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SUPERINTENDENT  
OF PUBLIC INSTRUCTION

BEFORE LINDA McCULLOUGH,  
SUPERINTENDENT OF PUBLIC INSTRUCTION  
STATE OF MONTANA

\*\*\*\*\*

[REDACTED]

vs.

[REDACTED]

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OSPI No. 2003-06

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
MEMORANDUM, AND  
ORDER

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DECISION OF THE HEARING OFFICER

PROCEDURAL HISTORY

The prehearing conference was held on August 28, 2003. During the conference, the Hearing Officer requested that the parties identify the amount of time necessary for the completion of the hearing. Both parties indicated that a two (2) day hearing would be sufficient. Following the prehearing conference, the Hearing Officer issued an order, directing the hearing be completed in two days. No parties objected. Subsequently the Hearing Officer, upon motion of the District, limited the number of witnesses to twelve for each party. No party objected.

The hearing on the above-entitled matter was held on October 14 and 15, 2003, in [REDACTED] Montana. Claimants, [REDACTED] and his parents, were represented by Dale [REDACTED]. The [REDACTED] School District, [REDACTED] County, Montana, was represented by [REDACTED]. The Claimants elected to open the hearing to the public. The Hearing Officer ordered timed testimony, unless one or the other party requested additional time for direct or cross-examination. Additional time was provided. During the first day of the hearing, the Claimant's case was presented which included six witnesses who provided testimony telephonically.

On day two of the hearing, the parent's counsel moved to extend the hearing beyond the statutorily required, and previously agreed upon, 90 days for additional time.

The request was denied. The Hearing Officer continued to order timed testimony, unless one or the other party requested additional time for direct or cross-examination. Additional time was provided.

Testimony was received. Document evidence was presented and received. Having heard the evidence, this Hearing Officer is now prepared and does hereby enter the following:

#### FINDINGS OF FACT

1. [REDACTED] is a ten year old boy. His parents are [REDACTED] and [REDACTED]. Evidence reveals the parents are very active participants in [REDACTED] special education planning and program implementation. They are knowledgeable about [REDACTED] disability and his special education programs. They have attended training and national conferences in this area.
2. [REDACTED] is enrolled in the [REDACTED] School District, [REDACTED] County, Montana. [REDACTED] has attended school and has received special educational services since 1996.
3. The [REDACTED] Public School District receives Federal funding for the education of children with special needs and/or disabilities.
4. [REDACTED] has been identified as "disabled" under the Individuals with Disabilities Education Act, 1997. [REDACTED] has been identified in various categories, including Mild Mental Retardation, Speech Impaired and most recently, a student with autistic spectrum disorders.
5. On July 30, 2003, Claimants filed a Due Process hearing request. Through an alternative strike selection process, the State Superintendent of Public Instruction appointment the undersigned as Hearing Officer.
6. Claimant's initial due process hearing complaint was unclear, so the Hearing Officer requested a clarified "Statement of Issues". On September 9, 2003, Claimants filed the amended "Statement of Issues". Claimant identified eight issues, alleging various violations of IDEA and its implementing regulations.
7. A review of the Statement of Issues indicates that, both in the original complaint filed with OPI and through citations in the Statement of Issues, Claimants alleged District failed to provide a free appropriate public education (FAPE) in the Least Restrictive Environment for [REDACTED]

ISSUE 1: The District failed to review the Benefis report.

8. On May 15, 2003, the parents attended a Child Study Team (CST) meeting where [REDACTED]'s speech teacher, Sarah [REDACTED], recommended that [REDACTED] be exited from speech services, but the parents disagreed with this recommendation and the IEP team was scheduled to reconvene on both May 27 and May 29, 2003.
9. Consequently, the parents contacted OPI who recommended that the parents seek an Independent Educational Evaluation for [REDACTED] speech, so the parents scheduled [REDACTED] to be evaluated by [REDACTED] at Benefis Healthcare (hereinafter Benefis) on May 26, 2003.
10. The District received the three and a half page report from Benefis on May 27, 2003 by fax transmission. The last day of school at the District was May 30, 2003. The last day of the contractual year for cooperative personnel serving the District special education program was May 29, 2003, and Ms. [REDACTED] was scheduled to leave the State on the same date.
11. The District refused to consider the results of the Benefis evaluation because there was not sufficient time before the end of the school year for the IEP team members to read the report, compare to District evaluations of [REDACTED] and [REDACTED] progress, and make an informed recommendation, so the District recommended that the Benefis report review be continued until District personnel returned for the 2003-04 school year after the summer break.
12. The IEP team convened on May 27, 2003, as scheduled, wrote the IEP which included all recommended special education services, and provided 2-3 hours per quarter for related services of speech, but that IEP did not state the IEP team will meet at the beginning of the next school year to consider the Benefis report.
13. This complaint was filed prior to the 2003-04 school year and since the parents have never signed and approved any part of the May 27, 2003 IEP, [REDACTED] has continued to receive special education services that were required on [REDACTED] 2002-03 IEP, which includes speech services.

ISSUE 2: The District failed to provide [REDACTED] with ESY in 2000, 2001, and 2002, and sufficient ESY in 2003.

14. The District did not provide Extended School Year (ESY) services for [REDACTED] during the summers of 2000, 2001, and 2002 because the IEP team had found [REDACTED] did not qualify for ESY.
15. The District did provide [REDACTED] with limited transition services at the end of the summer of 2002 to help [REDACTED] acclimate to a new school environment.
16. The District provided thirty hours of ESY to [REDACTED] during the summer of 2003 based on the IEP team findings that over the summer of 2002 [REDACTED] had experienced substantial regression in reading skills and was not able to recoup those skills.
17. Testimony from the parents and [REDACTED] records show that the parents agreed with the IEP team recommendations for ESY during the summers of 2000, 2001, 2002, and 2003.

ISSUE 3: The District has failed to implement HWT.

18. Testimony from [REDACTED], [REDACTED] special education teacher, indicates the District purchased the Handwriting Without Tears (HWT) program at the recommendation of the parents. Ms. [REDACTED] implemented the HWT program with [REDACTED] in February 2001.
19. The parents' testimony reveals the parents were aware that the District had implemented the HWT program.
20. Upon request of the parents, Ms. [REDACTED] and other teachers of [REDACTED] traveled to [REDACTED] and observed another classroom setting using HWT. The teachers returned to [REDACTED] School and continued to implement the HWT program for [REDACTED].
21. After a few months of using HWT with [REDACTED], the District discontinued the program in favor of another District curriculum handwriting program, because, as Ms. [REDACTED] testified, [REDACTED] had expressed his desire to use the same handwriting program as his peers.
22. The parents were aware of the decision to discontinue HWT and did not object.

23. A review of [REDACTED]'s IEP's reveal Handwriting Without Tears was never a required service under IEP, but mentioned in the minutes as options to consider.
24. Testimony reveals Claimant never raised the issue or requested the HWT program again until filing this complaint.

ISSUE 4: The District has failed to give proper notice of special education meetings.

25. Testimony of District personnel indicates at the June 1, 2000 IEP meeting, the parents requested a review of the IEP in November, 2000.
26. On November 8, 2003, the parents sent a note to the school reminding the District of the parent's request for an IEP meeting to be scheduled as soon as possible.
27. Consequently in November, 2000 the District admittedly scheduled an IEP team meeting at the same time that [REDACTED]'s parents were scheduled for [REDACTED]'s parent teacher conference without giving the parents proper notice of this IEP team meeting.
28. While the proper IEP team meeting notice was not sent to the parents, the parents did not object at the time to their parent teacher conference time being changed to an IEP team meeting and the parents participated in this meeting.
29. The District notified the parents of an IEP team meeting to be held on May 15, 2003, but when the meeting convened, the District personnel informed the parents that the meeting was actually a CST meeting. (This is the same meeting as referred to in Issue 1.)
30. The District admits that the notice sent was an error, but the records of the CST and parent testimony indicate that the parents did not object to the meeting being a CST and the parents actively participated in the discussion.

ISSUE 5: The District has failed to provide a full time aide from 1999 through 2003.

31. Evidence reveals Claimants signed the IEP for 1999, 2000, 2001, 2002. In all of the IEP's there is no requirement that a full time one-on-one aide be provided to [REDACTED], nor is there any documentation that [REDACTED] has been denied a full time aide.
32. Testimony indicated the District provided [REDACTED] with one-on-one instructional support as needed in all settings, including classroom, resource room, lunchroom setting. This instructional support was typically one-to-one with Resource Room teacher [REDACTED] and [REDACTED]. In addition, testimony indicated that

██████ had the support of para professional and teaching staff on an as needed basis in inclusion and resource settings.

33. Claimant's own witness, Dr. Wollersheim, stated that she would not recommend a full time one-on-one aide for ██████ Doug Doty, Education Specialist, Montana Office of Public Instruction, testified that a one-on-one aide to ██████ would likely adversely affect his educational progress because it would be more restrictive and would be inappropriate.

ISSUES 6 and 7: The District must provide an on-site autism specialist consultation and appropriately train District personnel in teacher children with autism.

34. District and special education cooperative staff have significant education and experience with students with Autism. These individuals included ██████ ██████ ██████ and ██████. These teachers and school personnel have had extensive background in special education, including experience with autistic children. The staff maintain BA and Masters degrees with specialties in special education. They are currently certified teachers with special education endorsements.
35. The IEP does not require on-site autism consultation.
36. Testimony indicates that autism experts and consultants have visited the District on behalf of ██████ Evidence reveals that at least three on-site autism consultants, including ██████, Doug Doty, Montana Office of Public Instruction and ██████ have been brought in by the District to assist in the education of ██████ and assist in training District personnel who service ██████
37. ██████ and ██████, Autism Consultants, observed ██████ on May 2, 2003 at school at the parents' request. Their comments were very positive to school staff about how well rounded ██████ school day was and how well ██████ did across settings.
38. On November 18, 2002, Doug Doty, special education specialist from the Montana Office of Public Instruction observed ██████ in his school setting. Mr. Doty commended the inclusive setting and overall program as well as the staff that coordinated those supportive efforts. Mr. Doty recommended that ██████

continue to be expected to act independently and appropriately and to hold him accountable by using some self-monitoring.

39. Testimony of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] reveals school personnel have received extensive autism spectrum disorder training. Both school personnel and cooperative personnel providing direct services to the District demonstrate that teachers, speech therapist and others have attended autism symposiums, CSPD regional and state events, Montana State University in Billings, CEC, ASHA trainings.

ISSUE 8: The IEP team has not failed to provide a behavioral/social skill plan.

40. District personnel consistently testified that [REDACTED] has not demonstrated behavior at school that impedes his ability to learn or those of others.
41. Testimony and evidence indicated that from first grade, and as he progressed from grades two, three, and four, [REDACTED] behavior improved and that [REDACTED] IEP's have consistently contained goals and objectives for behavior and/or social skills which show continued progress.
42. The parents' expert testimony overwhelmingly recommended that [REDACTED] IEP team develop a positive behavioral and social skill treatment plan.

From the foregoing Findings of Fact, this Hearing Officer draws the following:

**CONCLUSIONS OF LAW**

1. Claimants proved that [REDACTED] is a student in [REDACTED] School District eligible for special education services and [REDACTED] has been identified as "disabled" under the Individuals with Disabilities Education Act, 1997. Categories [REDACTED] has been identified under include Autism, Speech Impairment, and Mild Mental Retardation.
2. The District has a responsibility to provide [REDACTED] with a free appropriate public education. 20 U.S.C.A. §1401, §1414; 34 C.F.R. §300.300; *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).
3. The District failed to provide [REDACTED] with a free appropriate public education by failing to review [REDACTED] independent evaluation from Benefis and include the recommendations in [REDACTED] 2003-04 IEP.

4. The District provided appropriate ESY services to [REDACTED] when the IEP team determined that [REDACTED] had substantial or significant regression during the summer of 2003 and that the IEP team appropriately denied ESY services for the summers of 2000, 2001, and 2002.
5. The District adequately explained their implementation of the [REDACTED] <sup>HWT</sup> program and subsequent discontinuation.
6. The District failed to provide [REDACTED] with a free appropriate public education by failing to give his parents proper notice of IEP team and CST meetings in violation of 20 USCS §1415(c).
7. The Hearing Officer concludes that, pursuant to Issues 5 and 8 the District's program for [REDACTED] was reasonably calculated to provide educational opportunity for [REDACTED].
8. The District has provided sufficient on-site consultations of experts in autism to contribute expertise to the school staff in order to implement an appropriate IEP for [REDACTED].
9. The District's personnel have been trained in how to teach children with autism and the District has offered adequate training opportunities to [REDACTED] teachers.

#### MEMORANDUM

This case has been a difficult from the beginning because both sides have been unable to communicate their needs and concerns to the other party and this officer fears this adversarial relationship will continue after this decision is rendered. It is this Officer's hope that each side can put aside past procedural and substantive problems and work for a better future for [REDACTED].

#### Issue 1

This is the most controversial and problematic issue for both sides. This Officer, after weighing the testimony and evidence on this issue, believes the District did not uphold their obligations to provide FAPE for [REDACTED]. The District claims that there was not enough time at the end of the school year to sufficiently review the Independent Evaluation done at Benefis and that their response to put off review until the next school

year was reasonable. However there are too many inconsistencies and lack of attentiveness by the District to the procedures and [REDACTED] needs to ignore this issue.

The District argued that because the IEE was not received until May 27, 2003 when school was ending on May 30, 2003 and because [REDACTED] speech therapist, Ms. [REDACTED] was scheduled to go on vacation on May 29, 2003, it would have been difficult for the District to accommodate the Claimants. Conversely it certainly was not impossible or impracticable. In fact, at the end of the prior year, on June 6, 2002, the IEP team convened to discuss [REDACTED] ESY needs which was presumably after school was out for the summer. Additionally, there were already two meetings scheduled for May 27 and May 29, 2003, which afforded the IEP team the opportunity to hold the required meetings. Also, while Ms. [REDACTED] was going on vacation, another speech therapist, Ms. [REDACTED], who has an extensive history with [REDACTED] and had been critical in the 2002-03 IEP services delivered to [REDACTED] appears to have been available. Additionally Ms. [REDACTED] is competent to review the Benefis report since she has been involved with [REDACTED] since 1996, tested him in 1999 and 2002, and continued to deliver services to him during the 2002-03 school year. The Benefis report was just three and a half pages and the 2002 CST evaluation report was one page. Certainly the question of whether [REDACTED] should continue to receive speech services could have been addressed prior to the end of the school year.

The District also argues that the IEP written on May 27, 2003 provided speech services to [REDACTED] in the guise of related services. However, upon review of the related service proposal from the May 15, 2003 CST notes and the proposed IEP, the District had only recommended a few hours per quarter where Ms. [REDACTED] would review [REDACTED] progress and needs. It is clear to this Officer that the District did not intend to continue speech services to [REDACTED]

The District should have taken the time to review the Benefis report, therefore, this decision considers the District's recommendation to exit [REDACTED] from speech services. The District states that [REDACTED] discrepancy between his achievement and his ability found in standardized testing is not sufficient to warrant continued services. Ms. [REDACTED] testified that a student's achievement testing scores and ability testing scores must be separated by at least one and a half standard deviations for that student to qualify for

speech services under the criteria for speech-language impairment. This statement is misleading and inconsistent with the actual definitions of the criteria and prior District interpretations. First, the requirement to which Ms. [REDACTED] refers in the CST reads, "a significant deviation in oral performance if the student's performance on standardized test is two standard deviations below the population mean, or between 1.5 and 2.0 standard deviations below the population mean, and there is documented evidence over a six month period prior to the current evaluation of no improvement in the speech-language performance of the student even with regular classroom interventions," indicating that the student is compared against the population for whom that student is educated with. This requirement, in this Officer's observation, requires that the CST compare the tested student to the population of students of the same age or grade. It does not say that the student should be compared to the student's individual ability scores, which is the requirement for a child being qualified as learning disabled. Second, when this Officer reviewed the evaluation reports provided to the CST by Ms. [REDACTED] in 1999, she specifically points to significant discrepancies negative 3, and 2 standard deviations that can only be supported if [REDACTED]'s scores were being compared to the population mean, not [REDACTED]'s ability scores.

#### Issue 2

The District provided ample testimony and documentation that [REDACTED] was retaining sufficient skills that extended school year services had not been warranted in the years 2000, 2001, and 2002. The parents and the District agreed that [REDACTED] had substantially regressed during the summer of 2002 and was not able to recoup reading skills, so the Team recommended and [REDACTED] received 30 hours of extended school year services in the summer of 2003. Many of the experts who testified on behalf of the parents and District personnel testified that this is an expected grade for [REDACTED] to begin having difficulty because academics are starting to be more demanding. The claimants did not provide sufficient evidence to show 30 hours was not enough time for [REDACTED]. Both parties were open to considering [REDACTED]'s needs for the Summer of 2004.

This officer finds that the District has provided the parents with reasonable documentation for determining [REDACTED] regression and that the parents have been fully informed of requirements for extended school year.

### Issue 3

The District provided testimony that the HWT program had been tried and that the teachers, with the consent of the parents, discontinued the program as [REDACTED] had communicated his desire to do the same program as other students. The testimony of both sides showed that since the HWT program had been implemented in 2000, the Team had not considered implementing the program again.

### Issue 4

The District's procedural errors alleged by the claimants have not interfered with the services provided for [REDACTED] and the parents never objected to the procedural errors in the November 2000 and May 2003 meetings and have been active participants in those meetings. However the District must be more attentive to the rules for notifying parents if not because it is the law, then because the parents have the right to adequately prepare for any IEP meeting. If you take the parents' cooperation for granted and disregard the law, it only serves to hurt [REDACTED]. The only procedural error that appears to be frustrating either the special education process or services for [REDACTED] was the May 15, 2003 IEP meeting which ultimately led to the District's refusal to consider the independent evaluation before the end of the school year in May 2003.

### Issue 5

The claimants' experts, and the District personnel all agreed that a full time aide is not and has not been necessary for [REDACTED] as requested. However, all agree that there are specific times during [REDACTED]'s day where an aide is necessary, especially during unstructured times. The District showed ample evidence that the District has provided effective aide assistance for [REDACTED] and that the Team has consistently taken into consideration the parents, consultants, and their own personnel recommendations for better, more effective use of those aides.

### Issue 6

The District has provided an impressive array of opportunities for the District personnel, parents, and [REDACTED] to receive the benefits of expert consultants. The parents own specialists disagreed with this request and many consultants utilized by the District seemed genuinely impressed with the District's interest in making sure [REDACTED] got the best education that the District could reasonably provide. The parents have been an integral

part in the District scheduling these experts and should be commended for their active participation in [REDACTED] s and his teachers' education.

Issue 7

The District personnel provided an extensive record of training for educating children with autism spectrum disorders. The parents' experts who interacted with school personnel were all impressed with the each teacher's knowledge and interest in learning about autism and their desire in doing their best to teach [REDACTED]. If there is one flaw in the training the teachers, especially regular education teachers, it is that much of the training has been provided after the teachers already have been teaching [REDACTED]. The District could improve this by identifying [REDACTED] s future teachers the year before and offering and encouraging those teachers to attend trainings in autism.

Issue 8

The District personnel all testified that [REDACTED] has some behavioral / social skill needs, but those needs do not rise to a level of needing a specific plan. Parents and their experts advocated that a plan is needed for consistency and so [REDACTED] can generalize appropriate behaviors and social skills from one setting to another. There is no proof that the District has refused to consider such a treatment plan, but that the Team has approached [REDACTED] s behaviors and social development within the general rules of the school and normal, age appropriate interactions in the classroom with all students. Also there has been some behavior and social skill goals and objectives in the past that has been worked on with [REDACTED].

**IT IS HEREBY ORDERED:**

1. The District is ordered to immediately provide FAPE for [REDACTED] and provide [REDACTED] with an IEP that is in compliance with this order by December 11, 2003.
2. The IEP Team shall, by December 11, 2003, review and accept [REDACTED] independent evaluation from Benefis Therapy Center dated May 26, 2003 and shall include the recommendations in [REDACTED] 2003-04 IEP. The District shall provide communication/language services for [REDACTED] and provide District personnel the opportunity, if [REDACTED] parents or teachers request, to meet with [REDACTED].

██████ make sure the goals and objectives on ██████'s new IEP are implemented properly.

3. The School is ordered to review the law and the procedures for notifying parents of special education meetings and comply with the law in the future.
4. The IEP Team shall review the requirements for extended school year and specifically document ██████ level of progress on each goal and all relating objectives as of May 2003 and the evaluation results of each goal and all relating objectives when ██████ was assessed during the first quarter of the 2003-04 school year. The Team shall determine if during the summer of 2003, ██████ regressed significantly and was not able to recoup those losses, within the first quarter of the 2003-04 school year. If the team finds that ██████ has not recouped regression then the team shall declare ██████ as eligible for ESY services on each regressed goal in the summer of 2004. This shall be completed by February 1, 2004, so the District and parents can prepare for any ESY services that are deemed necessary.
5. The IEP Team shall review the numerous reports that have been provided on ██████, including experts that the parents have consulted, as well as District personnel observations and evaluations to determine whether a behavior and social skill treatment plan needs to be implemented. This shall be included in the new IEP for ██████ if the IEP team agrees.
6. The School is to exhibit full cooperation with the Parents.
7. The Office of Public Instruction shall provide an impartial observer, who is knowledgeable in special education, at the District's expense (if OPI requires payment), who will assist the IEP Team in cooperatively complying with the above orders and encourage the District and ██████ Parents to set aside differences and again work together for ██████

DATED this 9<sup>th</sup> day of November, 2003.

  
MARK A. RUSSELL, Hearing Officer

Certificate of Mailing

I hereby certify that, on this 10<sup>th</sup> day of September, 2003, a true and correct copy of the foregoing was deposited in the United States mail, postage paid, addressed to the following:

[REDACTED]

[REDACTED]

Ms. Linda Brandon-Kjos  
Legal Services  
Office of Public Instruction  
P.O. Box 202501  
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MARK A. RUSSELL, Hearing Officer