



May 3, 2024

Sent via US Mail and SMFTS



**THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION**

RE: **FINAL REPORT: *In the Matter of*** [REDACTED], 2024-04, 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 fourth grader at [REDACTED] (School) in the [REDACTED] Public Schools (District). Parent 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 Code of Federal Regulations (C.F.R.) Part 300 and ARM 10.16.3007 et seq. The Complainant alleges the following issues:

1. Did the District violate the IDEA discipline provisions by:
  - a. Improperly determining when a change of placement occurred pursuant to 34 C.F.R. § 300.536; and
  - b. Not continuing to provide educational services to Student after Student was removed for more than 10 school days in a school year in violation of 34 C.F.R. § 300.530?
2. Did the District violate ARM 10.16.3346 by using aversive treatment procedures with Student?
3. Did the District fail to consider the February 19, 2024 independent education evaluation (IEE) provided by Complainant in violation of 34 C.F.R. § 300.502(c) in decisions related to the provision of a free appropriate public education (FAPE) to the Student?
4. Did the District fail to complete a timely reevaluation of Student in all agreed upon areas in

violation of 34 C.F.R. § 300.303?

5. Did the District violate 34 C.F.R. § 300.503 by not providing Complainant with prior written notice (PWN) when it denied her request for therapy, occupational therapy (OT) and one on one support?

### **Procedural History**

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint filed by the Complainant on March 5, 2024.
2. The District confirmed that it received a copy of the Complaint, as required by 34 C.F.R. § 300.153(d) and ARM 10.16.3662(3).
3. The OPI Dispute Resolution Office issued a Notice of Filing on March 8, 2024, to the District and Complainant. Parties were notified of the opportunity to engage in informal resolution through the Early Assistance Program (EAP).
4. On March 11, 2024, Complainant emailed OPI requesting to proceed with the complaint process and declining participation in the EAP process and informal resolution.
5. The OPI Dispute Resolution Office issued a Request for District Response, Appointment of Investigator and Scope of Proceedings to the parties.
6. The District submitted a written response to the issues in the Complaint on March 25, 2024.
7. The OPI Dispute Resolution Office received a written rebuttal to the Response from the Complainant on March 31, 2024.
8. Complainant submitted additional information along with the submission of her response to the Complaint Investigator's questionnaire on April 10, 2024.

### **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 Complainant's rebuttal to the District and all exhibits;
- The education records relevant to this investigation; and
- Additional information requested by Complaint Investigator from District.

The investigator interviewed:

- The Complainant using a questionnaire, because the Complainant would not agree to an interview through Zoom or by telephone;
- The District's Special Education Coordinator and the School's Principal, with counsel present via telephone; and
- Two Special Education Teachers using questionnaires.

Additional information was requested and provided by the District.

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. § 300.303 | Reevaluations  |
| 34 C.F.R. § 300.304 | Evaluation Procedures                                |
| 34 C.F.R. § 300.502 | Independent Educational Evaluations                  |
| 34 C.F.R. § 300.503 | Prior Written Notice                                 |
| 34 C.F.R. § 300.530 | Authority of School Personnel                        |
| 34 C.F.R. § 300.536 | Change of Placement because of Disciplinary Removals |
| ARM 10.16.3346      | Aversive Treatment Procedure                         |
| 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 March 5, 2023, through March 5, 2024. Additional information beyond this timeframe was considered for the purpose of fully investigating the complaint.

**Findings of Fact**

1. Student is 10 years old, attending fourth grade in the District. Student is a learner eligible for services under the IDEA category of other health impairment (OHI) and emotional disturbance (ED). *May 9, 2023 IEP amended on December 13, 2023.*
2. During the 2023-2024 school year, Student attended a behavioral academic social emotional (BASE) classroom at one of the District's elementary schools with 12 other peers, grades 1-5 that have social/emotional difficulties. *District Response; May 9, 2023 IEP amended on December 13, 2023.*
3. Complainant preferred all communication with the District to be in writing. *Interviews with District Personnel; Instant Messaging 167-170, 173-175; February 15, 2024 Email p. 41.* Review of the records for this Complaint indicated this may have led to some misunderstandings.

**BASE Classroom**

4. The BASE classroom is connected by a door to another room called the regulation room. The door connecting the two rooms could be locked. The regulation room also had a door connecting it to the overflow classroom and a door to the hallway, neither of those doors could be locked from the regulation room. Within the regulation room, there are two small break rooms that each had one

door. The break room doors could not be locked and had windows. *Additional Information from District; Interview with District Personnel.*

5. The regulation room was a large empty classroom. Learning and calming materials were stored in the overflow room and could be brought in as needed. At times, there was more than one dysregulated student in the regulation room and so a student may be escorted to the overflow room or break room to assist them in achieving regulation. *Additional Information from District; Interview with District Personnel.* The break rooms were approximately 5 feet by 5 feet with no furniture or materials. *Additional Information from District; Interview with District Personnel.*
6. The Student was provided with one to one assistance as needed in the BASE classroom. *Complaint and Additional Information from Complainant; Interview with District Personnel; February 5, 2024 Evaluation Report.*

#### **IEP and Behavior Intervention Plan (BIP)**

7. Student's annual IEP dated May 9, 2023, was amended on December 13, 2023. This was the IEP implemented during the timeframe of this Complaint. *May 9, 2023 IEP Amended on December 13, 2023.*
8. The IEP Team determined that Student's behaviors impeded his learning or that of others. Student's IEP includes measurable annual goals solely in the area of social/emotional/behavioral. *May 9, 2023 IEP Amended on December 13, 2023 IEP.*
9. Student's IEP included accommodations such as distraction reduction through preferential seating, daily check-ins, allowing for movement breaks, having clear rules and expectations, using non-verbal cues to communicate inappropriate behavior and use of a positive behavior intervention plan (BIP). *May 9, 2023 IEP Amended on December 13, 2023 IEP.*
10. Targeted behaviors for Student included in part:
  - a. Demonstrating appropriate peer/adult relations by understanding of another's feelings and taking responsibility for his actions.
  - b. Refraining from impulsive behavior and demonstrating control of verbal and physical impact of others. Avoiding disrespectful words, avoiding physical aggression, and demonstrating appropriate personal space.
  - c. Transitioning effectively and promptly from one activity to another.
  - d. When given scenarios of social conflicts he will demonstrate problem solving skills. *February 10, 2023 BIP.*
11. Student's February 10, 2023 BIP included Student taking time and space away or receiving a direct request from the teacher or staff to take a time out. Student was then to be given time to process, with staff checking on him every 3-5 minutes to see if he was ready to process and move forward. Once Student was ready to move forward, he was to complete a behavior reflection sheet and

possibly an apology sheet and then rejoin the routine. *February 10, 2023 BIP.*

12. If Student became physically unsafe, which is “defined as any behavior that endangers self, others, or could result in significant property damage,” Student was to be removed from the environment by the teacher or staff to the designated break room to calm down and would be constantly and consistently monitored by staff while in the break room where he would remain until he is determined to be safe and is willing to process with the staff. *February 10, 2023 BIP.*
13. The Student would often target younger students or vulnerable staff. *Interview with District Personnel.*
14. An aversive treatment plan was not part of the Student’s IEP. An aversive treatment plan could not be agreed upon. *Interview with District Personnel.*
15. The District never physically restrained the Student. *Interview with District Personnel.*
16. All staff that worked with the Student was trained in safe, physical escort. *Interview with District Personnel.*

### **Reevaluations**

17. On October 23, 2023, Complainant signed consent for a reevaluation in the following areas: classroom-based assessments, observations, psychological assessment and a functional behavior assessment (FBA). *October 23, 2023 Evaluation Plan.*
18. Observations were completed by the School Psychologist on October 30, 2023, a psychological assessment was completed on November 13, 2023, classroom-based assessments were completed on December 11, 2023, and the Occupational Therapist completed observations on January 17, 2024. *February 5, 2024 Evaluation Report.*
19. The FBA Report of Findings and Recommendations was finished on January 31, 2023. The data collection for the FBA occurred between October 11 to December 8, 2023. Complainant was interviewed by the Special Education Teacher evaluator on December 19, 2023. The Special Education Teacher and Student’s father scheduled times to complete the parent interview and their schedules were not compatible. *February 5, 2024 Evaluation Report.*
20. During the December 13, 2023 IEP meeting, Complainant requested occupational therapy (OT) services for Student. The IEP notes indicate the District agreed to have an occupational therapist come in and observe Student and add it to the evaluation report. *May 9, 2023 IEP Amended on December 13, 2023.*
21. The December 13, 2023 PWN stated that there was a proposal to have an occupational therapist observe and become part of the Team to provide services to help Student with social emotional/behavioral needs. The Team agreed to have an occupational therapist observe and provide input on the evaluation and possibly the IEP. The occupational therapist had already been observing and working informally with Student in the classroom to help him meet social emotional

needs by providing sensory items for Student to help with social emotional regulation. *District Response; pp. 9-11; December 13, 2023 PWN.*

22. February 5, 2024 Evaluation Report:

- a. Parent comments included concern that Student has difficulty regulating emotions. The Student has been suspended many times because of emotional dysregulation and overstimulation. This would lead to the Student escalating verbally and physically toward staff and other students. Student needs additional support which can be seen based on numerous failed BIPs and continued suspensions for the same behaviors.
- b. School Psychologist, OT observations and implications for educational planning included:  
[Student] may benefit from breaks when he becomes frustrated, frequent check-ins, and positive reinforcement. During these breaks, he may benefit from activities or tools that promote deep pressure and major muscle work (e.g., chair sit-ups, wall push-ups, stretching, weighted items) to support alertness/attention and overall regulation. [Student] may benefit from taking these breaks in a separate area to support regulation and to limit stimulation from environmental factors.
- c. Classroom based assessments and implications for educational planning determined that Student's behaviors are interfering with his day more than 50% of the time which interferes with his ability to access grade level instruction. The Student struggled to maintain a regulated emotional state and would benefit from intensive social/emotional/behavioral support.

23. The February 5, 2024 Evaluation Report included an FBA:

- a. Examples of behaviors on the FBA included: cursing, physical aggression (hitting, kicking, throwing objects, spitting), verbal aggression (cursing, using unkind words, name calling), telling staff "no", targeting staff and peers with threats of physical harm, threats to shoot the school, eloping from classroom, and self-injurious behaviors that last longer than 15 minutes.
- b. The FBA baseline data indicated that the Student exhibited disruptive behavior on 16 out of 54.4 days of attendance. The baseline data documented 36 instances of disruptive behaviors that impacted learning. Dysregulation usually lasted for 30 minutes at least three out of five times per week. Staff were injured by the Student's physical aggression and materials and objects in the classroom were destroyed or damaged.
- c. The Student's behaviors limited his learning opportunities so that he was significantly behind grade level peers.
- d. The Team was to develop a BIP based on the FBA data. *February 5, 2024 PWN.*

24. The Complainant refused to sign the February 5, 2024 Evaluation Report because the PWN did not contain a denial or approval of OT services. *Complaint*.
25. Complainant followed up with the District on February 6, 2024, about OT in an instant message with the Special Education Teacher stating confusion because there is no mention of the request for OT in the reevaluation or PWN and she thought it was going to be included. *February 6, 2024 IM, District Response p.178; Complaint*. The District replied that after talking to the occupational therapist and School Psychologist that they thought they could discuss with entire Team at the next IEP Team meeting. *February 9, 2024 IM, p. 181; February 23, 2024 PWN, pp.52-55; Complaint*.
26. On February 20, 2024, via email, Complainant provided the District a copy of a diagnostic evaluation and recommendations for schooling from a private psychiatrist/physician dated February 19, 2024. *February 20, 2024 Email, pp. 47-50*.
27. At the February 20, 2024 manifestation determination (MD) meeting, the IEP Team considered the psychiatrist/physician's independent evaluation and recommendations and agreed to conduct another reevaluation in the additional areas to consider additional eligibility categories and recommendations in the report, including OT and speech therapy. *February 23, 2024 PWN, pp.52-55*.
28. On February 21, 2024, Complainant signed consent to an Evaluation Plan for permission to evaluate Student in the areas of behavioral, classroom-based assessment, communication (speech therapy), observations, social/emotional and OT. *February 21, 2024 Evaluation Plan, p.24*.

### **Significant Behavior Incidents**

29. Student's dysregulation increased and became more consistent in length and triggers over the course of the 2023-2024 school year. *Interview with District Personnel*. Contact with Complainant concerning the behaviors occurred frequently through instant messaging. *Instant Messages pp. 173-199*.
30. On October 26, 2023, Student was targeting a younger child and was moved to the break room to keep himself and others safe. Student was physically aggressive to staff and threatening to harm himself or others. A Psychotherapy Assessment Checklist (PAC) evaluation was recommended because of things that Student said. Complainant raised a concern about whether aversive treatment procedures were being used and what "safe space means" and wanting to know if he is in the "tiny closet". *District Response, Instant Message, p. 191*.
31. On October 31, 2023, Student was disrespectful to peers and a social worker. The Social Worker moved Student to the regulation space. Student escalated to physical aggression and was moved to the break room. The door was closed for a couple of minutes while he was very escalated.

Student threatened suicide and the Social Worker recommended a PAC evaluation again. Complainant was concerned Student needs to be able to have a break with quiet time. Social Worker let Parent know he cannot be alone in the regulation room, but he could choose to move to the “safe space (breakroom)” and close the door. Complainant did not think the “closet” (break room) is a good idea because it is too small and causes stress. *District Response, Instant Message p. 192.*

32. On January 4, 2023, the Student was sent to the regulation space. He became very aggressive, threatening to shoot up the school and kill a staff member. He was moved to “seclusion” for 10 minutes. The Special Education Teacher sat with Student in the room and helped him process. *District Response, Instant Message p. 197.*
33. On January 19, 2024, the Student was escorted to the regulation room to work on de-escalation. Student tried to return to the classroom and tried to push past the staff that was blocking the door. Doors to the hallway or overflow room were blocked by adults to prevent Student from eloping. The door to the main classroom from the regulation room was locked to prevent the Student from eloping into the main classroom and disrupting the other students. While in the room with at least two adults present, multiple techniques were attempted to de-escalate Student, including a walk around the building. Upon return, the Student was regulated and then became dysregulated. The Student was escorted to the break room where he was kicking the door resulting in potential injury to the staff or others. The door was held closed for two minutes and opened as soon as Student quit kicking. *Transcript from Voice Mail from Social Worker, Interview with District Personnel; Follow up information with District.*
34. On January 30, 2024, the Student was escorted by the Special Education Teacher to regulation space due to yelling, cursing, and disrupting the classroom. Special Education Teacher went back to class and Student escalated with physical aggressions. Student hit a another teacher and was put in the break room for 15 minutes. *District Response, Instant Message p. 175.*
35. On February 15, the Student became escalated verbally and physically kicking property and pushing a teacher, hitting and kicking the principal. Multiple threats of suicide were made and an officer was called. Student was moved to the break room, and the door was closed per officer’s request for two minutes because Student was escalated and trying to elope. Officer took Student to hospital for PAC evaluation. *District Response, Instant Message pp. 159-171.*
36. Student was not locked in the break rooms and was never left alone. The majority of the time staff would be in the room with the Student when the door was closed, or staff would be standing at the doorway monitoring the Student. *Interview with District Personnel.* Records indicated two instances where the Student entered or was escorted to the break room and the door was closed, and Student was briefly alone in the room (but under constant visual supervision) because the Student

was physically aggressive. *Instant Messages, pp. 167-170, 173-175; Interview with District Personnel.*

### **Disciplinary Removals and Manifestation Determination (MD) Review**

37. As a result of the Student's misbehaviors, the Student was subjected to disciplinary removals on September 8, 2023, September 11, 2023, September 12, 2023, September 28, 2023, October 11, 2023, October 12, 2023, October 13, 2023, December 8, 2023, December 11, 2023, December 12, 2023, February 15, 2024, February 16, 2024, February 20, 2024 and February 21, 2024. The February 15, 2024 removal is considered a disciplinary removal because the Student was suspended via email from the Principal prior to the officer transporting Student to the hospital for a PAC evaluation. Student did not receive educational services during any of the disciplinary removals *Complaint; Attendance records; February 15, 2024 Email from Principal.*
38. For the 2023-2024 school year, Student received 10 cumulative days of disciplinary removal as of December 12, 2023. *Student Attendance Records.* The IEP Team met on December 13, 2024 and increased supports and services in Student's IEP, but did not hold a MD meeting.
39. A MD meeting was held on February 21, 2024. The MD Team determined that the Student's conduct, physical aggression and threats towards staff and peers, was a manifestation of the Student's disability. The District proposed a change of placement from the BASE classroom to an out of district therapeutic day school due to the severity of the Student's behaviors. Additionally, the District proposed to provide remote services until an appropriate alternative program, such as a therapeutic day school program is available. *District Response; February 21, 2024 Manifestation Determination, February 23, 2024 PWN, pp. 52-55; Interview with District Personnel.*
40. There was no IEP amendment documenting the change of placement.
41. The District pursued placement for Student at a therapeutic day school. No immediate placement was available for the Student and the Student was placed on a waitlist. *District Response; February 23, 2024 PWN, pp.52-55.*

### **Instruction following Manifestation Determination**

42. The Student's father excused the Student from school for February 22-February 23, 2024. *Attendance Records.* Student did not return to school after the incident on February 15, 2024. Complainant picked up a computer from the school on February 22, 2024, and the access information, passwords, lessons plans and assignments were provided by the Teacher to the Complainant on February 26, 2024. Remote services began February 26, 2024. *Teacher 1 Questionnaire, District Response, Additional Information from the Complainant; Interview with District Personnel.*
43. The Student's initial remote Teacher (Teacher 1) that had been Student's Special Education Teacher in the BASE classroom reported she reached out daily to the Student about lessons and

other information starting on February 26, 2024. She also provided weekly digital lesson plans and curriculum and inquired about packets. Complainant reported to Teacher 1 that the Student would need to work independently. Teacher 1 had daily telephone calls with Student to address social emotional needs and the Student would email Teacher 1 if assistance was needed. *Teacher 1 Questionnaire, Lesson Plans.*

44. On March 11, 2024, a new Teacher (Teacher 2) was assigned to work with the Student and had daily contact with the Student through Google Meets to review work and provide assignments. Student received instruction in reading, math and social emotional needs. Student worked with the Edmentum program in addition to daily instruction from Teacher 2. *Teacher 2 Questionnaire.*
45. Teacher 2 met with the Student and Complainant on March 13, 2024, to discuss instruction for the Student and to assess needs and supports. *Teacher 2 Questionnaire.*
46. The plan to address the Student's social emotional needs was modified by Teacher 2 because the Student was no longer in a traditional classroom setting, but the Student still received social emotional services, such as journaling about positive self-talk after watching a video, developing strategies for managing behavior when moving back to a traditional setting, and discussions about healthy relationships. *Teacher 2 Questionnaire.*
47. Parent filled out enrollment paperwork at the beginning of April and Student began attending school at a therapeutic day school on April 22, 2024. *Enrollment Paperwork.*

## **Conclusions and Decision**

**Issue 1. Did the District violate the IDEA discipline provisions by:**

- a. Improperly determining when a change of placement occurred pursuant to 34 C.F.R. § 300.536; and**
- b. Not continuing to provide educational services to Student after Student was removed for more than 10 school days in a school year in violation of 34 C.F.R. § 300.530?**

### **Change of Placement**

1. When a student with disabilities violates a code of conduct, the student may be removed from their current educational placement to the same extent as children without disabilities, until there is a change of placement. A change of placement occurs when the removal is for more than 10 consecutive school days, or the child has been subjected to a series of removals that constitute a pattern. 34 C.F.R. § 300.536(a).
2. Whether a pattern of removal constitutes a change of placement is determined on a case-by-case

basis. 34 C.F.R. § 300.536(b). A pattern of removals may result in a change of placement because the series of removals total more than 10 school days in a school year, the behavior is substantially similar to the child's behaviors in the previous incidents that resulted in removals and because of additional factors such as the length of each removal, the total amount of time removed and proximity of the removals. 34 C.F.R. § 300.536(a)(2).

3. When a change of placement occurs due to disciplinary removals, then the District must convene an MD meeting within 10 school days. 34 C.F.R. § 300.530(e). The MD meeting participants include the parent and relevant members of the IEP team. 34 C.F.R. § 300.530(e). The participants must consider all relevant information in the child's file, including, but not limited to, the IEP, any teacher observations and relevant information provided by the parents to determine if the conduct was a manifestation of the child's disability. The conduct in question is a manifestation of the student's disability when it was caused by or had a direct and substantial relationship to the child's disability, or the conduct was the district's failure to implement the IEP. 34 C.F.R. § 300.530(e)(2).
4. When the conduct is determined to be a manifestation of the child's disability, the child must be returned to the placement from which the student was removed unless the parent and district agree to a change of placement as part of the modification of the BIP. 34 C.F.R. § 300.530(f)(2). If the parent and district agree to a change of placement, the IEP must be amended, and parental consent must be obtained in accordance with ARM 10.16.3505. Also, the district must complete an FBA, if one has not been completed, and review and modify, as necessary, the BIP. 34 C.F.R. § 300.530(f)(1).
5. If a district believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, the district may appeal the decision by requesting an expedited due process hearing. 34 C.F.R. § 300.532(a).
6. By December 12, 2023, the Student had been subjected to disciplinary removals for violations of the code of conduct for 10 cumulative school days in the same school year which resulted in a disciplinary change of placement pursuant to 34 C.F.R. § 300.536(a)(2). The IEP Team met on December 13, 2023, and increased Student's special education service minutes for social/emotional/behavioral needs and added the related service of social work. Additionally, the Student had a pending reevaluation that included an FBA. **However, the District did not hold an MD meeting to determine if the Student's conduct was a manifestation of Student's disability, which violated 34 C.F.R. § 300.530(e).**
7. The Student continued to have disciplinary removals with similar patterns of behavior. An MD meeting was held on February 21, 2024. It was determined that the Student's conduct was caused by the Student's disability. The MD Team considered the IEE that contained new diagnoses, the February 5, 2024 Evaluation Report and recommended another reevaluation and

revision of the BIP. The District proposed a change in placement at the MD meeting to a therapeutic day school with virtual services pending that placement, but **the District did not revise the BIP and amend the Student's IEP to reflect the change of placement in violation of 34 C.F.R. § 300.530(f) and did not obtain parental consent in violation of ARM 10.16.3505.** The IEP Team never met after the February 5, 2024 Evaluation Report Team meeting to revise Student's IEP or update the BIP.

### **Providing Services After Removal for 10 School Days**

8. Once a student has been subjected to disciplinary removals for 10 days, the student must continue to receive educational services to enable the child to continue to participate in the general education curriculum, although in an alternative setting, and to progress toward meeting goals in the student's IEP. 34 C.F.R. § 300. 530(d). After the child has been removed for 10 days in one school year, school personnel in consultation with at least one teacher determine the extent of services needed to enable the child to participate in the general education curriculum and make progress toward IEP goals. 34 C.F.R. § 300. 530(d)(4).
9. As of December 12, 2023, the Student had been removed for 10 school days in the same school year. Student did not receive educational services for any subsequent disciplinary removals on February 15, 16, 20 and 21, 2024 **in violation of 34 C.F.R. § 300.530(d)**. Student was excused by his father on February 22 and 23, 2024. The Student received a computer from the school on February 22, 2024, and virtual educational services began on February 26, 2024.

**There were violations of Part B of the IDEA.** The District did not properly determine when a disciplinary change of placement occurred in violation of 34 C.F.R. § 300.356 and did not provide educational services to Student after he was subject to disciplinary removals for 10 school days within the school year violating 34 C.F.R. § 300.530(d). Additionally, the District did not properly change Student's placement by amending Student's IEP and obtaining parental consent in violation of 34 C.F.R. § 300.530(f) and ARM 10.16.3505.

### **Issue 2. Did the District violate ARM 10.16.3346 by using aversive treatment procedures with Student?**

10. The IDEA does not specifically address the use of aversive treatment procedures. The U.S.

Department of Education has opined that “[p]hysical restraint<sup>1</sup> or seclusion<sup>2</sup> should be reserved for situations or conditions where there is imminent danger of serious physical harm to the child, other children, or school or program staff.” *Restraint and Seclusion Resource Document* (May 2012, US DOE).

11. Montana law provides that “[a]versive 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. A person employed or engaged by a school district may use physical restraint, placing hands on a 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). Additionally, an IEP team may determine that the frequency, intensity or duration of the restraint warrants an aversive treatment procedure. ARM 10.16.3346(2)(a).
13. Isolation time-outs result in removal of a student to an isolation room where the student is: alone in the isolation room during the period of isolation, prevented from exiting the isolation room during the period of isolation, the door to the isolation room remains closed during the period of isolation, and the student is prohibited from participating in activities occurring outside the isolation room and from interacting with other students during the period of isolation. ARM 10.16.3346(2)(b). A student in an isolation time-out must be under the direct and constant visual observation of a staff person throughout the entire period of isolation. ARM 10.16.3346(3). Isolation in a locked room is prohibited. ARM 10.16.3346(4)(b).
14. Exclusion time-outs are not considered an aversive treatment procedure and are defined as removal of a student from a regularly scheduled activity for disciplinary purposes that does not result in placing the student in an isolation time-out. ARM 10.16.3346(5).

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<sup>1</sup> Physical restraint is “[a] personal restriction that immobilizes or [reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.” *Restraint and Seclusion Resource Document* (May 15, 2012, US DOE).

<sup>2</sup> Seclusion is “[t]he involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purposes of calming.” *Restraint and Seclusion Resource Document* (May 15, 2012, US DOE).

15. A behavioral intervention plan that includes an aversive treatment procedure 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 regularly 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). Parents are to be 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).
16. The Student's IEP Team determined his behaviors impede the learning of himself or others. Student was in the BASE classroom to support his behavioral needs. His IEP includes solely social/emotional/behavioral goals and a BIP to address target behaviors such as refraining from impulsive behaviors and demonstrating control of his verbal and physical impact on others by avoiding physical aggression with the use of positive behavior supports.
17. Student's IEP did not include aversive treatment procedures. During instances when Student becomes physically unsafe to self or peers, the procedure in the BIP was for Student to be removed by the teacher or staff to the break room to calm down and to be constantly monitored by staff. Student was to remain in the break room until determined safe and willing to process with staff.
18. There are two documented instances when the Student was placed in an isolated time out according to ARM 10.16.3346(2)(b), both were for two minutes and were used when Student was physically aggressive with staff.

**The OPI finds no violation.** The District followed the procedure in Student's BIP for when he became physically unsafe to himself or others. The majority of the time staff was with Student in the break room if the door was closed or staff would stand in the doorway monitoring Student. The two instances that rose to being an isolated time out were due to Student being physically aggressive and staff needing to do something in order to protect Student or themselves. Physical restraint would have been justified per MCA 20-4-302(4), but the District chose to close the door briefly to defuse the behavior.

**Issue 3. Did the District fail to consider the February 19, 2024 independent education evaluation (IEE) provided by Complainant in violation of 34 C.F.R. § 300.502(c) in decisions related to the provision of a free appropriate public education (FAPE) to the Student?**

19. Parents always have the right to obtain an IEE of their child at their own expense. 34 C.F.R. § 300.502(a)(1). When a parent shares an independent educational evaluation (IEE) obtained at private expense, the results from that evaluation must be considered by the by the district, if it meets agency criteria, in any decision made regarding the provision of FAPE to the child. 34 C.F.R. § 300.502(c).
20. An MD meeting was held on February 21, 2024. At that meeting, the MD Team reviewed and considered the February 19, 2024 IEE obtained by Complainant. The IEE was a diagnostic evaluation conducted by a psychiatrist/physician. The results included a diagnosis of autism among other diagnoses and recommendations including adding related services in OT and social pragmatic language training to Student's IEP.
21. The Team determined additional assessments were necessary to consider updated eligibility criteria related to the medical documentation of Autism and recommended related services. On February 21, 2024, the Complainant signed consent to an evaluation plan for permission to evaluate Student in the following areas: behavior, classroom-based assessments, communication (speech language), observations, social emotional and OT.

**The OPI finds no violation.** The District considered the IEE provided by Complainant in compliance with 34 C.F.R. § 300.502(c).

**Issue 4. Did the District fail to complete a timely reevaluation of the Student in all agreed upon areas in violation of 34 C.F.R. § 300.303?**

22. 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).
23. 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), *emphasis added*. There is no similar time requirement set out for reevaluations pursuant to 34 C.F.R. § 300.303.

24. While the 60-day timeframe does not apply to reevaluations, 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. *Letter to Saperstone*, 21 IDELR 1127 (OSEP 1994).
25. Guidance from OPI states that “[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*, October 2021 (Page 63, Question 27).
26. Complainant signed consent to the Evaluation Plan on October 23, 2024, giving the District permission to conduct classroom-based assessments, observations, psychological assessments and an FBA. All of the assessments were completed, and an Evaluation Report was issued dated February 5, 2024.
27. The Evaluation Plan did not include an OT evaluation. OT services were requested by the Complainant during the December 13, 2023 IEP meeting and the IEP notes stated that the occupational therapist would observe Student and add that to the evaluation report. Additionally, the PWN indicated that the occupational therapist had been informally working with Student in the classroom to help with social emotional needs. The Occupational Therapist did observe Student and those observations were added to the Evaluation Report.
28. After the February 5, 2024, Evaluation Report Team meeting, Complainant followed up with an instant message to Teacher 1 on February 6, 2024, about the status of OT. Complainant was told the Team would need to meet to discuss OT. At the February 21, 2024 MD meeting after review of the IEE, Complainant signed consent to an Evaluation Plan for permission to conduct additional evaluations, including an OT evaluation.
29. After receiving consent on October 23, 2023, the District immediately began the evaluation process. The record shows that steady progress was made, including the addition of the Occupational Therapist’s observations, until January 31, 2024, when all of the assessments included in the Evaluation Report were completed.

**The OPI finds no violation.** The District did not delay in conducting the reevaluation consented to on October 23, 2023, in all of the agreed upon areas. Based on the circumstances, the reevaluation was conducted within a reasonable timeframe.

**Issue 5. Did the District violate 34 C.F.R. § 300.503 by not providing Complainant with prior written notice (PWN) when it denied her request for therapy, occupational therapy and one on**

**one support?**

30. A PWN is required when the District proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). The PWN must be written and include the description of the action proposed or refused, an explanation of why the district proposes or refuses the action, a description of each evaluation, procedure, assessment, record or report used as the basis for the decision, procedural safeguards and resources for assistance, other options considered and why rejected and other relevant factors. 34 C.F.R. § 300.503(a) and (b).
31. PWN is used to notify and ensure that parents understand the school district's proposal or refusal to take action. PWN must be provided within a reasonable time before the district implements the proposal or refusal described in the notice. 71 Fed. Reg., 46691 (August 14, 2006). "The purpose of such advance notice is to provide the parent sufficient time to consider the proposal or refusal and respond prior to the implementation of the proposed action, or in response to a refusal to take a requested action. In order for the parent to make his or her decision, she or he must be clear on the action being proposed or refused." *Letter to Atkins-Liberman*, 56 IDELR 141 (OSEP August 5, 2010).
32. The investigation determined one on one support was provided in the BASE classroom. Instant messages between District and Parent and the IEP notes contained references to the Complainant seeking private therapy for grief counseling. No requests for one on one support or other therapy were found in the record that were not addressed by the District.
33. Complainant requested OT services during the December 13, 2023 IEP meeting. The PWN attached to the IEP documented the District's proposal to have the Occupational Therapist observe and become part of the Team to provide services and to help the Student with social/emotional/behavioral needs. The IEP Team agreed to have the Occupational Therapist observe and provide input on the evaluation report and possibly the IEP. The Occupational Therapist had been observing and working with Student in the classroom to help meet social emotional needs.
34. By instant messaging on February 6, 2024, the Complainant let the District know she refused to sign the February 5, 2024 Evaluation Report because the attached PWN did not contain a denial or approval of OT services. The evaluation report team goes over the results of the assessments and makes recommendations for consideration by the IEP team. The IEP Team did not meet to discuss the recommendations at that time. To have provided a PWN with regard to OT services after the Evaluation Report Team meeting would have been incorrect and potentially resulted in predetermination. On February 9, 2024, the District let Complainant know that the entire Team needs to discuss OT before anything is decided.

**The OPI finds no violation.** The District provided PWN as required by 34 C.F.R. § 300.503.

**Corrective Action**

The District shall provide three hours of training on the discipline provisions of IDEA and aversive treatment procedures pursuant to ARM 10.16.3346. The District shall comply with the following conditions:

1. Participants in the training shall include the following District staff: all administrators (including principals and vice principals), special education administrators, special education teachers, case managers, school counselors, related service providers, and any additional staff involved in disciplining or use of aversive treatment procedures with students with disabilities.
2. The training shall be completed **by September 27, 2024.**
3. The training shall be conducted by the OPI. The District shall reach out to OPI's School Improvement/Compliance Unit Manager **by June 3, 2024**, to schedule the training.
4. The District shall submit the date of the training and a list of all staff members required to take the training to OPI's Early Assistance Program Director **by June 28, 2024.**
5. Evidence of the completion of the training, including sign-in sheets with the name of all participants, date(s) of training, and copies of all training material shall be submitted to OPI's Early Assistance Program Director **within 5 days of the completion of the training.**

**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*  
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Danielle McCarthy  
State Director of Special Education

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