MONFORTON LAW OFFICES, PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
32 KELLY COURT
BOZEMAN, MONTANA 59718

TELEPHONE: (406) 570-2949
FACSIMILE: (406) 586-3869
E-MAIL: matthewmonforton@yahoo.com

Licensed in Montana and California

November 16, 2012

Ms. Denise Juneau
Superintendent of Public Instruction
P.O. Box 202501
Helena, MT 59620-2501

Via Facsimile & U.S. Mail

Re: Due Process Complaint

Dear Superintendent Juneau:

We represent Eric and Kelsi Wilson, the parents of N.W., a four-year-old, preschool student with hearing and speech-language impairments. Please accept this due process complaint as a written request for an impartial due process hearing pursuant to Administrative Rules of Montana § 10.16.3508 and 34 C.F.R. § 300.508. Please also find included herein an invocation of N.W.'s IDEA right to "stay put" while this matter is resolved. *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

I. IDENTIFICATION OF THE STUDENT

Eric and Kelsi Wilson are the parents of N.W., a current preschool student with an existing Individualized Education Program ("IEP"). The Wilsons reside at 441 1st Avenue South, Columbus, MT 59019, putting them within the jurisdiction of Columbus Public Schools, specifically Columbus Elementary School. N.W.'s special education services are administered by the Stillwater/Sweet Grass Special Services Cooperative ("the Cooperative").

II. DESCRIPTION OF THE FACTS

Columbus Public Schools does not offer a public preschool program. Accordingly, the Cooperative fulfilled its obligations under the IDEA by providing funding for N.W. to attend one of three private preschools in her area. The Wilsons, pursuant to their sincerely held religious beliefs, chose to enroll N.W. in ABC-123 University, a Christian preschool close to their home. N.W.'s current IEP provides that, among other things, the Cooperative will pay for her to attend ABC-123 University three days per week and provide N.W.'s teachers with training on troubleshooting N.W.'s hearing aids and Frequency Modulated or FM system.

Previously, the Wilsons and the Cooperative agreed to a similar placement at ABC-123 University for N.W.'s older sister, K.W., a student who also has hearing and speech-language impairments and thus receives special education services under the IDEA. K.W. successfully received special education services, including payment of her tuition by the Cooperative, at ABC-123 University for approximately one year. She then went on to attend Columbus Elementary School.

N.W. began attending ABC-123 University in September 2012. The Cooperative paid her tuition through the month of September. In late September 2012, the Cooperative informed the Wilsons that the Office of Public Instruction ("OPI") revoked the tuition aid set out in N.W.'s IEP because of a newly adopted practice of prohibiting parents from selecting private religious preschools to provide their children's special education services. The Cooperative told the Wilsons that the OPI required that they move N.W. to a nonreligious private preschool if they wished to continue receiving special education tuition assistance. This directive resulted from the OPI's interpretation of 34 C.F.R. §§ 76.532 & 76.658, which prohibit the use of IDEA funds for religious worship, instruction, and proselytization, or the benefit of a private school and the students generally enrolled therein; and Article X, Section 6 of the Constitution of the State of Montana, which prohibits the use of state funds to aid any school controlled in whole or in part by a church, sect, or religious denomination.

The Wilsons objected to transferring N.W. from ABC-123 University to one of the two nonreligious private preschools in their area on multiple grounds. First, pursuant to their sincerely held religious beliefs, the Wilsons desire for N.W. to attend a religious preschool that both shares and will help foster their Christian beliefs. They objected to the OPI negating N.W.'s right to special education tuition assistance simply because they had independently chosen a private religious service provider. Second, N.W. made great strides at ABC-123 University in her speech and language development, learning to adjust to being in a classroom environment, and learning how to function with special equipment that helps her to hear better. ABC-123 University has already proven to be very able and willing to make accommodations for N.W.'s special education needs, whereas the level of accommodation N.W. would receive at the other two private preschools in the Wilsons' area is unknown. Third, N.W. took some time to become accustomed to the environment, students and staff at ABC-123 University. Transferring her to a different preschool program would needlessly disrupt her substantial educational progress and has a high likelihood of setting her back, as consistency in environment and staff is a critical component in the educational progress and success of students with special needs. Fourth, the other two private preschools in the Wilsons' area are currently oversubscribed and are unlikely to accept new students. ABC-123 University is not oversubscribed and the staff members there are able to provide N.W. with more individualized attention.

In late September 2012, the OPI informed the Cooperative that N.W. needed to be transferred to a nonreligious preschool by October 1, 2012. The Cooperative, after much resistance from the OPI, was able to lengthen this deadline to October 15, 2012. The Wilsons ultimately refused to accept the OPI's proposed alteration of N.W.'s existing IEP and kept her enrolled in ABC-123 University. On October 17, 2012, they received a letter from the Cooperative that reads as follows:

> The Stillwater/Sweet Grass Special Services cooperative was informed by the Office of Public Instruction (OPI) on September 26, 2012, that we cannot use federal preschool funds to pay preschool tuition at religious based preschools. Since ABC 123 University is a Christian based preschool, we can no longer pay for [N.W.]'s tuition to attend.

> I am very sorry for the position that this puts the Cooperative and you in as [N.W.]'s parents. I understand your desire to have [N.W.] attend ABC 123 University. It is an excellent preschool close to the cooperative with staff so willing to accommodate and modify to meet the needs for students with special needs. I admire your decision to pay the tuition so that [N.W.] can continue to go there, even though other options were discussed at no cost to you.[1]

Since October 15, 2012, N.W. has continued to attend ABC-123 University. The Wilsons paid $75.00 in tuition for the three remaining weeks in October, and $150 in tuition for the month of November.

III. DESCRIPTION OF THE NATURE OF THE PROBLEM

A. N.W.'s Educational Needs Are Best Served By Enrollment at ABC-123 University.

The OPI's proposed alteration of N.W.'s existing IEP is completely divorced from any individualized educational considerations and the IDEA's statutory requirements. *See* 20 U.S.C. § 1414 (establishing that an IEP should be revised to address educational concerns, such as a lack of progress toward special education goals, the results of any reevaluation of the student, new information about the student, and the student's anticipated needs); 34 C.F.R. § 300.324 (same). The Wilsons and the Cooperative mutually agreed that ABC-123 University was an appropriate educational placement based on N.W.'s individual educational needs. *See* 20 U.S.C. § 1412(a)(10)(B)(i) (requiring tuition payments for special needs students placed in a private school by a state or local educational agency as a means of fulfilling the IDEA's requirements); 34 C.F.R. § 300.146 (same). And nothing relevant to that determination has changed. The OPI thus has no valid educational basis for revising N.W.'s existing IEP.

To the contrary, the Cooperative noted that ABC-123 University is "an excellent preschool close to the cooperative with staff" who are very "willing to accommodate and modify" the instructional program "to meet the needs for students with special needs." N.W. has already made great strides at ABC-123 University in her speech and language development, learning to adjust to being in a classroom environment, and learning how to function with her hearing aids and FM system. Transferring N.W. to a different private preschool would undoubtedly subject her to an adjustment period that would hinder her educational progress at a sensitive time in her pre-kindergarten development. Such an adjustment period is unnecessary, would serve no educational purpose, and would harm N.W.'s educational progress and the strides she has made in learning to function with her special needs.

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[1] These "options discussed at no cost" to the Wilsons were two private nonreligious preschools, which are currently oversubscribed. As explained herein, the state may not deny N.W. the educational benefits she is entitled to under IDEA by conditioning the Wilsons' receipt of IDEA tuition benefits on the surrender of their fundamental rights to the free exercise of religion, free speech, and equal protection of the laws.

ABC-123 University offers the important benefit of a Christian-based program that will further N.W.'s religious educational needs, a service neither nonreligious private preschool would provide. In addition, the two other private preschools in the Wilsons' area are at full capacity. It is therefore doubtful that OPI's offer to pay for special education services at these schools is of any practical benefit as N.W. would be required to await a vacancy. Such a waiting period is unacceptable as N.W. requires ongoing special education services to improve her speech sound production listening skills, and use of aids in order for her to be prepared for kindergarten next year. Even if N.W. was allowed to enroll in one of the two nonreligious private preschools in her area, the staff there would be able to provide her with less individualized attention. Transferring N.W. to a nonreligious private preschool would thus hinder her educational progress and fail to serve any of the IDEA's educational goals.

In requiring the unilateral revision of N.W.'s IEP, the OPI also violated the IDEA's procedural requirements. The Ninth Circuit has explained that two options are available to an educational agency that wishes to finalize an IEP but cannot gain parents' approval: (1) continue working to develop a mutually acceptable IEP, or (2) unilaterally revise the IEP and file a due process complaint to have it approved. *See Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1056 (9th Cir. 2012). The OPI did neither; instead, it simply ordered the Cooperative to stop funding N.W.'s tuition. *See id.* (noting that a school district's "'take it or leave it' approach contravened the purposes of the IDEA"). This procedural violation is far from harmless as an "egregious loss of educational opportunity" results from the erroneous denial of eligibility for special education services. *Michael P. v. Dep't of Educ.*, 656 F.3d 1057, 1068 (9th Cir. 2011).

B. Disallowing Students From Attending Private Religious Preschools Violates the Free Exercise Clause of the First Amendment.

The OPI's proposed alteration of N.W.'s existing IEP is based on a recently adopted practice of denying tuition aid to parents who choose to enroll their children in private, religious preschools, while providing tuition aid to parents who enroll their children in private, nonreligious preschools. The Free Exercise Clause of the First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, prohibits state actors from regulating or prohibiting conduct undertaken for religious reasons in this manner. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

In this case, the Wilsons enrolled N.W. in ABC-123 University pursuant to their sincerely held religious belief that she would reap a spiritual benefit from receiving special education services in a school that both shares and will help foster their Christian faith. The OPI would fund her tuition at a private, nonreligious preschool, but not at the religious-based preschool of her parents' independent choice. The OPI's new practice, and application of it to the Wilsons, violates the Free Exercise Clause because it is not neutral, not generally applicable, and targets religious conduct on its face. *See id.* at 534.

The Supreme Court's ruling in *Locke v. Davey*, 540 U.S. 712 (2004), does not excuse the OPI's new practice because its reasoning is limited to "the State's interest in not funding the

religious training of clergy." *Id.* at 722 n.5. That interest is not at issue here. Moreover, the OPI's ban on all religious private preschools receiving tuition payments is much broader than the exclusion approved in *Locke*. The State of Washington, in that case, allowed college students to use their promise scholarships at private religious schools so long as they did not pursue devotional degrees. *See id.* at 717, 724. Here, all private religious preschools are banned.

Students' rights under the IDEA are not lessened one iota by their voluntary enrollment in a private religious, as opposed to a private nonreligious, preschool. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 231 (1997). And the First Amendment clearly bars the OPI from denying IDEA benefits to N.W. based on the Wilsons' free exercise of religion. Indeed, state officials are precluded from conditioning the receipt of IDEA benefits on the foregoing of any constitutional right.

C. Disallowing Students From Attending Private Religious Preschools Violates the Equal Protection Clause of the Fourteenth Amendment.

The OPI's general prohibition on religious parents privately selecting a faith-based preschool education for their children targets a suspect class—religious individuals—for unfavorable treatment in violation of the Equal Protection Clause of the Fourteenth Amendment. Equal protection commands that state officials treat all similarly situated persons alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). There is no relevant distinction between religious and nonreligious parents of children with special education needs. It therefore violates the Equal Protection Clause for the OPI to limit the educational choice of religious parents, while giving nonreligious parents a free hand to select the preschool that best meets their children's educational needs.

In addition, classifications that impinge on fundamental rights, including the freedom of religion, are subject to strict scrutiny. *See id.* Barring religious parents from independently placing their children in high-quality private preschools simply because they are religious in nature—without any consideration of these schools' educational merit—fails to satisfy rational basis review, let alone strict scrutiny. The OPI cannot demonstrate that a general ban on religious parents independently placing their children in private religious, as opposed to private nonreligious, preschools is narrowly tailored to serve a compelling state interest.

D. Disallowing Students From Attending Private Religious Preschools Violates the Free Speech Clause of the First Amendment.

The Free Speech Clause of the First Amendment, as incorporated against the states by the Fourteenth Amendment, prohibits suppression of a particular viewpoint in the funding context in the same manner as other modes of expression. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-31 (1995). In this case, the OPI denies tuition assistance to students whose parents independently choose a private, religious preschool for their child's special education, while granting tuition assistance to parents who choose a private, nonreligious preschool. The Free Speech Clause prohibits such discrimination against religious points of view. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-09 (2001).

E. Disallowing Students From Attending Private Religious Preschools is also Unconstitutional Under a Hybrid Rights Theory.

The United States Supreme Court has recognized that free exercise claims that implicate other constitutional protections, such as free speech, may qualify for strict scrutiny even if the challenged provision is neutral and generally applicable. *See Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990). As explained herein, the OPI's practice of disallowing parents of students with special needs from independently placing their children in private religious preschools implicates not only the Wilsons' right to the free exercise of religion, but also their rights to equal protection and freedom of expression. Because the OPI cannot demonstrate that its practice is narrowly tailored to serve a compelling state interest, it violates the Federal Constitution under a hybrid rights theory as well.

F. The Establishment Clause of the First Amendment Does Not Require the OPI's Ban and Indeed Prohibits Such Hostility to Religion.

The OPI ostensibly attempted to alter N.W.'s existing IEP in order to comply with 34 C.F.R. §§ 76.532 & 76.658. *See* 34 C.F.R. § 76.532 (prohibiting the use of IDEA funds for "[r]eligious worship, instruction or proselytization"); 34 C.F.R. § 76.658 (requiring the use of IDEA funds for students with special needs, not for "[t]he needs of a private school" or "[t]he general needs of the students enrolled in a private school"). But the U.S. Department of Education implemented § 76.532 and related regulations to comply with constitutional requirements and has interpreted them as merely being coextensive with the Establishment Clause. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 6 n.7 (1993) (agreeing with the Department that § 76.532 is merely coextensive with the requirements of the Establishment Clause). Time and again, the United States Supreme Court has explained that the Establishment Clause does not bar public funds becoming available to religious schools as a result of the private choices of individual parents. *See, e.g.*, *id.* at 8-11 (citing cases). Moreover, it is clear that the IDEA funds used to pay N.W.'s tuition at ABC-123 University were used to meet her individual educational needs, not those of the school or other students. There is accordingly no basis for invoking § 76.658 here.

Preventing the parents of children with special educational needs from independently enrolling their children at a private religious preschool, as opposed to a nonreligious one, also fosters a pervasive state bias or hostility to religion. This the Establishment Clause, which requires neutrality towards religion, does not allow. *See, e.g.*, *Rosenberger*, 515 U.S. at 845-46.

G. Article X, Section 6 of Montana Constitution's Does Not Require the OPI's Ban and May Not Validly Bar Parents from Selecting Private Religious Schools.

In revoking the tuition aid provided to the Wilsons and attempting to transfer N.W. to a private nonreligious preschool, the OPI also claimed to be complying with Article X, Section 6 of the Constitution of the State of Montana. Montana's Constitution does not prohibit the parents of students entitled to IDEA benefits from independently placing their children in a religious, as

opposed to a nonreligious, private preschool. In fact, subsection (b) of Article X, Section 6 expressly states that it does "not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education." Since the OPI's revocation of tuition aid only implicates federal funds, Article X, Section 6 does not even apply to this matter. But to the extent it is construed to the contrary, it cannot contravene the federal constitutional and statutory rights outlined above.

H. Article II, Sections 4, 5 & 7 of Montana's Constitution Protect Parents' Right to Independently Place Their Children in Private Religious Schools.

For many of the same reasons stated above, the OPI's practice of prohibiting parents from independently enrolling their special needs children in private religious preschools violates Article II, Sections 4, 5, & 7 of the Constitution of the State of Montana, which guarantee the Wilsons' rights to individual dignity, freedom of religion, and freedom of speech and expression.

IV. PROPOSED RESOLUTION TO THE PROBLEM

The Wilsons seek the overturning of the OPI's practice of prohibiting parents from independently placing their children in private religious preschools as violations of their rights under IDEA, the First and Fourteenth Amendments to the United States Constitution, and Article II, Sections 4, 5, & 7 of the Constitution of the State of Montana as set out above. The Wilsons further seek OPI's and the Cooperative's full compliance with the terms of N.W.'s existing IEP. They also seek reimbursement for the costs they have incurred in paying N.W.'s tuition at ABC-123 University, which to date is $225.00. This amount will increase should the Cooperative continue to deny tuition assistance.

V. N.W.'S RIGHT TO "STAY PUT" WHILE THIS MATTER IS RESOLVED

Under 20 U.S.C. § 1415(j) and 34 C.F.R. § 300.518(a), N.W. has the right to remain in her current educational placement while this matter is resolved. This "stay put" rule functions as an automatic preliminary injunction that maintains the status quo until a final judgment is rendered. *See Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9th Cir. 2009). One aspect of the IDEA's "stay put" right is the requirement that a local education agency continue to finance an educational placement made by the agency and consented to by the parent before the parents requested a due process hearing. *See Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 865 (9th Cir. 1996).

N.W.'s existing IEP requires the Cooperative to pay for her to attend ABC-123 University three days a week. Accordingly, that is the educational placement subject to the "stay put" provision. The OPI and the Cooperative must therefore continue to pay N.W.'s tuition at ABC-123 University until this matter is finally resolved through either an administrative or court process. *See id.* at 867.

VI. WAIVER OF RESOLUTION MEETING AND MEDIATION PROCESS

Because the practice of prohibiting parents from independently placing their special needs children in private religious preschools was both developed and enforced at the state level by the OPI, a resolution meeting or mediation process with the Cooperative would not be beneficial. The Wilsons accordingly agree to waive any resolution meeting or mediation process with the Cooperative pursuant to 34 C.F.R. § 300.510.

VII. CONCLUSION

Please notify us immediately as to whether the OPI intends to comply with N.W.'s stay put right while this matter is pending. If we do not hear from you by November 26, 2012, we will assume the Wilsons' stay put request has been denied. Thank you for your prompt attention to this matter.

Matthew G. Monforton
MT Bar No. 5245
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, MT 59708
Phone: (406) 570-2949
Fax: (406) 586-3869

David A. Cortman
GA Bar No. 188810*
Senior Counsel
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, GA 30043
Phone: (770) 339-0774
Fax: (770) 339-6744

Jeremy D. Tedesco
AZ Bar No. 023497*
Senior Legal Counsel
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Phone: (480) 444-0020
Fax: (480) 444-0025

* Pro hac vice application pending