Judson W. Tolman
[redacted]
Hearing Officer

BEFORE THE STATE IDAHO DEPARTMENT OF EDUCATION
(ADMINISTRATIVE HEARING)

[redacted]. as legal guardians and parents of [redacted], a minor, Petitioner, vs. MONTICELLO MONTESSORI CHARTER SCHOOL, District No. 474, Respondent.	SDE Nos. H-21-02-08a **MEMORANDUM DECISION**

INTRODUCTION

[redacted] and [redacted] (collectively "Petitioner"), parents of the [redacted] ("Student"), submitted a Due Process Complaint ("Complaint") to the Idaho State Department of Education on February 8, 2021. Petitioner's Complaint alleges that Monticello Montessori Charter School ("Respondent" or "MMCS") failed to provide Student with educational benefits afforded to students with disabilities under the Individuals with Disabilities Education Act ("IDEA"). Respondent submitted an Answer to the Complaint on February 22, 2021, denying Petitioner's claims.

A due process hearing was held on May 17 – 18, 2021. Witnesses testifying at the due process hearing included:

- [redacted], Petitioner;

- [redacted], Advocate, Mountain West Supportive Services;
- [redacted], Special Education Teacher at Monticello Montessori Charter School;
- [redacted], Principal/Superintendent at Monticello Montessori Charter School;
- [redacted], Teacher at Monticello Montessori Charter School; and
- [redacted], Licensed Master Social Worker.

Both Petitioner and Respondent presented documents at the due process hearing that were admitted into evidence. The following exhibits were admitted into evidence:

Plaintiff's Exhibits: 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 117, 118, 119, 121, 122, 123, 124 and 125;

Respondent's Exhibits: 205, 207, 209, 213, 224, 225, 226, 227, 228, 229, 232 and 238,

Following the due process hearing both Parties submitted written closing arguments.

ISSUES

In the Complaint Petitioner asserts two claims against Respondent:

1. Respondent denied Student a Free and Appropriate Public Education ("FAPE") by failing to evaluate Student for, and provide Student with, an Individualized Education Program ("IEP") as required by the IDEA.

2. Respondent violated the IDEA by causing an involuntary change in placement for Student.

RELIEF SOUGHT BY PETITIONER

The relief sought by Petitioner, as stated in the Complaint, is as follows:

- "Compensatory education by way of paying [Student's] new school for the evaluations, services, and placements [Student] receives at [the] new school.

- Ordering [Respondent] to create, modify, and implement special education policies; conduct broad-scale staff trainings; or to restructure or bring into compliance its special education programs.
- Ordering that the Hearing Officer's findings be appropriate redacted and delivered to the Idaho Public Charter School Commission for consideration of whether continuation of [Respondent's] charter is advisable, or should be subject to other sanctions.
- [Petitioner's] attorney's fees and costs." Complaint, p.2.

BURDEN OF PROOF

"The burden of proof in an administration hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). Commenting on Schaffer, the Ninth Circuit stated: "[T]he ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims, … [a]bsent some reason to believe that Congress intended otherwise, … we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9th Cir. 2007).

Applying *Schaffer*, and the Ninth Circuit opinion in *Van Duyn*, Petitioner bears the burden of proof on both issues for determination in this matter because Petitioner is the party challenging the IEP and the only party seeking relief.

FINDING OF FACTS

1. Student is currently [redacted] years old. Student attended school in [redacted] and [redacted] grade in Ontario, Oregon. Student attended [redacted] grade in Idaho Falls, and then was home

schooled during [redacted] grade. Student resumed attending school at Idaho Falls during the [redacted] grade. In mid-February 2020, Student started attending MMCS. Transcript (TR") 60:9-62:6.

2. Student was placed on an IEP while attending school in Ontario, Oregon. Student was taken off the IEP when [redacted] went to [redacted] grade. TR 65:20-66:3.

3. Student was not on an IEP when Student transferred to MMCS. Student was not on an IEP while attending MMCS. TR 59:6-8.

4. On or about March 16, 2020, the Idaho Governor issued a "soft closure" of all public schools in the state of Idaho. For the remainder of the 2019-2020 school year, Student attended MMCS remotely. TR 63:14-19.

5. MMCS resumed in-person attendance at the beginning of the 2020-2021 school year. The first day of the 2020-2021 school year was on August 26, 2020. TR 66:16-20.

6. On August 24, 2020, Petitioner sent an email to MMCS requesting that Student be placed on an IEP. Ex. 100.

7. While attending the [redacted] grade at MMCS, Student's scores on Idaho standardized tests for reading and math showed that Student was performing above his grade level. Student's scores showed that he was performing at a grade equivalent of 6.3 and 7.2 for math and reading respectively. Ex. 207.

8. Student's progress report, dated November 11, 2020, showed that Student's grades at MMCS were average to above average and that Student needed improvement with some social development skills. Ex. 205.

9. In September 2020, Special Education Teacher, [redacted] requested Student's General Education teacher, [redacted], submit information about Student's performance and behaviors in the classroom by completion of a form entitled "General

Education Teacher Input." TR 209. [redacted] submitted the completed form to [redacted] on September 24, 2020. Ex. 209.

10. [redacted] supplemented the information relating to whether Student needed special education through conversations and emails with [redacted]. TR 290:6-23.

11. Petitioner told [redacted] that Student was on the autism spectrum. TR 278:11-15.

12. While attending [redacted] grade at MMCS, [redacted] used behavioral intervention techniques to assist Student when Student experienced behavioral issues at school. TR 277:14 – 278:10; 281:12 -284:17. Student responded positively to these interventions and the interventions were successful in helping Student work through behavioral issues Student experienced at school. TR 298:7 – 304:17.

13. In September 2020, [redacted] provided Petitioner with a form entitled "Caregiver Input" for Petitioner to submit information about Student. TR 40:2-12; Ex. 209 p.2. Petitioner submitted the completed form to [redacted] on October 18, 2020. Ex. 107.

14. Meetings were held at MMCS to discuss the interventions used to assist Student and the effectiveness of such interventions. TR 169:6-19; 174:1-24; 303:15 – 304:17.

15. On October 20, 2020, MMCS sent Petitioners a Written Notice concerning the Petitioners' request for an IEP. That Written Notice provides, in relevant part:

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"After consideration of the parent's request, to refer [Student] for a special education evaluation, the team determined that the intervention strategies will be utilized in the areas of concern as part of the pre-referral process".

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"Intervention data will be collected in areas of concern as part of the pre-referral process. Additional evaluation measures are not warranted at the present time."

***

"The Intervention Team's goal is to provide support and strategies to be utilized as part of the RTI process. The team will continue to monitor [Student's] progress with interventions so the evaluation process can be revised in the event [the Student] demonstrates educational need."

***

"The option of conducting an evaluation was considered and rejected due to the need for additional information to determine present levels of performance and specific needs. In order to comply with the LRE requirements, state rule requires response to intervention data prior to eligibility determination."

***

"The team reviewed all records available, including parent and teacher input, school records, medical records, progress report cards, state and standardized assessment data, and observations. Based upon a review of this data, the team will initiate interventions to determine progress in areas of concern."

The team has reviewed and declined your request to initiate a special education evaluation at this time. Interventions in areas of concern will be implemented and documentation of [Student's] response to those interventions will be reviewed." Ex. 108.

16. At the time Student attended MMCS, [redacted], Superintendent, was aware that Student had a diagnosis. TR 213:25-214:11. Petitioner reported to [redacted] in September 2020 that Student had a diagnosis, possibly autism. TR 229:9-25.

17. On or about October 20, 2020, [redacted] contacted Child Protective Services about a concern relating to a sibling of Student. [redacted] contacted Child Protective Services again on December 15, 2020, regarding the same sibling of Student. TR 194:1 – 195:23; 197:18-20.

18. On December 10, 2020, MMCS Superintendent, [redacted], contacted Child Protective Services about concerns [redacted] had for Student's sibling. TR 248:15-24. On or about December 14, 2020, [redacted] contacted Child Protective Services to supplement [redacted] previous report made on December 10, 2020.

19. A representative from Child Protective Services met with Petitioners on December 16, 2020. Child Protective Services determined that the reports were erroneous. TR 335:2-16.

20. Petitioner sent an email to MMCS on December 16, 2020, withdrawing Student from MMCS. TR 246:16-247:6; Exh. 123.

21. For the 2020 – 2021 school year, Student attended school at MMCS from August 26, 2020 until December 16, 2020. TR 66:11-15.

CONCLUSIONS OF LAW

I. MMCS Violated Initial Evaluation Requirements of the IDEA.

Under the IDEA state and local agencies provide special education to children with disabilities. 20 U.S.C. § 1412(a); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). To this end, schools are charged with the responsibility of identifying and assessing all children who are suspected of having disabilities and are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.

The purpose of the IDEA is, among other things, to provide children with disabilities a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further employment and independent living; to ensure that the rights of children with disabilities and parents of such children are protected; and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities. 20 U.S.C. § 1400(d)(1)(A)-(C).

"School districts may deny a child a free appropriate public education by violating either the substantive or procedural requirements of the IDEA. *M.M. v. Lafayette Sch. Dist.*, 767 F3d

842, 852 (9th Cir. 2014). A school district denies a child a free and appropriate public education by violating the IDEA's substantive requirements when it offers a child an IEP that is not reasonably calculated to enable the child to receive educational benefits. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432-33 (9th Cir. 2010). The school district may also, however, deny the child a free appropriate public education by failing to comply with the IDEA's extensive and carefully drafted procedures. See *Doug C. Hawaii Dep't of Educ.*, 720 F3d 1038, 1043 (9th Cir. 2013)." *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1118 (9th Cir. 2016).

One of the procedural requirements of the IDEA requires that "if a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the Act." Id. At 1119.

The IDEA and Ninth Circuit precedent establish that "if a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment. That notice may come in the form of expressed parental concerns about a child's symptoms, as in *Pasatiempo* [infra], of expressed opinions by informed professionals, as in *Hellgate* [infra], or even by other less formal indicators, such as the child's behavior in or out of the classroom. A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel the suspicion through informal observation. Rather, such notice automatically triggers mandatory statutory procedures: the school district must conduct an assessment for all areas of the suspected disability using the comprehensive and reliable methods that the IDEA requires." *Paso Robles* at 1121-22. See also, *Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)(holding that "Once either the school

district or the parents suspect disability . . . a test must be performed so that parents can receive notification of, and have the opportunity to contest, conclusions regarding their children."); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008)(holding that the requirement to assess may be triggered by the informed suspicions of outside experts).

Although any parent having reason to suspect that their child may have a disability may request an initial evaluation, the school district may deny the request. If the school denies the request, it must provide written notice to the parents explaining that it refuses to conduct an initial evaluation and provide an explanation as to why it does not suspect the child has a disability and what records or evaluations it used as the basis for its decision. 34 C.F.R. § 300.503(a) & (b). A parent may then challenge the decision by requesting a due process hearing under 34 C.F.R. § 300.507.

Petitioner's request for an IEP for Student made on August, 24, 2020, inferred a request for an initial evaluation. The October 20, 2020, written notice provided by MMCS to Petitioner, wherein MMCS denied Petitioner's request for an initial evaluation, was an appropriate notice under 34 C.F.R. § 300.503(a) & (b). Petitioner's Complaint challenges MMCS's denial of Petitioner's request for an initial evaluation of Student.

MMCS was on notice that Student may have a diagnosis for receiving special education. Petitioner informed MMCS of a possible autism diagnosis and Student displayed behavioral issues at school. This information from Petitioner together with Student's behavioral issues occurring at school gave rise to MMCS' obligation to provide an initial evaluation of Student pursuant to the IDEA and the above-cited Ninth Circuit precedent.

MMCS argues that an initial evaluation of Student was not necessary at the time of the written notice because MMCS was providing interventions under a Response To Intervention

("RTI") program. According to Student's general education teacher, the interventions provided in the general education classroom sufficiently addressed Student's behavioral issues experienced at school. However, the use of interventions in the general education classroom do not excuse or negate MMCS' obligations to provide an initial evaluation when there is a reasonable basis for suspecting a disability. The U.S. Department of Education, Office of Special Education, is authorized to implement the IDEA and has provided guidance applicable to the current case: "The regulations at 34 CFR §300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-300.311, to a child suspected of having a disability under 34 CFR §300.8. . . . It would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework." Memorandum to State Directors of Sp. Ed., 56 IDELR 50 (OSEP 1/21/11).

Consistent with the guidance from Office of Special Education and the Ninth Circuit case law cited above, MMCS' obligation to provide an initial evaluation was triggered when it had notice of Student's suspected disability and such obligation cannot be avoided or delayed by the provision of interventions as part of an RTI program.

II. MMCS' Procedural Violation Did Not Deny FAPE.

The Ninth Circuit Court of Appeals has held that a procedural violation of the IDEA that does not result in the loss of an educational opportunity does not constitute a denial of FAPE. See *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir. 2007). Further, in *Burnett v. San Mateo Foster City Sch. Dist.*, 739 Fed.Appx. 870 (9th Cir. 2018), the Ninth Circuit Court affirmed

the district court conclusion that procedural violations did not result in a denial of FAPE where it was never established that the student was eligible for special education.

A student is eligible for special education if the student is a "child with a disability" and as a result needs special education that cannot be provided with modification of the regular school program. 20 U.S.C. § 1414(b); 34 C.F.R. § 300.8(a)(1).

In this case, no evidence was presented at the due process hearing indicating that Student needs special education. The evidence presented shows that while attending MMCS 1) Student achieved average to above average grades; 2) on standardized state exams Student achieved scores showing Student is performing above-grade level in math and reading; and 3) by providing modifications to the regular school program (i.e., interventions) Student's behavioral issues were handled in the general education classroom. The evidence presented in this case does not show that Student needs special education; therefore, MMCS' procedural violation did not result in a denial of FAPE because Petitioner never established Student's eligibility for special education.

III. Petitioner's Claim Regarding Placement Is Without Merit.

Petitioner argues that MMCS' reporting to Child Protective Services caused an involuntary change in Student's placement under the IDEA. Petitioner correctly states that "a change in placement under the IDEA is preceded by appropriate consideration by the IEP team, often in consultation with the help of other professionals, and is always preceded by appropriate notices that would have allowed [Petitioner] to contest a decision made." Complaint, p. 2. Petitioner's claim presumes that Student is eligible for special education under the IDEA. Placement under the IDEA is for the provision of special education in the least restrictive environment. See 20

U.S.C. § 1412(a)(5); 34 C.F.R. § 300.315-316. In the present case Student is not eligible for special education therefore the placement rules of the IDEA do not apply to Student.

CONCLUSION

For The reasons set forth above, MMCS failed to provide an initial evaluation as required by the IDEA. however, such failure was harmless and did not result a denial of FAPE because Student is not eligible for special education under the IDEA. Also, Petitioner's claim alleging involuntary change of placement is without merit. Accordingly, Petitioner's claims are DENIED.

So ORDERED this 23rd day of June, 2021.

/s/ - Judson W. Tolman
Hearing Officer

NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 U.S.C. §1415(i)(1). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (See 20 U.S.C. §1415(1)(2)). 20 U.S.C. §1415(i)(2)(a) provides that: Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by State law. (Emphasis Added).** IDAPA 08.02.03.109.05(g) provides that "An appeal to civil court must be filed within forty-two (42) calendar days from the date of issuance of the hearing officer's decision."

CERTIFICATE OF SERVICE

I DO HEREBY certify that on the 23rd day of June, 2021, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:

Aaron K. Bergman Bearnson & Caldwell 399 North Main Street, Suite 270 Logan, UT 84321 abergman@bearnsonlaw.com	☒ ☐ ☐ ☒	U.S. Mail, postage prepaid Overnight Mail Facsimile Email
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By: /s/ - Judson W. Tolman
Hearing Officer