

**BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA**

* * * * *

IN THE MATTER OF [the student])	OSPI Case No. 2004-10
)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER

* * * * *

A request for an impartial due process hearing was made by counsel for [the student] and his parents pursuant to 10.16.2403(2), ARM, when [the student]’s parents objected to his proposed placement at ***** Elementary School District (District) and to the decision of the Individual Education Plan (IEP) team that Extended School Year (ESY) services were not appropriate for him under the Individuals with Disabilities Education Act (IDEA). The request was sent to the State Superintendent of Public Instruction on September 28, 2004, and forwarded to the District on or about October 6, 2004.

As a result of conflicts in scheduling, the parties stipulated to an extension of the initial hearing time line and a waiver of the 45-day period for issuance of a final order specified by Section 10.16.2417, ARM.

The impartial due process hearing in this matter was held from Monday, January 10, 2005 through Thursday, January 13, 2005 and Monday, January 31, 2005 through Wednesday, February 2, 2005. Petitioners were present and represented by their counsel, Kathleen Manley-Coburn. The District was present and represented by its counsel, Elizabeth A. Kaleva.

Counsel for the parties had stipulated to the following facts before the hearing:

1. ****, the student, is four years old and is a preschool age student.
2. He resides with his parents within the boundaries of the **** Elementary School District.
3. He was evaluated at 21 months and the evaluation revealed deficiencies in the areas of communication and cognitive skills.
4. He was evaluated on August 14, 2002 by Dr. Lawrence Laveman, who found that he had ongoing language, cognitive, and motor skills deficits, atypical social behaviors, and a history of serious otic effusion.
5. Arnold Gold, M.D. evaluated the student on January 3, 2003, and found that he had significant delays and deficits in speech and language involving both receptive and expressive language, with marked inconsistencies. Deficiencies with interactive behavior were noted in Dr. Gold's report. Dr. Gold found that socialization issues were of significant concern, including attention, interaction, distractibility, and temper tantrums. Dr. Gold stated that an autistic component appeared to be complicating the student's performance. Dr. Gold found continued speech and language therapy was mandatory; and consideration of a behavioral therapy program which addressed socialization skills should be considered.
6. The Children's Center for Therapy and Learning performed a behavioral assessment on the student on January 30, 2003.
7. **** Township School District developed an initial IEP on February 20, 2003.
8. **** Township School District provided the student with 12.5 hours per week of

preschool under his initial IEP.

9. [The *** Township] Speech Therapist Virginia Krieg stated that, by the end of the 2002/2003 regular school year, the student had displayed nice improvement since starting the preschool program three months earlier.

10. On June 4, 2003, the [**** township] IEP team reconvened and found that the student had made good progress in his listening and receptive language skills, and that his fine and gross motor skills were progressing. The IEP stated that the student needed support with expressive language and behavior, and that he tended to wander and not follow instructions. The IEP stated that he needed support with basic readiness skills, that he needed one-to-one attention during basic skills instruction, and that he needed a reward system, as well as a multi-sensory approach when learning a new skill.

11. The student participated in an ESY program called Celebrate the Children, which provided no related services in the summer of 2003.

12. On March 3, 2004, the student was evaluated by the CDC in [city] and was found to have autism spectrum disorder.

13. Dr. Cook recommended that the student have a comprehensive, intensive program designed for a child with autism spectrum disorder.

14. The student was not provided ESY services or speech services by the District over the summer of 2004.

During the due process hearing, the Hearing Officer accepted the following exhibits into evidence:

[THE STUDENT]'s Exhibits:

- 1 CDC Development Evaluation
- 2 CDC Teaching and Behavioral Suggestions
- 3 OPI Manual - Montana Administrative Statutes and Rule
- 4 **** Elementary IEP (September 22, 2003)
- 5 OPI Manual - The Child Study Team
- 6 **** Elementary IEP (November 18, 2003)
- 7 [**** Township] Speech and Language Evaluation
- 8 Children's Center Occupational Therapy Progress Report
- 9 Children's Center Early Intervention Behavioral Assessment
- 10 **** Elementary IEP (March 22, 2003)
- 11 **** Elementary IEP (May 7, 2004)
- 12 Adaptive Behavior Assessment System (Teacher)
- 13 Adaptive Behavior Assessment System (Parent)
- 14 **** Elementary IEP on OPI Form (May 7, 2004)
- 15 **** Significant Change to IEP (September 10, 2004)
- 16 **** IEP Meeting Transcripts (May 7, 2004)
- 17 OPI Manual - Extended School Year
- 18 Dawson and Osterling Report
- 19 Dr. Ilene Schwartz's Notes
- 20 Educating Children with Autism Book Excerpt

- 21 On Track IEP Assessment
- 22 On Track Teaching Record
- 23 On Track Teaching Record
- 24 On Track Teaching Record
- 25 On Track Teaching Record
- 26 On Track Teaching Record
- 27 On Track Teaching Record
- 28 **** Elementary Significant Change to IEP (September 3, 2004)
- 29 P.A. Moses Phone Logs
- 30 Section 20-4-302, MCA
- 31 Confidential File Log for CB
- 32 Records Check out Log
- 33 Parental Rights Booklet - OPI
- 34 Respondent's Response to Petitioner's First Set of Interrogatories, Requests for Admission and Requests for Production
- 35 September 9, 2004, Letter to the parents
- 36 Child Find, Referral and Evaluation Plan - October 2002
- 37 Notes of ****

**** Elementary School District Exhibits:

- A Dr. Arnold P. Gold Letter
- B OPI Manual - IEP Guide

- C Dr. **** Letter
- D Dr. **** Deposition Excerpt
- E **** Phone Log
- F **** Elementary Notice of IEP Meeting for September 22, 2003
- G [**** Township] School CST Social Assessment
- H [**** Township] School Initial IEP Meeting
- I [**** township] School June IEP Meeting
- I2 [**** Township] Speech and Language Goals
- J OPI Manual - Aversive Treatment
- K March 2004 Progress Reports
- L On Track Teaching Record
- M Co-Teach Preschool Observation
- N Campfire Preschool Observation
- O Occupational Therapy Sensory Profile
- P Speech and Language Evaluation
- Q On Track IEP Assessment
- R On Track Teaching Record
- S Co-Teach Preschool medical emergency information
- T On Track IEP Assessment
- U On Track IEP Assessment
- V Speech and Language Comparison

W January 2004 Progress Reports

X Monthly Average Sentence Length

Y Percentage of Occurrence Language Sample

Z May 2004 Progress Report

AA Speech and Language Evaluation.

The issues as defined by Petitioners are as follows:

1. Whether the District followed ARM procedural requirements regarding interstate transfer of special education students when the student entered the District in September 2003.

2. Whether the District followed the IDEA and applicable Montana law requiring prior written notice in September 2003.

3. Whether the District's 2003-2004 school year IEPs were reasonably calculated to provide meaningful educational benefit to the student based on his individual needs.

4. Whether the District should have provided Extended School Year (ESY) services to the student during the summer of 2004.

5. Whether the proposed IEP for the 2004-2005 school year was reasonably calculated to provide meaningful educational benefit for the student based on his individual needs.

6. Whether the student should be provided ESY services during the summer of 2005.

7. Whether the student should be provided compensatory services should it be determined his special education program provided inadequate speech and language, instructional and/or socialization services during the 2003/2004 school year.

8. Whether the District should provide compensatory speech and language services for the time no ESY speech and language services were offered during the summer of 2004.

9. Whether the District should be required to apply for one of the OSEP PDA training programs for educators of children with autism, or, in lieu of that, be required to provide a consultant with experience and expertise in working with children with autism or autism spectrum disorder to assist the District in developing, implementing, and evaluating an appropriate educational program for the student for the 2005-2006 school year.

10. Whether the parents shall be reimbursed for Co Teach enrollment costs for the 2004-2005 school year.

11. Whether the District should provide an appropriate amount of speech and language services for the 2004-2005 school year reasonably calculated to allow the student to make progress on speech and language goals and objectives.

12. Whether the District should provide staff training regarding the IDEA and applicable Montana law.

13. Whether the District used legally defective forms to provide significant IEP changes, which had no place for parental permission.

14. Whether the District violated the IDEA and applicable Montana law by not having one of the student's regular education teachers at meetings where the significant IEP change document was used and presented to the parents.

A certified court reporter made a record of the proceedings.

Having considered the documents submitted, the statutes and laws applicable to this

matter, and the evidence presented at the due process hearing as well as in the post-hearing briefs, the Hearing Officer makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Stipulated Findings of Fact numbered 1 through 14 are incorporated herein.

15. The student's father moved to Missoula in June 2003 and the family followed in August of 2003.

16. The student was enrolled at **** Elementary.

17. The student's mother brought his special education records from New Jersey and gave them to the school in August. She met once with the school personnel in August before school started.

18. [Special Education teacher] has been a special education teacher at **** Elementary for seven years. She has had the opportunity to work with many students who have been diagnosed with autism or autism spectrum disorder whose range of disability varies.

19. [The special education teacher] reviewed the June 4, 2003 IEP from [**** Township] on August 26 or 27. There was no documentation that the student had been diagnosed as a student with autism. The IEP reflected a disability category of preschool disabled. Her review of the records revealed severe speech and language impairment.

20. Petitioners did not indicate they were concerned about their child as a student with autism at the September 2003 IEP meeting.

21. [The special education teacher] did not conclude, from reading the report from Dr. Gold, that the student was diagnosed with autism spectrum disorder or should be categorized

as a child with autism.

22. **** is a speech language pathologist and has been employed at **** for 19 years. She has extensive experience in treating students with autism.

23. [The speech pathologist] reviewed the student's records within the first week of school.

24. The student's summer program in [**** Township] did not provide any related services.

25. The student did not come to the District as a student with autism but as a student with significant delays in both expressive and receptive language skills.

26. The District accepted and implemented the [**** Township] IEP dated June 4, 2003 and began providing 12.5 hours per week for special education and related speech services. [The student] was placed in two programs: a three-year-old integrated special education program and a four-year-old integrated program.

27. The District adopted the student's prior IEP from [**** Township]; although his speech time was actually less, as he appeared to District personnel to be overwhelmed and unable to handle two full hours.

28. Based on [the speech pathologist's] work with the student and her experience, one half hour of speech time per week was sufficient during the interim placement.

29. **** is the school psychologist and counselor at **** Elementary. In addition to her professional training, she has had additional training related to autism and has had extensive experience working with students with autism. She reviewed the student's records

the first week of school. She did not conclude from the review that the student was autistic.

30. An IEP meeting was held on September 22, 2003.

31. The IEP cannot address every area of deficits which an assessment tool may indicate deficit. A Child Study Team must review the results of all areas and have a conversation which leads to IEPs that prioritize concerns.

32. The staff had had an opportunity to observe the student in the placement from the date that school started. [The special education teacher] had some concerns, shared by other staff, about whether the placement in the four-year-old group was developmentally appropriate.

33. [The special education teacher] had read the evaluation from the Children's Center special educator which stated that the student would do better in a small group.

34. At the IEP meeting, the team discussed their observations and the need for more time with the student in order to write clear specific goals and objectives for him. The recommendation was to do this as an interim IEP. The IEP team unanimously determined the interim placement for the student was appropriate.

35. The interim IEP provided meaningful education benefit.

36. Interim IEP and diagnostic IEP are essentially the same terms in Montana.

37. The student's mother was in attendance and participated at the meeting. She did not indicate that her child was autistic. Although she testified she had some confusion regarding the nature of an interim IEP, she did not voice any objection, and she signed the IEP approving the content.

38. Prior to enrolling at **** Elementary, The student was on the waiting list for Co-Teach, a private preschool associated with the [university]. He started there four days after starting at **** Elementary.

39. The staff at [the elementary school] was aware that the student was at Co-Teach and were concerned about his being overwhelmed.

40. During this interim period, the District provided the student educational services relying on the [**** Township] IEP goals and objectives.

41. The interim period, during which data was collected on the student, was scheduled to last for six weeks, until the next IEP meeting. The period was slightly longer because the meeting had to be rescheduled due to a team member illness.

42. The next IEP meeting occurred on November 18, 2004.

43. The student's mother testified she was unhappy with the placement, which provided for a two-day-a-week program. She was concerned that he was the only boy in the program and that two days a week were not sufficient. She had concerns about his self-concept.

44. The student's mother said she saw great progress at home.

45. Staff had observed great improvements during the beginning of the school year. The student would join and participate in activities and was talking more.

46. The data collected by [the special education teacher] indicate the student was making excellent progress in his speech.

47. The team concluded it would be best for the student to remain in the current placement, but speech time was increased.

48. Another boy was added to the classroom.

49. The student's mother did not voice an objection to the goals and objectives.

50. The IEP team had no information on which to draft goals solely based on a diagnosis of autism at the November 2003 IEP team meeting.

51. The student's mother approved of the November 2003 IEP, including the time provided and the goals and objectives.

52. The goals and objectives from the November 2003 IEP met the student's individual needs and provided meaningful educational benefit.

53. At that meeting, the student's mother expressed concerns that he may be autistic.

54. The family was again referred to the Child Development Center (CDC). This referral was for an ADOS-G (Autism Diagnostic Observation Schedule-Generic) evaluation. They received a referral from [the elementary school] staff in September which had not been acted upon.

55. ***** Elementary does not have an ADOS team. School personnel are not trained and cannot administer an ADOS evaluation.

56. On December 12, 2003, the student's mother called CDC to request an ADOS. Evaluations are done by CDC at no cost to the families. The evaluation occurred on March 3, 2004.

57. Shannon Guilfoyle from Co-Teach was invited by the student's mother to attend and observe the evaluation. She went to the discussion after the evaluation, where the ADOS team asked her questions.

58. Prior to reviewing the ADOS evaluation report, she had never seen documentation that the student had a diagnosis of autism.

59. Co-Teach did not alter its program for the student after the CDC diagnosis.

60. District personnel were not asked to participate in the evaluation.

61. [The special education teacher] invited herself to the ADOS evaluation so that she and**** , the preschool teacher, could share information with the ADOS team regarding [the elementary school].

62. The student was evaluated at the CDC by Clinical Psychologist Bill Cook, Speech and Language Pathologist Kari Altenhofen, Physical Therapist Joyce DeFreest, and Ned Vasquez, M.D. The student was diagnosed with autism spectrum disorder for the first time. Dr. Bill Cook testified as an expert in evaluating children with disabilities including autism disorder.

63. The student obtained a score of 14 on the ADOS evaluation; and such a score is characterized by Dr. Cook as a high functioning autism spectrum disorder. Autism spectrum disorder is a higher functioning form of autism and a milder form of it.

64. This conclusion was based on areas of disability including communication skills, social skills, and restricted behaviors.

65. As Dr. Cook explained in his testimony:

... although (the student) has strengths in how he enjoys and interacts with people, particularly his family, the characteristics of autism spectrum disorder get in the way of his being able to make full use of those skills. Even though he enjoys being with people, it is hard for him to read the social cues that other people present to him. He doesn't make consistent eye contact with people. He doesn't know how to initiate

activities with another person. If a person starts the activity and sets it up and provides a way for him to become involved, the chances are that he will become involved. He doesn't know how to coordinate the communication that he gives to other people. He might say something but not look at you. He might make a facial expression but not combine that with words. And so he shows a number of communication difficulties, the kind that we called social communication difficulties. It's hard for him to maintain a social interaction. It's hard for him to keep a conversation going. He shows some echolalia, which is basically just echoing what the person has said. He has gestures, he has pointing, he has eye contact, he has words, but it's very hard for him to coordinate those in such a way that he uses all of them.

66. The evaluation included a medical summary of “significant speech delays and behavioral abnormalities which do, in part, appear to improve with consisted (sic) targeted discipline.”

67. The ADOS team recommended it would be beneficial if the techniques being used at Co-Teach could be applied at the [elementary] Preschool so that consistency is present in both environments.

68. It was recommended that the student needed to have a comprehensive and more intensive preschool program that was coordinated across all areas in order to make full use of his potential. The programs should be designed to meet the needs of children with autism spectrum disorder. This would allow a major teaching emphasis in areas related to social communication and social interaction.

69. Dr. Cook’s goal when providing treatment to students with autism is to enable the student to make full use of their potential.

70. The ADOS evaluation recommended a specific book, Relationship Development Intervention with Young Children: Social and Emotional Development Activities for

Asperger Syndrome, Autism, PDD and NLD, as a training model which would provide focus on social skills development.

71. At the hearing, however, Dr. Cook testified that this is book does not describe the “best practices” for treating students with autism and there are other approaches which are quite good.

72. Dr. Cook does not believe a regular teacher is qualified to provide education to a student with autism as the lead teacher.

73. Dr. Cook testified that, in recommending an intensive program for the student at the time of the evaluation, he believed putting the student in a typical preschool program and letting him go would not be productive. Rather, he believed the student needed someone solidly aware of what autism means, providing prompts and cues and coaching, modeling and facilitating in order to get the student to benefit. He opined those things would not happen just because the student was in a group of students working with a teacher, but rather required someone specifically set up to establish those contingencies. Dr. Cook stated that the ability to understand and process social cues, initiate social interaction, and ability to communicate across domains was needed, and required specialized skills, making it intensive and comprehensive.

74. Dr. Cook was not aware of what programs were present at Co-Teach that were not present at ***** Elementary. Information given to the team about the effectiveness of the programs at Co-Teach was provided by the parents.

75. No one from [the elementary school] contacted him regarding the report.

76. He did not review the March IEP or any subsequent IEP, nor has he ever reviewed [the elementary school] programs.

77. Peggy Moses is the CDC clinic director. She was not part of the ADOS evaluation. She did conduct an Autism Diagnostic Interview with the family for the purpose of utilizing the assessment tool for a training session that she was attending. The results of the ADI were released to the student's parents but were not shared with the school district at the subsequent CST or IEP meetings.

78. Ms. Moses testified the CDC does not generally make determinations as to which preschool would be most beneficial to a child being evaluated. For the CDC report to do so in this instance was unusual.

79. On 3/22/04 the [elementary school] IEP team reconvened with several additional individuals, including Angela Walker (OPI), Peggy Moses and Breezy Reimers (CDC), and Shannon Guilfoyle (Co-Teach).

80. The IEP team reviewed the evaluation prior to the March 22 IEP; and the IEP was drafted with consideration of the report and the diagnosis of autism spectrum disorder.

81. Ms. Moses attended the March CTS and IEP meetings as a support to the family. The student's parent raised the discussion of the evaluation and the concerns.

82. The IEP document reflects the parents' concern that the student's program was not intensive enough, that early intervention was critical, and that more time was indicated for working on the student's deficits. The parents stated a concern that behavior issues impeded the student's progress. School staff identified transitions, and focused attention and social

interactions with peers as concerns. Speech and language therapy was seen as an ongoing need. The 3/22/04 IEP incrementally increased preschool time from 5.5 hours per week of preschool to 12.5 hours per week by 5/24/04. The student was placed in the 3-year-old classroom and the 4-year-old classroom. Previous [elementary school] IEP goals and objectives were continued.

83. Behavioral concerns were not noted by school staff.

84. The related services provided by [the speech pathologist] assisted the student in achieving meaningful educational benefit. The data collected reflected that the student made excellent progress with regard to sentence length.

85. The team unanimously agreed to carry over the goals and objectives from November to the March 2004 IEP.

86. The unanimous IEP team, including the student's parents, approved a placement for the student and agreed that additional testing would be done for him. The team also determined that ESY would be fully discussed at the May 7, 2004 IEP team meeting.

87. The student received meaningful educational benefit under the terms of this IEP.

88. The data collected by staff at the District indicate that the student was making progress at school, and was receiving a meaningful educational benefit.

89. This date was not changed or altered subsequently.

90. Data regarding regression for the student indicated that he did not show regression over breaks that could not be recouped, and in some cases showed no regression at all.

91. The student's mother recommended that the school staff use a physical approach for

noncompliance as she had observed at Co-Teach as a behavior modification. The parent requested an aversive treatment plan because those techniques worked at Co-Teach.

92. The student's parents were concerned that their child's behavior was impeding his learning, which led to the discussion of the need to develop an aversive treatment plan. Records reflect that in April of 2004, the student hit his para-educator three times over the course of two days and pushed another boy in line. Additionally, on one day, he fell on two girls, although that was considered as his way of being funny. This was not addressed through a behavior plan.

93. District personnel were not aware of any behaviors at school that would have triggered a functional behavioral assessment. There was no behavior to support an aversive treatment plan; and an aversive treatment plan was not developed.

94. The District does not employ the use of physical restraint to address noncompliance for any student. The District's approach to the student's occasional noncompliance was non-physical and effective.

95. In April of 2004, District Psychologist ***** compiled the results of the Adaptive Behavior Assessment System (ABAS II) test on the student.

96. Staff at ***** Elementary performed additional testing on the student between the March and May IEP team meetings, as requested by the March IEP team. The testing areas included speech and language, sensory needs, additional developmental testing, and adaptive behavior scale.

97. An occupational therapy sensory profile summary indicated that, with the exception

of oral sensory processing, the student is able to process sensory information and use that information in a meaningful way in his daily life.

98. On May 7, 2004, the Child Study Team (CST) met. In attendance were *****, Superintendent of ***** Elementary; Angela Walker, OPI/Technical Assistance; Peggy A. Moses, CDC, the student's parents; *****, Speech/Language Pathologist; *****, Preschool Teacher, *****, ***** Elementary Para-Educator; *****, ***** Elementary Director of Special Services; *****, ***** Elementary Special Education Teacher; and *****, ***** Elementary K-2 principal.

99. Continued need for group interaction, communication, appropriate behavior, and academic skills were noted. The team discussed his recent test results at school. Adaptive Behavior ratings (ABAS II) ranged from the 2nd percentile in conceptual skills to the 4th percentile in social and practical skills. Special education case manager [special education teacher] discussed findings on her administration of the DIAL screening.

100. A significant amount of time was spent discussing whether the student was eligible for ESY (extended school year) services over the summer of 2004 during the 5/07/04 IEP meeting. Peggy Moses testified the student was making good progress which should not be interrupted over the summer.

101. The parents asserted that the student needed ESY services.

102. ESY is based on whether a child shows regression in the goals and objectives. Proof of regression is not required. The IEP team may consider information that would indicate the likelihood of regression based on individual student factors related to regression

and recoupment of skills.

103. The student was making steady progress consistently month by month.

104. The student's parents testified they had seen great progress in their child's speech, language and social skills and that he was moving ahead.

105. The parents' concern was that the recreational activities they would provide to their child would be comprised of other kids with whom he was not familiar and would not provide socialization opportunities necessary to sustain his progress.

106. Any summer program provided by the school district is based on need. At the point of that meeting, there was only one child who would be provided services, a few days before school started, to help that child with the transition to school. As a result, ESY services, even if provided, would not address the student's social skills, as there would be no children with whom the student was familiar.

107. The data collected by speech language pathologist **** did not show regression during school breaks.

108. ESY criteria relevant to the student were considered by the team. The team considered the nature and severity of his disability. The team considered the ability of his parents to provide educational structure in the home. The team considered behavioral and physical impairments

109. After extensive discussion, it was concluded that the student was not on the verge of a breakthrough opportunity of emerging skill because his progress was steady and was not eligible for ESY services.

110. The student's mother disagreed with that conclusion. She argued that a four-year-old child was on the brink of a lot of breakthroughs. She argued that ESY was necessary because the progression rate could drop and they wanted to continue the progression.

111. IEP reflected the parents' position that behavior continued to be an issue in progress. Additionally, the IEP reflected that the student, while difficult to motivate, could concentrate on activities if interested; and his speech was improving and language was coming.

112. The team recommended a placement for the following year. The IEP reflected program modifications or supports for school personnel to include trainings on autism, behavior management, and developmental disabilities.

113. The May 7, 2004 IEP was designed to provide the student with a meaningful educational benefit.

114. The parents did not sign the IEP.

115. Petitioners did not identify any objection either verbally or in writing to the IEP or sign the document during the summer of 2004.

116. During the summer of 2004, Petitioners had contacted legal counsel and authorized access to their son's records.

117. The student's mother testified she called [the superintendent] sometime during the summer regarding the signing of the IEP. [The superintendent] denies that he spoke with the student's mother on the subject or that she offered to sign the IEP. In any event, the IEP was not signed.

118. On August 26, 2004, the school sent a letter to the student's parents informing them that the school would offer a part-time Head Start classroom placement, and a part-time [elementary school] preschool placement. The letter stated a need to get the May 2004 IEP signed. The letter did not state a plan to meet before school with the student's new preschool teachers, or a plan to provide in-service training on children with autism spectrum disorder to the teachers.

119. The September 3, 2004 meeting, with the parents and their counsel, was not an IEP team meeting.

120. School district personnel listed as attending this meeting were there to answer any questions the family might have about the documentation presented at the IEP.

121. The student's parents indicated they disagreed with the placement and the decision not to provide ESY services, but there were no specific objections.

122. The parents and their counsel initiated discussion about changing the student's IEP at the September 3, 2004 meeting. They refused portions of the May 7, 2004 IEP and made specific requests about the student's placement.

123. These requests included a comprehensive research-based program, a minimum of 25 hours per week year-round, contract services with one of three specialists in the area of autism to plan a program for the student, and two hours of speech. In the alternative, the parents requested a placement at Co-Teach. The school district disagreed on the basis that the student was making progress in all areas and maintained the position that the May IEP would provide educational benefit to the student.

124. The parents then requested that the school place the student in the Co-Teach preschool program full time, because it would offer a highly structured, predictable program in one setting for the student, at District expense. The school refused this request.

125. On 9/10/04 another meeting was held. This was not an IEP meeting. The parents notified the school they would be placing their child in the Co-Teach program, because the preschool teachers [the elementary school] offered were not trained to work with a child with their son's needs, and because putting their child in these two different programs at [the elementary school] would not meet his needs. The parents requested that the school provide speech and language services to their child. The District refused these requests.

126. The parents refused to sign the IEP and, at this time, rejected their child's placement.

127. Co-Teach is a [university] laboratory preschool for children with and without disabilities. Co-Teach has a high teacher/adult-to-student ratio of approximately 6:18. Co-Teach serves as a practicum site for [university] students. Practicum students, who work with the students at Co-Teach, do not have any specific training in educating students with autism.

128. Because his parents had privately enrolled him at Co-Teach, rather than the District enrolling him at Co-Teach, the student has no IEP there.

129. The parents were concerned that the preschool teachers at [the elementary school] were not special education teachers. They believed that both of the student's teachers at Co-Teach were special education teachers.

130. Mary is one of the student's teachers at Co-Teach. She is not an endorsed special education teacher. The parents were satisfied with Mary as a teacher.

131. The parents informed Co-Teach staff prior to enrollment that they suspected some form of autism spectrum disorder.

132. The student's behavior problems at Co-Teach increased throughout the 2003-2004 school year.

133. Shannon Guilfoyle testified the student does not have a significant behavior problem, and his behavior does not impede his educational opportunities.

134. The student's behavior problems decreased during the 2004-2005 school year. The student started the program where he left off and the staff saw huge gains.

135. Co-Teach has a highly structured behavioral component in which students may be restrained and which allows for the placing of hands on a student in a reasonable and necessary manner to quell a disturbance, protect the student from self or others, maintain order, or protect property.

136. Dr. Ilene Schwartz, an autism expert, testified for Petitioners. She testified the 11/18/2003 IEP had some good goals and objectives such as learning body parts and colors and speech/language objectives, but was missing objectives teaching the student to use language in a social way, to have conversations with peers, and learn appropriate ways to negotiate conflicts with peers using his language.

137. Dr. Schwartz further testified that the matrix of services showed the student spent very little time with trained special educators or related services personnel, and that five

hours per week was not enough for a child with his significant disability.

138. Dr. Schwartz testified that the 11/18/2003 IEP goals and objectives did not adequately address appropriate instruction in things like imitation, self-care, or independence.

139. Dr. Schwartz did not see any description of staff having the training necessary to provide the supportive teaching and generalization environments necessary for the student to make meaningful progress.

140. Dr. Schwartz expressed concern that the 11/18/2003 IEP reported the student showed defiance, acted out to get needs met, and may have demonstrated some challenging behavior.

141. Dr. Schwartz opined that the 11/18/2003 IEP did not include parental involvement as an important part of the program, particularly regarding consistency across settings and self-care skills.

142. Dr. Schwartz testified that the November 2003 IEP goals and objectives were good, but not sufficient for a child with autism.

143. School-sponsored support groups for parents are not required by law.

144. Dr. Schwartz testified that the CDC report should have been addressed in the 3/22/04 IEP. She further testified that it was inappropriate to ease the student into the lengthened program, that it would have been better to start out with the full increase and provide the amount of appropriate support for him, and then ease back on the support. She testified that for a child having difficulty with change, it would be difficult having schedule

changes every few weeks, and would be more effective to set up a schedule where the adult's schedule changed around the student.

145. Dr. Schwartz testified that she could not see in the document where they incorporated the recent CDC evaluation report, and that the CST did not even check that he had autism.

146. Dr. Schwartz testified that the 5/07/04 IEP did not include important IEP goals and objectives such as transition, managing his materials, coming into the classroom by himself and independently hanging up his coat, which the student would need to do in kindergarten.

147. Regarding social behavioral skills, Dr. Schwartz testified she was concerned that the bar was set too low in requiring the student to interact with other students only 30% of the time, and then with verbal and visual cues. She stated the goal of having him play without threat, risk to self or others, and mentioning aggression in the IEP document, was a concern because there was no statement that the school would do a functional behavior assessment.

148. Dr. Schwartz testified the speech and language goals were lacking because they did not address conversations with peers, using language to regulate the student's behaviors, or communicate with the parents. She stated concern with the functionality of the IEPs. The IEP did not address using concepts in realistic or naturalistic settings.

149. She opined the 5/07/04 IEP goals and objectives were so poorly written, that the bar was so low, she did not know if he was going to be required to make meaningful progress.

150. Dr. Schwartz testified the 5/07/05 IEP goals and objectives for social interactions were of concern for her because they did not address the student targeting feelings in

naturalistic settings, to help him regulate emotions. Dr. Schwartz stated that nowhere did the IEP talk about attending problems, or teaching the student to enter a peer group or increasing the kinds of toys that he played with significantly with peers.

151. Dr. Schwartz further stated there was no evidence that staff had much training in autism, based on the way the goals and objectives were written.

152. Dr. Schwartz testified the 5/07/04 IEP goals and objectives were not reasonably calculated to prepare the student to participate in the regular education setting for kindergarten because the three skills children with special needs require to successfully transition to kindergarten (necessary for children with special needs identified through her three-year research study) included making independent transitions, working independently for 5-10 minutes, and participating in group instruction.

153. Dr. Schwartz testified that the 5/07/04 IEP did not provide for enough services, that the National Research Council Report (*Educating Children With Autism*) recommends that all children with autism receive year-round services, and that hours provided on the IEP were not enough, that she believed 20 hours per week were the standard for children with autism and should not go below that to make meaningful gains. She stated that she believed at least 20 hours would have been appropriate for him, based on his liking to be with people making him very prime for interacting.

154. Dr. Schwartz stated that summer programming was important for consistency and continuity, and that children with autism have a terrible time with generalization. She opined that the idea such students could go without consistency for three months and pick up where

they were at the end of the year was not well founded.

155. Dr. Schwartz believes that every child with autism requires year-round services, and makes that determination before she collects the data to support such recommendation.

156. Dr. Schwartz met with the student for a few hours.

157. Dr. Schwartz relied on the book *Educating Students with Autism* and the Dawson and Osterling report to form her opinion.

158. Dawson and Osterling and the NRC report suggest at least 25 hours per week of year-round services, and the early IEPs don't come close to meeting that suggestion. Dawson and Osterling have concluded they could not determine from their data exactly how many hours were needed to educate a student with autism.

159. There are multiple approaches to educating a student with autism.

160. The term 'best practices' means different things to different people. Different associations advocate different best practices for their members.

161. Dr. Schwartz has not reviewed the student's entire special education file.

162. Dr. Schwartz does not know what methodology is used by the District to educate the student, and she did not evaluate the educational program at the District. She only reviewed some of the progress reports. She does not know if the testing requested in the March IEP was ever conducted.

163. Some of the facts that Dr. Schwartz relied on came from the Complaint filed in this matter, and she assumed those facts to be true for the purpose of formulating her opinion.

164. A reference to an aversive treatment plan is not appropriate without a functional

behavioral assessment, and Dr. Schwartz has no information about why a reference to an aversive treatment plan was in the IEP document.

165. Dr. Schwartz's opinion that the staff did not have training in autism is based on her reading of the IEP and not based on any evidence of a lack of training.

166. Dr. Schwartz's opinion that the District did not have a qualified preschool teacher is based on her reading of the IEP and not on any evidence of that person's qualifications.

167. Dr. Schwartz's opinion about the need for a Functional Behavioral Assessment (FBA) is not based on the law.

168. Dr. Schwartz does not believe physical restraint is appropriate to deal with issues of noncompliance.

169. The student had not been diagnosed as a student with autism when he came from New Jersey, and he was not diagnosed as a student with autism prior to March 2004.

170. Dr. Schwartz testified that the recommendation to use Co-Teach techniques at [the elementary school] is a good recommendation, but she was unaware of the fact that Co-Teach uses physical restraint to address noncompliance.

171. Dr. Kathy Kelker is a professor at MSU Billings where she teaches special education and special education law classes to undergraduate and graduate students. Dr. Kelker testified on behalf of the student's parents as an expert in special education.

172. Dr. Kelker is the founder and director of Parents Let's Unite for Kids (PLUK). PLUK is a resource for families and was created to help parents understand what special

education is supposed to be about. PLUK is offered statewide and offers library resources, videos, consultation, and advocacy for families.

173. At the hearing, Dr. Kelker testified that the District failed to adhere to the Administrative Rules of Montana regarding interstate transfer of special education students. She testified that the District did not declare, in the IEP minutes of the 9-22-2003 IEP, that they had accepted or not accepted evaluation or IEP documentation from the previous school district.

174. Dr. Kelker testified that the term ‘diagnostic IEPs’ is not used much anymore and they are more commonly referred to as ‘interim IEPs’.

175. According to Dr. Kelker, interim IEPs are appropriate when a student arrives at the district and the district personnel feel as though they don’t have enough information about that student and they want to do some observations and work with that student before an IEP is developed.

176. Dr. Kelker testified that the 9/22/03 IEP goals and objectives did not regard the student. She stated that goals are to be written showing what the student will do in an interim period. Therefore, there was no description of what the student’s free appropriate public education (FAPE) would provide. Dr. Kelker testified the IEP did not meet FAPE requirements, as written.

177. Dr. Kelker testified the student’s prior New Jersey evaluations as well as Dr. Gold’s report were typical of a child identified under autism spectrum disorder, indicating a need for uniquely designed instruction that would address the symptoms and the impairments related

to the autism spectrum disorder.

178. Dr. Kelker testified that the 11/18 03 IEP goals and objectives for speech and language were quite appropriate.

179. Dr. Kelker testified that the 11/18/2003 IEP did not meet the IDEA Prior Written Notice requirement, due to significant time and services changes from the last [*** Township] IEP. There had never been a written explanation to the parents for such changes.

180. Dr. Kelker testified she did not believe the November IEP goals and objectives were appropriate (other than the speech and language goals and objectives), because they were not adequate to prepare the student for meaningful participation in the regular classroom.

181. Dr. Kelker relied on the book *Educating Children with Autism* and the Dawson and Osterling report in forming her opinion about the student's program.

182. Dr. Kelker believes that a school must hold an IEP or CST team meeting any time a student transfers into the state of Montana, but in her testimony, she referred only to incidents when either the school or parent challenged the incoming diagnosis or placement.

183. Dr. Kelker acknowledged there is no statute that requires the District to hold a meeting, either IEP or CST, if it accepts the transferring student's IEP.

184. Dr. Kelker acknowledged the reports generated by the specialists prior to the student's placement at [the elementary school] did not indicate he was autistic.

185. The goals and objectives for the November IEP could be appropriate for a child with a cognitive or developmental delay, but there was nothing in the goals and objectives that were specific to a student with autism.

186. According to Dr. Kelker, the ABAS instrument is not recommended for use on autistic children.

187. Dr. Kelker could not understand or interpret the On Track documentation.

188. Dr. Kelker believed the student was showing emerging skills, but she did not observe or even meet him at any time, and based her opinion on the records provided by the parents' counsel.

189. Dr. Kelker agreed the minutes of an IEP meeting do not capture the nuance of everyone's perspective at the meeting.

190. Dr. Kelker did not review the student's entire special education file.

191. Dr. Kelker did not review the District's curriculum and has no information about the District's program.

192. Dr. Kelker does not believe that every child with a form of autism needs ESY services.

193. To address their concern that the student maintain social interaction skills, the parents obtained private speech therapy and socialization activities over the summer of 2004, costing approximately \$2,400.00, with all but approximately \$600.00 being out-of-pocket expenses.

194. Linda Maass testified for the District as an expert in the area of special education in Montana. She reviewed the entire special education file for the student.

195. Ms. Maass would not have concluded the child was a student with autism by

reviewing Dr. Gold's report and the records provided by [**** Township].

196. Schools use many different forms for noticing parents of IEP meetings.

197. In Ms. Maass's opinion, the September 2003 IEP meeting listed goals that were designed to determine the student's individual needs; they were relying on the goals from the last Sparta IEP while they collected the necessary information. The student's mother approved of this interim situation.

198. According to Ms. Maass, prior to the CDC evaluation the District should not have been significantly concerned about the student having autism.

199. Ms. Maass does not agree with the recommendation from CDC to use Co-Teach techniques at the District for the sake of consistency.

200. The team unanimously agreed to carry over the goals and objectives from November to the March 2004 IEP.

201. The progress reports indicate the student was making progress and receiving a meaningful educational benefit under the goals and objectives from the November and March IEPs.

202. Ms. Maass did not have any trouble understanding the On Track data.

203. It is a common practice for staff to check testing information and make notations.

204. The records and staff do not indicate that the student's behavior was impeding his ability to learn or that of others, and a functional behavioral assessment was not necessary for him.

205. The May 2004 IEP was designed to provide the student with a meaningful educational benefit.

206. Making full use of a student's potential is not the standard for public schools under IDEA.

207. There is no statute or regulation that requires the IEP team to consider every factor outlined in the OPI extended school year services listed in Exhibit 17 when considering whether ESY is necessary.

208. There was no evidence there was a likelihood that the student would regress if not provided ESY services.

209. Ms. Maass testified the District team appropriately determined that ESY was not required for the student, based on the factors it was required to consider, the progress he was making, and the data showing that he did not regress over breaks.

210. In Ms. Maass's opinion, twenty-five hours a week of year-round programming, based solely on a diagnosis, does not meet the standard of individualized education set out in the IDEA. She believes that an autistic student can receive a meaningful educational benefit with less than twenty-five hours a week of year-round programming.

211. It is not uncommon for practitioners to have different ideas about appropriate IEP goals and objectives; and it is not uncommon for practitioners to go back and, with hindsight, pick apart another practitioner's IEPs.

CONCLUSIONS OF LAW

Under IDEA and implementing regulations, the Montana Superintendent of Public Instruction has jurisdiction to hold an impartial due process hearing with respect to complaints about the identification, evaluation, or educational placement of an eligible child with a disability or the provision of a free appropriate public education to that child. 20 U.S.C. § 1415(b)(1)(E); see also 34 C.F.R. § 300.506, incorporating § 300.504(a)(1) and (2), and §§ 10.60.102 and 10.16.2402, ARM. The hearing officer has jurisdiction under IDEA to hear and decide the issue that has been presented for decision.

The Individuals with Disabilities Education Act (IDEA) assures an eligible child with a disability a free appropriate public education (FAPE). See 20 U.S.C. §§ 1400(c) and 1412(1). The child's individualized education program or IEP is the means by which a free appropriate public education is achieved. See 20 U.S.C. § 1401(a)(18)(D) and *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 181 (1982).

Pursuant to 20 U.S.C. Section 1401(18), the term 'free appropriate public education' means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State education agency;
- (C) include an appropriate preschool, elementary or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under Section 1415(a)(5) of this title.

Educational placement decisions must be based upon the child's unique individual needs, as reflected in the child's IEP. 34 C.F.R. 300.552(a)(2).

IDEA does not require a school district to maximize the potential of a child with a disability, but only to assure that the child receives an appropriate education reasonably calculated to enable him or her to receive educational benefit. A school district affords FAPE to a child with a disability by providing "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. at 203.

A school district has the burden of proving that its proposed placement will provide FAPE. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1443, 1501 (9th Cir. 1996) quoting *Clyde K. v. Puyallup School*, 35 F.3d 1396, 1397-98 (9th Cir. 1994).

1. The District did not violate ARM procedural requirements regarding interstate transfer of special education students.

Montana Administrative Rule 10.16.3342(2) requires that, when an IDEA-eligible student moves to Montana from another state, the first step is to determine whether to adopt the most recent evaluation and IEP. Although there is no written documentation, testimony from both the student's mother and the District indicated that the District adopted the former IEP and placed the student according to the terms of the [**** Township] IEP.

If the former IEP is adopted by the new district and the parents agree to its use, it can be implemented. There is no requirement that the new district hold an IEP or CST meeting to adopt the former IEP if the new district and the parents agree to its use. Therefore, the

District properly accepted the student's IEP, with the parents' consent, when he enrolled in the District in September of 2003.

2. The District did not fail to provide prior notice.

The IDEA requires state and local education agencies to guarantee safeguards for handicapped children and their parents in the provision of FAPE. 20 U.S.C. §1415(a). Procedural flaws do not automatically require a finding of a denial FAPE. However, procedural inadequacies that result in a loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP process clearly result in the denial of a FAPE. *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992). See also: *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir.1990) (no reimbursement for private placement where violation of IDEA notice requirement did not affect development of child's IEP or provision of free appropriate public education); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 949 (1st Cir.1991) (no violation of notice requirement where parent received copies of meeting minutes after meeting at which change in placement was decided where change was never implemented).

Prior written notice must be provided to the parents of a child with a disability within a reasonable period of time before the school proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. 20 U.S.C. § 1415(b)(3). The notice must include the following:

(A) a description of the action proposed or refused by the agency;

- (B) an explanation of why the agency proposes or refuses to take the action;
- (C) a description of any other options the agency considered and the reasons why those options were rejected;
- (D) a description of each evaluation procedure, test, record or report the agency used as a basis for the proposed or refused action;
- (E) a description of any other factors relevant to the agency's proposal or refusal;
- (F) a statement that the parents are protected by the procedural safeguards and, if the notice is not one for an initial referral for evaluation of the child, the means by which a copy of a description of the procedural safeguards can be obtained; and
- (G) sources for parents to contact to obtain assistance in understanding the provisions of the notice requirements.

34 C.F.R. § 300.503(b).

The parents received proper notice of the IEP meetings from the district. “The procedural safeguards and in the IDEA are all designed to inform parents and to involve them in the development of the IEP for their child. The Act involves parents at all stages, making them members of their child's IEP team and enabling them to advocate for their position if a dispute arises. The school system must give parents written notice of their rights at key intervals: when their child is initially referred for evaluation, when they are notified about each IEP meeting, when their child is reevaluated, and when they register any complaint about the school system's effort to provide a free appropriate public education for their child.

20 U.S.C. §§ 1415(d)(1).” *Weast v. Schaffer ex rel., Schaffer*, 377 F.3d 449 (C.A.4 2004).

The school district provided notice of the IEP meetings which included a copy of the parents’ rights and procedural safeguards booklet. The parents have had the opportunity to actively participate and advocate for their child throughout the process. An IEP meeting, by its nature, will develop goals and objectives. Specific information delineated relevant to the IEP will more appropriately be developed and/or discussed at the IEP, not before. This will be set out in the IEP documents which will, essentially, constitute the prior notice of the intended placement.

The IEP process involved the participation of the parents; and the resulting document was notice of the placement, in which they could consent or disagree and pursue their remedy, which they did.

3. The IEPs were designed to provide the student with FAPE.

The September 22, 2003 IEP team properly and unanimously placed the student in an interim setting to gather more information about him in order to write more appropriate goals and objectives for him. The student received a meaningful educational benefit during the interim period.

The November 18, 2003 IEP team properly and unanimously placed the student and wrote appropriate goals and objectives for him based on the available information. The IEP was designed to provide a meaningful educational benefit to the student, and he received a meaningful educational benefit under its goals and objectives.

There was no evidence that the student was diagnosed as autistic at this time. The parents had not expressed concern about autism to the District until the November 18, 2003, IEP team meeting. This concern led to the CDC referral. The District did not have sufficient information to reasonably suspect that the student was autistic and cannot be held to have had that knowledge in hindsight. Additionally, testimony reflected that no placement would be made based on a diagnosis rather than the child's needs; and his educational needs were being addressed.

The March 22, 2004, IEP team properly and unanimously placed the student after considering the new diagnosis of autism. The team properly and unanimously determined that the goals and objectives written for the student in November were still valid, and would be revisited in May after further testing was performed on the student by District personnel. The March 22, 2004 IEP was designed to provide a meaningful educational benefit to the student, and he received a meaningful educational benefit under its goals and objectives. The CDC evaluation was raised by the student's mother; and she, along with the rest of the team, agreed to the goals and objective contained in the IEP in light of that evaluation. The student was making progress, and the IEP was developed and implemented so as to provide meaningful benefit.

The recommendations made by the CDC specific to Co-Teach were not typical of their recommendations and made without knowledge of the [elementary school] program. Further, the recommendations are not binding on the school district. The law does not require that the

District adopt the recommendations in order to provide FAPE. *G.D. v. Westmoreland School District*, 930 F.2d 942 (1st Cir. 1991); *Burilovich v. Bd of Ed. of Lincoln Consolidated Schools*, 208 F.3d 560 (6th Cir. 2000).

The May 7, 2004 IEP team properly placed the student after considering the input of all of the parties and the new diagnostic information available to the team. The May 7, 2004, IEP was designed to provide a meaningful educational benefit to the student.

The CDC preschool recommendations were intended to enable the student to make full use of his potential. This is what every parent wants for their child. However, there are many programs which are effective. Further, the statute does not require potentially maximizing services. The District is not required to implement an IEP program requested by the parents, but one that is reasonably calculated to confer a *meaningful benefit on the child*. *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Gregory v. Longview School District*, 811 F.2d 1307, 1314 (9th Cir. 1987).

Rowley admonished courts to "be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. 207. The Supreme Court was convinced that Congress did not intend courts "to overturn a State's choice of appropriate educational theories" *Id.* at 207-08. Thus it has been held that parents do not have a right under IDEA to compel a school district to provide a specific program or to employ a specific methodology to educate their disabled child. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988). See also *A.W. v. Northwest R-1 Sch. Dist.*, 164 (8th Cir. 1987).

Both of the experts who testified on behalf of the student were of the opinion the each

of the IEPs from [the elementary school] did not provide educational benefit. While the experts are extremely qualified in their areas, neither of them had evaluated or reviewed the District's curriculum or had information about the District's program. Neither of them had viewed the student's entire special education file. Dr. Schwartz had met the student for a few hours once; and Dr. Kelker had never met him. As a result, the Hearing Officer is compelled to give more weight to the decision of the IEP team, which included the student's parent or parents and other individuals who knew and worked with the student on a daily basis.

Dr. Schwartz evaluated the goals and objectives developed and agreed to by the IEP team with reference to the Dawson and Osterling report on Early Intervention in Autism and the National Research Council book on Educating Children with Autism. She opined that the district was obligated to provide a minimum of 20 hours per week of service to the student with programming available in the summer.

She based her opinion on a review of the records provided by the parents and a brief observation of the student. She did not speak to the staff. Additionally, she admitted during testimony that the Dawson Osterling report reflects the researchers are unable to conclude from the data what the necessary and sufficient number of hours per week of school-based intervention are required for a positive outcome.

The IEPs cannot be judged in hindsight, but whether the goals and objectives at the time the plan was implemented were reasonably calculated to confer meaningful benefit. See *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999). At the IEP meetings, the individuals most familiar with the student all agreed he was receiving educational benefit

from the IEPs and making progress. In fact, testimony reflects it was because of the progress the student was making that ESY became an issue. The parents felt a summer break would jeopardize their child's progress.

The parents assert that, because the student was in two programs (Co-Teach and [the elementary school]), it is impossible to tell which program was responsible for the progress. That does not lead to a conclusion that the District programs contained in the IEP did not provide FAPE. There is no evidence which was available at the time of each IEP meeting that the student was not making progress or that the [elementary school] goals and objectives were not providing educational benefit to him. There was no evidence provided at the hearing that any progress made was the result solely of the student's participation in the Co-Teach program. The parents' testimonies reflect that they preferred Co-Teach; and it is understandable that this would lead them to conclude any progress was attributable to that program. However, this does not constitute evidence that progress was attributable to Co-Teach, not [the elementary school]. Likewise, the CDC recommendation suggested the techniques applied at Co-Teach should be applied at [the elementary school], which undoubtedly bolstered the parents' support and desire for Co-Teach. However, in making that recommendation, the CDC did not have any information about the curriculum or program at [the elementary school], nor did they have participation from [the elementary school] staff in the same manner in which they had participation from Co-Teach staff. Thus, while consistency may be the recommendation, there is no evidence on which CDC could base a determination that Co-Teach curriculum and techniques would provide more

educational benefit than [the elementary school] curriculum, and no evidence on which the parents can base their contention that the Co-Teach program was responsible for their child's progress.

4. There was no procedural violation of the IEP in relation to the September 2004 meetings.

5. There was no procedural violation of the IDEA because a regular education teacher did not attend either meeting in September of 2004.

6. The use of the Significant Change to IEP Form to reflect the meetings did not constitute a violation of the IDEA.

An IEP meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as methodology, lesson plans, coordination of service provisions, or IEP meeting preparation. 34 C.F.R. s300.501. 20 U.S.C. 1414(f).

The September 3, 2004 meeting between the parties was not noticed as an IEP team meeting, and was not intended to be an IEP team meeting. The meeting was requested to discuss the May 7, 2004 IEP and obtain the parents' permission to provide the services as indicated on that IEP. The parents and their counsel attended, along with various school personnel who were there to provide information or answer questions. At that meeting, the student's mother initiated a conversation as to what the parents believe needed to be provided.

The IEP had not been signed, and the meeting notes contain a statement from the

parents that they generally disagreed with the placement offered by the District. Consequently, the discussion and proposals relating to the unsigned IEP from the parents could not constitute a significant change to the IEP. The Significant Change to IEP Form was used, according to testimony, because it was available and reflects a change in speech and language based on the parents' indication that their child would not be at [the elementary school]. The form reflects the services that could continue to be provided to their child if he was not a student at [the elementary school], as the remaining service was to be in the classroom and would not be provided in his absence.

The District appropriately attempted to informally obtain the consent of the parents on the IEP form which had, at that point, been neither signed nor specifically refused. *See* ARM 10.16.3505(2)c. The discussion initiated by the parents as to what they wanted cannot be construed as changing the character of the meeting into an IEP. Because this was not an IEP meeting, there was no procedural violation on the basis that a regular education teacher was not in attendance. The student's parents attended the meeting with their counsel and were aware this meeting was not noticed as an IEP meeting. This informal meeting cannot be recharacterized to provide the basis for a finding of a procedural violation against the District. *See e.g., MM v. Greenville*, 303 F. 3d 523 (4th Cir. 2002).

Likewise, the meeting held on September 10, 2004 was not an IEP meeting. Again, no IEP had been signed and the parents' purpose in attending the meeting was to reject the placement as outlined in the May IEP. Again, the Significant Change to IEP Form, used to reflect the parents' rejection of the placement and refusal of services, may not have been

accurate, given that there was no IEP in place to change. However, the decision to use that form does not elevate that meeting into an IEP meeting or result in a violation of the IDEA on the basis that no regular education teacher was present.

7. The CST properly determined that ESY was not required and the school district did not violate the IDEA in refusing the parents' request that ESY be provided for the summer of 2004.

ESY is determined on an individual basis. ESY services are provided to maintain identified skills and to prevent or avoid substantial loss of previously acquired or emerging skills or behaviors. ESY services are required when a child would regress to an extent that the time required to regain those skills, once instruction begins again, is so great that it makes reasonable future progress unobtainable. *JH by JD and SS v. Henrico County Sch. Bd.*, 326 F.3d 560 (4th Cir. 2003) (noting that the purpose of ESY is to prevent gains from being significantly jeopardized, not to make progress on goals unmet during the regular school year.) The regression/recoupment formula is used in Montana with the additional factors of:

- (1) the nature and severity of the student's disability;
- (2) the ability of the student's parents to provide educational structure in the home;
- (3) behavioral and physical impairment;
- (4) the ability of the student to interact with peers;
- (5) the student's vocational needs;
- (6) the availability of alternative resources; and
- (7) whether there are "emerging skills" and "breakthrough opportunities" as when a

student is on the brink of learning to read.” *Extended School Year Services 3* (Office of Public Instruction 2002).

The parents’ expert, Dr. Ilene Schwartz, opined that all children with autism needed to receive year-round services, and that 20 hours a week would be appropriate for the student. Dr. Schwartz also stated that summer programming was important for consistency and continuity and that children with autism have a terrible time with generalization.¹ Dr. Kelker does not agree that every student with a form of autism needs ESY services. These are positions which illustrate how experts and providers of service can disagree about what is appropriate. There is no one practice which can be considered the only practice or approach.

Dr. Kelker did opine that the failure to provide ESY was a failure to provide FAPE, as the student’s language skills were just beginning to emerge. However, as the Hearing Officer stated earlier, Dr. Kelker had never met or observed the student, had not reviewed all of his education records, and had no direct knowledge of the student’s language skills.

This opinion in contrast to the conclusions of the CST team, which consisted of the people who know the student and who have spent significant time with him. The data collected done by District staff regarding regression indicated he did not show regression which could not be recouped, and in some cases showed no regression at all. The team considered every fact relevant to the student and necessary to determine the necessity of ESY based on his individual needs. While it is understandable that the parents did not want to see

¹Presumably, Petitioners’ issue relating to ESY services for the summer of 2005 is based on Dr. Schwartz’s opinion, as no other evidence supporting ESY services in 2005 was produced at the hearing.

the steady progress everyone agreed their child was making to be interrupted, that is not the standard for making an ESY determination. The determination that the student was not eligible for ESY services was not in violation of the IDEA.

The parents want only the best for their young child and want him to have every opportunity to reach his potential. As his father testified, he wants his child to be a well adjusted normal functioning adult. They are deeply committed and passionate advocates on his behalf. This is as it should be. There is an inherent tension between what parents want for their children and what the law says a public school must provide for the student. There are limits to what the school district is mandated to provide. The school district is not required to hire specific consultants or adopt a specific curriculum. They are required to provide a program which provides educational benefit, which is what the District did. It is the conclusion of the Hearing Officer that the District has met its responsibilities as mandated by the IDEA.

ORDER

1. Respondent satisfied its duty in the development and implementation of the student's IEPs.
2. The 2003-2004 and 2004-2005 IEPs were reasonably calculated to provide meaningful educational benefit for the student based on his individual needs.
3. The Respondent did not violate IDEA procedural requirements in the adoption of the out-of-state IEP or the notice provision.

4. The District was not required to provide ESY services during the summer of 2004.
5. The District is not required to provide ESY services during the summer of 2005.
6. The District is not required to bring in a third party to design a program or specific staff training as requested by the student's parents.
7. Pursuant to the Findings and Conclusions, Petitioners' claim for relief is denied.

DATED this 25th day of April, 2005.

DEE ANN G. COONEY
Hearing Officer

Certificate of Service

I hereby certify that, on April 25, 2005, a true and correct copy of the foregoing was deposited in the United States mail, postage prepaid, addressed to the following:

Kathleen Manley-Coburn
Manley-Coburn Law Office
Post Office Box 5595
Missoula, MT 59806-5595

Elizabeth Kaleva
Attorney at Law
Post Office Box 9312
Missoula, MT 59807-9312

Linda Brandon-Kjos
Office of Public Instruction
Legal Division
Post Office Box 202501
Helena, MT 59620-2501

CAROL A. KNIGHT