

BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

IN THE MATTER OF ****) OSPI 2004-06
)
) **FINDINGS OF FACT,**
) **CONCLUSIONS OF LAW**
) **AND ORDER**

A due process hearing in this matter was convened by Hearing Officer Leslie Halligan on June 14, 2004 in ****, Montana. Present at the hearing were Lori B. Miller, Attorney at Law in *****, on behalf of her clients *****, parents of ****; W. Carl Mendenhall, Attorney, Worden Thane P.C. in Missoula on behalf of the **** School District (hereinafter “*SD”) with *SD Superintendent **** and ****, Ph.D., *SD Special Services Director.

The following witnesses were called and testified under oath on behalf of ****: **** High School teachers **** and ****, **** and ****. The following witnesses were called and testified under oath on behalf of *SD: ****, *SD Superintendent and Dr. ****, *SD Special Services Director.

The following exhibits were stipulated to and accepted into evidence on behalf of the [student]: C-1 through C-14 (see attached listing). Exhibit C-15 was offered by [the student] and admitted into evidence over the objection of *SD. (Hearing Transcript (“TR”) at page 29). The following exhibits were stipulated to and accepted into evidence on behalf of *SD: *SD-001 through *SD-160 (see attached listing).

At the pre-hearing conference the parties stipulated to extend until July 1, 2004 the normal 45 day limit for the hearing officer's final decision. The parties further agreed to a deadline of June 21 for the submission of proposed findings of fact and conclusions of law.

Based on the evidence presented at the due process hearing, the hearing officer enters the following:

I. FINDINGS OF FACT

1. [The student] is a student with Down's syndrome, who resides with his parents at *****, *****, within the school attendance area of *SD. (**** testimony, TR 48).
2. ***** are the parents of **** (**** testimony, TR 48; **** testimony, TR 70).
3. [The student]'s date of birth is January 11, 1985 (C-4; *SD-022). He was 18 years old as of September 10, 2003 and turned age 19 on January 11, 2004.
4. [The student] is eligible for special education services under the category of Cognitive Delay. (C-4, *SD-022). Ms. ****, [the student]'s primary special education teacher, described [the student] as having severe cognitive delay, also known as mental retardation. Both Ms. **** and Mr. ****, another special education teacher, agreed that [the student] learns at a much slower rate than other students. (**** testimony, TR 6; **** testimony, TR 42).
5. *SD has provided [the student] with special education services since age 3. (*SD-073 to *SD-074; C-5, C-1 to C-4). These services have been delivered pursuant to a District-to-District Student Attendance Agreement between *SD and **** School District No. * (**SD), with the tuition paid by *SD. (*SD-118 to *SD-119; **** testimony, TR 86). *SD also pays [the student]'s parents for their transportation costs in driving [the student] to and from **** High School. (*SD-104; **** testimony, TR 86).
6. At **** High School, [the student] receives special education instruction and services with approximately eleven (11) other students who range in age from 14 through 21, with at least one student being age 21. (**** testimony, TR 6-7).
7. During the five years that [the student] has participated in special education services at **SD, a team which included his parents, representatives of

***SD, *SD and community providers involved or interested in his education, has developed [the student]'s Individualized Education Program (IEP).

8. All of the IEPs have been accepted and approved by the IEP team participants and *SD, except for the May 6, 2003 IEP that was developed for [the student] for the 2003-2004 school year. Mrs. ****, [the student]'s mother, signed the May 6, 2003 IEP indicating that she participated in developing the IEP, she received a copy of the IEP, and that she approved the content of the IEP except for the IEP's provision changing the graduation date to "pending." Mrs. **** contended that the appropriate graduation date should be June 2006, as had been anticipated in the IEP that had been developed for the past three years IEP. (C-4, *SD-031). [The student's parents continue to object to the change in graduation date for [the student] (**** testimony, TR 69; **** testimony, TR 75).

9. [The student]'s IEP for the 1999-2000 school year (his first in high school) indicates an anticipated a graduation date of "June 2004." (*SD-072). This initial IEP contemplated five years of high school.

10. [The student]'s IEP's for the 2000-2001, 2001-2002 and 2002-2003 school years indicate an anticipated graduation date of "6/2006." (*SD-058; *SD-048; *SD-038). The IEP team changed [the student]'s graduation date from June 2004 to June 2006, because it was in the best interests of [the student] (**** testimony, TR 22; **** testimony, TR 55, 58-60).

11. In September 2002, Mrs. **** met with Dr. ****, *SD Special Services Director, concerning [the student] (**** testimony, TR 61; ****testimony, TR 87). During this meeting, Mrs. **** received some information that caused her to believe that there might be a change in [the student]'s anticipated graduation date. She attempted to clarify this information with Dr.****. (**** testimony, TR 60-62). Dr. **** advised Mrs. **** of the **** School Board Policy No. 3110 which concerns age of attendance and that

Mrs. **** would need to appeal to the Board if she wanted a variance of that policy. (**** testimony, TR 87). No evidence was presented at the hearing that [the student]'s parents sought such a variance from the *SD Board of Trustees.

12. During the May 6, 2003 IEP meeting, Dr. **** advised Mrs. **** and the ***SD staff that *SD would not provide funding for [the student] beyond the 2003-2004 school year as a result of school board policy and not based on [the student]'s educational needs. (**** testimony, TR 95, **** testimony, TR 37-38).

13. Dr. **** advised that written notice of the change in the graduation date had been provided to the [parents], specifically the change of graduation to “pending,” because it was included in the May 2003 IEP. (**** testimony, TR 91).

14. Dr. **** provided Ms. Miller, Attorney for the [parents], a letter dated March 22, 2004, which addressed information pertaining to the determination of [the student]'s anticipated graduation date. In this letter, Dr. **** recited *SD policies that would not allow extended services to [the student] because of his age; indicated that IEPs were contracts that do not extend beyond the time specified in each IEP; and commented that [the student] may not be materially benefiting from continued services. Dr. **** stated “Specifically, some of the short-term objectives identified by staff (and agreed to by parent) have actually declined in scope over the three years” (C-8).

15. *SD sent **** High School a letter dated April 30, 2004 again advising them of the *SD policies and that *SD would not provide tuition or transportation costs beyond the 2003-2004 school year. (*SD-077).

16. [The student]'s IEP team met on May 7, 2004 to review the 2003-2004 IEP. The minutes of that meeting indicated that a letter written by Dr.****, *SD Special Education Director, was read which stated that “tuition and transportation will cease at the end of this school year, 2003-2004.” The team reviewed transition to post secondary services and change to medications for [the student]. Additionally, the minutes state that

the IEP team discussed developing an IEP from the annual review date (5-6-03) to the end of the year because of the legal action initiated by the [parents] against *SD. The IEP team agreed with ***SD implementing the current IEP goals and objectives through the 2003-2004 school year. (*SD-076)

17. [The student]'s IEP team again met on May 14, 2004 to review ***SD's responsibility to implement an IEP for [the student] and determined that ***SD was not the responsible district for providing a free appropriate public education for [the student]. The IEP team concluded that [the student]'s IEP would be implemented through the 2003-2004 school year.

18. Ms. **** testified that the IEP team had reviewed the goals and objectives set forth in [the student]'s 2003-2004 IEP and that [the student] was continuing to make progress, and showed even greater progress toward the end of the year, possibly because of a change in his medications. (**** testimony, TR 23-24). Both Ms. **** and Mrs. **** reported improvements in [the student]'s ability to participate and a reduction in the behaviors that interfered with his ability to learn. (**** testimony, TR 24-25; **** testimony, TR 64-66).

19. By the end of the 2003-2004 school year, [the student] passed approximately 65% of the goals set for him in the IEP. (**** testimony, TR 24-25). Ms. **** stated that [the student] had not completed all of his IEP goals, but would be eligible for graduation. (**** testimony, TR 34.) However, no testimony was provided as to whether the IEP team recommended graduation for [the student].

20. Ms. **** testified that [the student] could accomplish more of the annual goals if he had two more years of education services. (****, TR 35).

21. From their testimony, [the student]'s parents anticipated the continuation of special education services for [the student] until he attained the age of 21. (**** testimony, TR 74-75; **** testimony, TR 56-57).

22. *SD's Program Narrative for 2003-2004, Policy No. 3110, provides in relevant part: "The District will not assign or admit any child who has reached his/her nineteenth (19th) birthday on or prior to September 10 of the year in which the child is to enroll." (C-10; *SD-112). This policy was adopted and approved by the *SD Board of Trustees on May 11, 1999. (*SD-111 to *SD-111a).

23. *SD Policy No. 2161 provides, in part: For students eligible for services under IDEA, the District will follow procedures for identification, evaluation, placement, and delivery of services to children with disabilities as provided in the current "Montana State Plan Under Part B of the Individuals with Disabilities Act. This policy was adopted and approved by the *SD Board of Trustees on May 11, 1999. (*SD-110)

24. *SD has provided two sets of Program Narratives to the Office of Public Instruction (OPI). (**** testimony, TR 88-90). One is from 1995 (*SD-134 to *SD-160) and the other covers 2003-2004 (*SD-112 to *SD-117).

25. The *SD Narrative, revised September 7, 1995, states "**** School District #** currently serves students ages 3-19. The goal is to serve students ages 3-21 on a timetable that is consistent with the Montana State Plan regarding Individuals with Disabilities Education Act/Supplemental to Part B and 89-313 applications." (*SD -137).

26. On June 19, 2001, the **** School Board Trustees meet in a special session and the minutes of the meeting indicate that an IDEA Program Narrative was approved. The minutes state that this *SD Program Narrative "mirrors the state plan, however, the District does not serve students over 19 years old unless specifically identified in an IEP." (C-7). According to *SD Superintendent ****, the statement about serving students over 19 years of age if specifically identified in an IEP did not become part of the program narrative and was not approved by OPI as required. (**** testimony, TR 84).

27. During the 2003-2004 school year, *SD admitted two students who were age 19 prior to September 10, 2003. (**** testimony, TR 77-79; **** testimony, TR 85-86).

28. Dr. **** testified that *SD agreed to provide extended special education services, tuition and transportation costs, for [the student] at ***SD for the 2004-2005 school year. (**** testimony, TR 86).

II. CONCLUSIONS OF LAW

1. The Office of Public Instruction, through the appointed hearing officer, has jurisdiction of this matter. 34 C.F.R. 300.507; Mont. Code Ann. § 20-7-402(1)(b); Admin. R. Mont., 10.16.3507, et seq.

2. In general, federal and state law requires school districts to provide a free and appropriate education to students with disabilities. 20 U.S.C.A. §§ 1400-1487 Individuals with Disabilities Education Act ("IDEA"); Mont. Code Ann. § 20-7-401, et seq.

3. [The student] is a child with a recognized disability, cognitive delay, who resides in the *SD and who is entitled to a free appropriate public education student pursuant to federal and state law.

4. [The student] was born January 11, 1985, and attained the age of 19 on January 11, 2004. [The student] will be age 19 as of September 10, 2004 and will be age 20 as of September 10, 2005.

5. Federal law, through the Individuals with Disabilities Education Act (IDEA) requires states to ensure a free appropriate public education for individuals from age 3 through age 21, inclusive. 20 U.S.C. § 1412(a)(1)(A).

6. The IDEA, however, provides a limitation or exception for states regarding the provision of services to special education students between the ages of 18 and 21. This limitation is found at 20 U.S.C. § 1412(a)(1)(B), which provides:

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; . . .

7. The regulations implementing 20 U.S.C. § 1412 are found in 34 C.F.R. § 300.300, which provide:

Provision of FAPE.

(a) General.

(b) *Exception for age ranges 3-5 and 18-21. This paragraph provides the rules for applying the requirements in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20, and 21 within the State:*

(1) If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(2) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(3) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(emphasis added).

8. Montana statutes also provide age limits or restrictions on admission of all students. Montana Code Annotated § 20-5-101 governs the admittance of children to school, and provides in relevant part:

(1) The trustees shall assign and admit a child to a school in the district when the child is:

(a) 6 years of age or older on or before September 10 of the year in which the child is to enroll but is not yet 19 years of age;

(b) a resident of the district; and

(c) otherwise qualified under the provisions of this title to be admitted to the school.

(2) The trustees of a district may assign and admit any nonresident child to a school in the district under the tuition provisions of this title.

(3) The trustees may at their discretion assign and admit a child to a school in the district who is under 6 years of age or an adult who is 19 years of age or older if there are exceptional circumstances that merit waiving the age provision of this section.

(emphasis added).

9. Montana law also provides that "The Board of Trustees of every school district shall provide or establish and maintain a special education program for each child with a disability between ages 6 and 18 inclusive." Mont. Code Ann. § 20-7-411(2).

10. The administrative rules in Montana regarding the issue of attendance age provide as follows:

10.16.3121. OFFICE OF PUBLIC INSTRUCTION RESPONSIBILITY FOR FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

(1) The office of public instruction shall ensure that all students with disabilities, ages 3 through 18 inclusive, including students with disabilities who have been suspended or expelled from school, are provided a free appropriate public education (FAPE) in accordance with the Individuals with Disabilities Education Act (IDEA) (20 U.S.C., sections 1401 through 1485) and its implementing regulations (34 CFR, part 300), the Montana statutes pertaining to special education (Title 20, chapter 7, part 4, MCA) and the administrative rules promulgated by the superintendent of public instruction governing special education (ARM Title 10, chapter 16).

(2) The office of public instruction shall ensure that when local educational agencies provide education to students ages 19, 20 or 21, students of the same age with disabilities are provided FAPE in accordance with IDEA.

(emphasis added).

11. As to which school district is financially responsible for the special education of a child with a disability, Mont. Code Ann. § 20-7-420 provides, in relevant part:

(1) In accordance with the provisions of 1-1-215, **a child's district of residence for special education purposes is the residence of the child's parents** or of the child's guardian if the parents are deceased, unless otherwise determined by the court. This applies to a child living at home, in an institution, or under foster care. If the parent has left the state, the parent's last-known district of residence is the child's district of residence.

(2) The county of residence is financially responsible for tuition and transportation as established under 20-5-323 and 20-5-324 for a child with a disability, as defined in 20-7-401, who attends school outside the district and county of residence because the student has been placed by a state agency in a foster care or group home licensed by the state. The county of residence is not financially responsible for tuition and transportation for a child who is placed by a

state agency in an out-of-state public school or an out-of-state private residential facility.

(emphasis added).

9. The Montana State Plan under Part B of IDEA, Revised 6/01, provides age eligibility requirements:

The Office of Public Instruction (OPI) ensures that all students with disabilities between the ages of 3 and 18, inclusive, including students with disabilities who have been suspended or expelled from school, are provided a free and appropriate public education (FAPE) consistent with the requirements of 34 CFR 300.300 through 300.313. This policy applies to all public agencies.

Montana State Plan, p. 27, Policies and Procedures column.

10. The Montana State Plan also contains the following policy statement: "Services for students, ages 19 through 21, inclusive, are permissive." Montana State Plan, page 31, Policies and Procedures column.

11. Federal law also provides that the State must have on file with the Secretary detailed policies and procedures through which the State has established a goal of providing a full educational opportunity to all children with disabilities aged birth through 21. 34 CFS 300.123, citing 20 U.S.C. 1412(a)(2).

12. The Montana State Plan sets forth the goal of the OPI "that all students with disabilities, birth through 21, have available full educational opportunity." The State Plan further states that the OPI shall work collaboratively with LEAs and state agencies to achieve this goal by the year 2015. Montana State Plan, p. 32 and 33, Policies and Procedures column.

13. Currently, neither federal law nor Montana law requires school districts to provide services to students who are age 19 or older as of September 10 of the school year. However, if a school district provides education services to any students ages 19, 20 or 21, then the school district must provided IDEA services to students with disabilities in the same age categories. Admin. R. Mont. 10.16.3121(2).

14. Since *SD provided regular education services to two students who were age 19 as of September 10, 2003, it must provide IDEA services to [the student] at age 19 for the 2004-2005 school year pursuant to Montana Administrative Rules, 10.16.3121(2); and federal regulations, 34 CFR 300.300(b)(1). But for this exception, *SD would have no obligation under federal or state law to provide educational services to [the student] if he had attained the age of 19 as of September 10 of the school year.

15. The *SD Board of Trustees policy regarding the extension of educational services to children ages 19-21 who are being served by an IEP is unclear. The June 19, 2001 minutes of the *SD Board of Trustees meeting indicate that “the District does not serve students over 19 years old unless specifically identified in an IEP.” At the hearing *SD Superintendent **** interpreted this policy by stating, “If there’s a need for a student over 19 that has a special need, we would need to write a program narrative and ask for OPI, Office of Public Instruction office, ask them to approve. And of course, we have no approval from OPI for that.” (**** testimony, TR 83) While the statement contained in the June 19,2001 minutes does not appear to have been included in the *SD 2003-2004 Program Narrative, it is unclear as to whether its omission was unintentional, whether the minutes were inaccurate or whether the *SD Board of Trustees later changed this policy. The *SD Board of Trustees should review its policies regarding the eligibility of students ages 19-21 who are being served by an IEP to provide clarity to affected students and their families.

16. The [parents] have alleged other violations of IDEA, specifically the lack of appropriate written notice of the proposed change in graduation and the lack of consideration by *SD of [the student]’s special needs in the review of the IEP and the change in graduation.

17. Graduation from high school with a regular diploma is a change in placement under IDEA requiring notice in accordance with 34 CFR 300.503. 34 CFR §

300.122. The [parents] received notice through the IEP meeting and the letters from Dr. **** about the *SD's intention to cease special education services based on age eligibility policies. Reviewing the requirements of 34 CFR 300.503, the notice provided by *SD included a description of the action proposed and an explanation of why the action was proposed. While all of the notice requirements may not have been relevant and may not have been clearly delineated in the notice provided by *SD, the [parents] were sufficiently informed of the proposed change in graduation to request a due process hearing and safeguard the interests of [the student].

18. Federal law does not require an evaluation of a child with a disability whose termination of the student's eligibility under Part B occurs due to graduation with a regular high school diploma, or who exceeds the age eligibility for FAPE under State law. The regulation concerning determination of eligibility, 34 CFR §300.534(c), provides:

(1) A public agency must evaluate a child with a disability in accordance with §§300.532 and 300.533 before determining that the child is no longer a child with a disability.

(2) The evaluation described in paragraph (c)(1) of this section is not required before the termination of a student's eligibility under Part B of the Act due to graduation with a regular high school diploma, or exceeding the age eligibility for FAPE under State law. (20 U.S.C. 1414(b)(4) and (5), (c)(5))

19. The failure of *SD to consider [the student]'s special needs and his progress with regard to the IEP could be justified if *SD was acting on the determination that [the student] had exceeded the age of eligibility for FAPE under the *SD policies and Montana law. In this situation, members of the IEP team may have considered a review of [the student]'s progress important, but such a review could not have altered the age eligibility policy and might have served only to evaluate whether [the student] should graduate with a regular diploma.

20. After considering the evidence presented, the IEP team has demonstrated appropriate efforts to evaluate [the student]'s special needs in the review and development of each annual IEP. Such a review by the IEP team will be appropriate and necessary for the development of [the student]'s IEP for the 2004-2005 school year.

21. Given the challenge raised by the parents, the reversal of the *SD position on [the student]'s eligibility for educational services during the 2004-2005 school year, and the actions by the IEP team to continue services pending resolution of this matter, [the student] has not been denied a free appropriate public education.

Based on the foregoing findings of fact and conclusions of law, the hearing officer enters the following:

ORDER

1. **** School District #** shall provide educational services and transportation reimbursement to [the student] for the 2004-2005 school year.

2. Prior to the beginning of school in August 2004, an IEP meeting shall be convened to develop an IEP for [the student] for the 2004-2005 school year consistent with this Order.

3. Prior to the conclusion of the 2004-2005 school year, the IEP team shall meet to review whether [the student] should be recommended for graduation; specifically determining whether [the student] has met the school district's graduation requirements or has substantially completed his IEP goals.

4. The issue of whether the *SD shall provide education services to [the student] for the 2005-2006 school year is premature and dependent on both changes in *SD Board of Trustee Policy (which would permit an extension of educational services to students ages 19-21 with an IEP) and a determination by [the student]'s IEP team that

he has not met graduation requirements or has not substantially completed his IEP goals and requires extended educational services.

5. Each party shall bear their own costs and attorneys fees.

DATED this 1st day of July, 2004.

Leslie Halligan, Hearing Officer

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that on the ____ day of July, 2004, a true and exact copy of the foregoing was mailed, first class mail, postage prepaid to:

Lori B. Miller
Attorney at Law

District Superintendent
**** Public Schools

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DATED this ____ day of July, 2004.

Leslie Halligan, Hearing Officer