
 - Developing a plan to have Student return to school for the entire school day.
- **By August 22, 2024**, the District shall provide the following information to OPI's Early Assistance Program Director:
 - The IEP meeting notice; and
 - The fully developed and proposed IEP and prior written notice.

4. **Required Staff Training**

- The District shall arrange for the District superintendent, principals, special education director, special education teachers and school counselors and school psychologists

to participate in professional development training on addressing behaviors that impact learning by **August 30, 2024**, with an OPI trainer. In order to schedule the training, please reach out to John Gorton, OPI School Improvement/Compliance Unit Manager.

- Participants must sign-in at the training and the sign-in sheet shall be filed with the OPI's Early Assistance Program Director by the OPI Trainer along with a copy of the training materials.

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.

Danielle McCarthy

Danielle McCarthy
State Director of Special Education

- C: Mandi Gibbs, Dispute Resolution/EAP Director (via SMFTS only)
John Gorton, School Improvement/Compliance Unit Manager (via SMFTS only)
[REDACTED] District Attorney (via SMFTS only)
[REDACTED] District Special Education Director (via SMFTS only)