

**Complaint Investigation Report**  
**Parents v. Baxter Academy for Technology and Science**

May 9, 2016

Complaint #16.052C  
Complaint Investigator: Jonathan Braff, Esq.

**I. Identifying Information**

Complainant: Parents  
Address  
City

Respondent: Kelli Pryor, Board Chair  
54 York St. #1  
Portland, ME 04101

Director of Student Services: Moises Nunez

Student: Student  
DOB: xx/xx/xxxx

**II. Summary of Complaint Investigation Activities**

The Department of Education received this complaint on March 17, 2016. The Complaint Investigator was appointed on March 23, 2016 and issued a draft allegations report on March 24, 2016. The Complaint Investigator conducted a complaint investigation meeting on April 7, 2016, resulting in a stipulation. On April 13, 2016, the Complaint Investigator received 31 pages of documents from the Complainants, and received a 5-page memorandum and 215 pages of documents from Baxter Academy for Technology and Science (the "School") on April 19, 2016. Interviews were conducted with the following: Michelle LaForge, Head of School; Moises Nunez, director of student services for the School; and the Student's father.

**III. Preliminary Statement**

The Student is xx years old and is currently attending xx grade at the School. This complaint was filed by the father and mother (the "Parents"), alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

**IV. Allegations**

1. Failure to identify the Student as a student who may need special education and related services and refer him to an IEP Team to determine eligibility despite evidence that he qualified for those services under the categories of Emotional Disturbance, Other Health Impairment and/or Specific Learning Disability in violation of MUSER §§IV.2.A, IV.2.D, VII.2.E, J and L.

#### **V. Stipulations**

1. As of March 17, 2016, the School had not referred the Student to special education.

#### **VI. Summary of Findings**

1. The Student lives in City with the Parents and, since the beginning of the current school year, has been attending xx grade at the School (the "School").
2. Prior to attending the School, the Student attended school in RSU #xx where at one time he had received special education services as a student with Emotional Disturbance. In 2013, the Student's IEP Team, in connection with a triennial reevaluation, determined that the Student was no longer eligible for special education services.
3. The following school year, RSU #xx referred the Student for a psychological evaluation. The report of that evaluation, by Dr. Courtenay Hale and dated October 12, 2014, stated that the assessments administered did not "indicate the presence of any mood, anxiety, attention deficit, processing or autism spectrum disorder," that symptoms of a disruptive, impulse-control or conduct disorder were not in evidence, and that the Student demonstrated "high average to very superior skills in executive function, memory, verbal problem solving and nonverbal reasoning."
4. When the Student began attending the School in 2015, the School was unaware that he had previously been receiving special education services. On October 9, 2015, Mr. Nunez emailed the Student's mother to report that the Student was having trouble participating and focusing in class. The Student's mother wrote back that the Student had an IEP in the past "but that seemed to make issues worse," and offered to have a telephone conversation with Mr. Nunez.
5. On November 4, 2016, the Student's advisor emailed the Parents requesting the opportunity to speak with them about behavior of the Student during advisory that he found troubling. That same day, the Student was one of a group of boys who had a knife trainer on the school bus. As a result, the Student was suspended from the bus for two days.
6. On December 8, 2015, a disciplinary incident report was written for the Student after he refused three successive requests from his teacher to get on task, change seats, and leave the classroom. Ultimately, Mr. Nunez came to the classroom and got the Student to leave.

7. On January 11, 2015, Mr. Nunez responded to an inquiry from the Student's mother as to how the Student's attitude and behavior had been that week. Mr. Nunez stated that the School had been providing supports for the Student, such as scaffolded handouts and outlines, but that it was difficult to know in what way they were helpful. Mr. Nunez reported that, although the Student's behavior had improved in that he was no longer being rude to school staff, the Student continued to not talk to his teachers, not participate in class, and not cooperate with teachers when they tried to redirect or assist him. Mr. Nunez further stated that the Student was much more receptive to having an IEP than when he had first discussed it with him. Mr. Nunez suggested they wait until the next progress reports were issued and then have the Student's IEP Team meet.

7. On February 1, 2016, Mr. Nunez wrote to the Student about an incident that had occurred that day in the School. Mr. Nunez identified four things the School required, at a minimum, of the Student: not talking in class; not using the computer for inappropriate things; not disrupting his peers; and handing in work. Mr. Nunez stated that the Student was struggling to meet any of those objectives.

8. On February 2, 2016, a disciplinary incident report was completed for the Student based on his behavior in his Modeling class, consisting of using the computer for inappropriate things, disrupting his peers, not completing his work and being rude and argumentative to the teacher.

9. On February 4, 2016, Mr. Nunez wrote to the Parents requesting an opportunity to meet with them and the Student to discuss the student's behavior and the School's expectations. Mr. Nunez described the Student as refusing to use the assistance offered during his resource period, and stated that the Student had cut that class the previous two days.

10. The Student was suspended for 10 days on February 11, 2016 based on bullying behavior towards another student and the misuse of the School internet code.

11. The Student's mother sent an email the next day in which she stated that there had been discussion in October 2015 about the Student's "prior IEP/504's," including a suggestion that "we try to have one of them to have in place," and that there had been a discussion in the fall about scheduling a meeting "to have another one put into place," but that there had been no follow-up by the School. The Student's mother also described incidents of bullying at the School in which the Student had been the target of that behavior. In response, the Student's suspension was reduced to six days, and a meeting was scheduled for February 25, 2016.

12. At the February 25<sup>th</sup> meeting, a behavior plan was developed that delineated what the responsibilities would be for the Student, the Parents and the School. After the meeting, the School believed that the Parents had agreed that the supports being put in place for the Student were those that would best help him and that the Parents were not making a referral to special education.

13. On March 4, 2016, the Student was found to be tampering with another student's phone and was given a warning. One week later, the Student was removed from his film projection group due to use of profanity, disruption, and targeting another member of the group.

14. On March 13, 2016, the Parents sent an email to the school which included the statements that they were awaiting "notifications regarding convening an IEP Team to explore [the Student]'s disabilities and whether or not he meets criteria for special education," and that "the school has failed to meet its obligations under IDEA, since it's been close to 5 months since [the Student] was identified as possibly needing services."

15. In an email on March 17, 2016, Ms. LaForge wrote to the Parents that "[b]ased on observations and a review of [the Student]'s file and testing we have not felt that a special education referral is warranted. I understand from your email that you are now requesting a referral for special education. Based on this request, we will be scheduling an IEP team meeting to consider whether [the Student] should be identified for special education and whether further evaluations are needed to make this determination."

16. On March 15, 2016, the Student was suspended for five days due to bullying of another student, including instigating other students to do the same. The Parents responded with an email stating that the Student hadn't bullied anyone and was himself being bullied.

17. The Student is currently in the process of being evaluated to determine whether he is a child with a disability.

18. During an interview conducted by the Complaint Investigator with Moises Nunez, Mr. Nunez stated the following: This is the Student's first year at the School. When school started, the School didn't know that the Student previously had an IEP and a 504 plan. After the first couple of weeks, the School was aware that the Student might have had a 504 plan at his previous school, but the School had received only a partial student file from that school. The School continued to request that the additional records be sent, and by October was calling every day with that request. The Parents ultimately confirmed to him that there had been a 504 plan. He only learned that the Student had also once had an IEP in the Parents' October 9, 2015 email.

In early October, he told the Parents that the School had been unable to get a copy of the 504 plan, and asked them to meet with him. By that time, there were concerns about the Student's behavior - including inappropriate computer use, inattentiveness and getting up out of his seat during a class - although these concerns were spread across a broader group of the xx grade class. When the Student handed in work it was of good quality, but he was falling behind in his classes. In a phone conversation with the Student's mother to set up the meeting, she told him that the IEP process had been unnerving for her and difficult for the Student.

At the meeting, the Parents presented a brief history of the Student's challenges in school, and told him how difficult the last two years in xxx school had been for the Student. He told the Parents what strategies were being tried with the Student including: walking away, rather than engaging in confrontation with the Student when he was being defiant, and then checking in with him later; and having an ed tech ask the Student if he needed a break. The Parents told

him that the Student's experiences with a 1:1 ed tech in xx school were very negative, and that he still got in trouble despite having that support. The Parents said that they thought the Student had been treated unfairly in xx school and had been targeted. They told him there had been a couple of times when the Student had been suspended – for inappropriate use of computers, and for causing a commotion – and that the xx school's response to the Student's behavior was to isolate him.

During the meeting, the Parents said that they had tried to get the Student back on an IEP in xxx school, but they complained that the psychologist, who said that the Student's attitude wasn't a disability, refused to diagnose the Student with ODD. He told the Parents that he believed the School could work with the Student. He told them that there is an ed tech in every classroom, that the School has a reading specialist and a math/science tutor, and that there were other supports available. The Parents agreed to let the School try to utilize these supports and didn't push for a referral to special education. After the meeting, he met with school staff and shared with them what had been discussed with the Parents. They decided to put the Student in a resource period where he could get extra help.

A couple of weeks later, he spoke to the xx grade class about weapons in school, and what constituted a weapon. He said that even training knives, which are not sharp, could be weapons because they are perceived as weapons. He asked the Student and some other boys to show him their training knives and asked them to explain to other students why they aren't permitted in school. As he was speaking to this group of boys, the Student talked over him and told the other boys not to listen to him. The next day, two students on the Student's school bus told the bus driver that the Student had a knife, causing the bus driver to pull over and ask the Student to give him the training knife. The Student refused. The bus driver later said he wouldn't drive the bus with the Student on it. The Student was suspended from the bus for two days. He tried to talk with the Student about it, but the Student insisted that the training knife wasn't a weapon, that the rule was stupid and that he was stupid.

He began researching ODD and what strategies were successful with students who had ODD. As difficult as the Student could be, he didn't act "crazy" like a student who had an emotional disturbance – there was no violence, physical posturing, or muttering under his breath. The Student seemed really unhappy and didn't want to be at the School. There were no signs of learning issues. The Student's production was spotty, but was of good quality when he did the work, especially in math and science. The Student had some academic successes, and shared them with the class during the weekly class lunch.

In December, the teacher of the Chinese language class was organizing a talent show, and there was an online sign-up page. The teacher reported to him that the Student was signing up other students without their knowledge. She was getting calls from parents whose children were being signed up which was making them upset. He also received reports that the Student had been putting foreign substances in students' drinks. One day during the resource period there was a student who was looking unwell. Another student said he shouldn't have had "that [Student] drink." The Student was mocking the student who was unwell and telling the other boys not to listen to him. He sent an email to the Student explaining how the Student's behavior looked to him.

He had several conversations with the Student about having an IEP. He asked the Student how he would feel if he had one, and if it provided that he had a weekly meeting with the guidance counselor. The Student was very negative about having an IEP. He asked the Student what help would look like, and where it would come from. He talked about the Student needing to take responsibility for his actions, and talked about the Student working with a therapist. The Student was somewhat receptive to this, and was now saying he didn't want to leave the School.

The Student returned to school after the winter break having lost some of the ground he had gained in terms of his attitude. He decided he wanted to bring the Parents in to discuss the Student's refusal to accept help and to discuss referral again. He wanted the Student to have more supports, more access to the guidance counselor, social work services and social speech/language services – things that the Student would be eligible for with an IEP. He wrote to the Parents on February 4, 2016 asking to meet with them. They had trouble finding a date that would work for everyone. Then the Student got suspended on February 11, 2016. The Parents became very upset, claiming that the Student was being targeted, that his punishment was too severe and didn't fit the crime, that he was the one being bullied. Before he was able to arrange that meeting with the Parents, the Parents sent the March 13, 2016 email. This was the first time he understood that the Parents were making a referral to special education.

He disagrees with the statement in the email that there was an understanding that the School would be moving forward towards an IEP. The understanding was that the School would put supports and strategies in place and would share the results with the Parents. The School finally got the Student's 504 plan at the end of January, and the supports and accommodations in the plan were mostly all the same things that were already in place at the School. There was no record of a diagnosis that would support a finding of emotional disturbance, and the Parents were convinced that the Student would not be diagnosed. The Parents agreed that the Student did not have learning issues or ADHD.

19. During an interview conducted by the Complaint Investigator with Michelle LaForge, Ms. LaForge stated the following: She is the head of school for the School. As part of her responsibilities, she knows all of the students. As the School is a STEM school, it generally attracts more boys than girls. She remembers from the first days of this school year seeing that the Student had a group of boys with whom he was talking and laughing. As the weeks went by, she began to notice that the Student was often involved when there was some troublesome activity at school. When she spoke with the Student, he would stop the activity without being rude or disrespectful; there was no swearing or stomping out of the room.

Sometime in the fall, there were a few boys (including the Student) who were bringing training knives to school. She met with the boys and told them those knives were not allowed in school or on the bus. A bus driver told her that the Student had a knife on the bus. When she spoke with the Student about it, he admitted that he had the knife, and that he knew he was not allowed to bring it to school.

Teachers were also seeing the Student involved in distracting activities, and the School staff wondered whether this behavior was the result of the Student struggling with the academic

material. She spoke with Mr. Nunez about what supports could be put in place both to help the Student and to provide more information about his needs. She learned that the Parents had told Mr. Nunez that the Student at one time had an IEP and that it hadn't helped, and that the Student had a 504 plan which had not yet been sent with the Student's records from his prior school. She doesn't remember hearing that the Parents were seeking a referral to special education, or that anyone on the staff thought that it was time to make a referral. There are at least two students currently at the School who were referred to special education during this school year, at least one of them referred by the School.

In February 2016, it was called to her attention that there was a boy student getting harassing emails at school, and that the Student seemed to be involved. Students reported that pictures of that boy were showing up in documents being used for classwork. Staff members found pictures of that student on the Student's school computer. Students had been told explicitly that they were not allowed to post pictures of other students without their permission. She investigated and came to believe that the Student had been involved in the harassment of that boy. The Student admitted that he had been using derogatory expressions in emails about other students, and that he signed on to web pages as other students. She came to understand that there was a hidden network of disruption at the school in which the Student was participating.

Each time there was discussion about the Student's disruptive behaviors and academic performance, she was looking for ways to have the Student experience success in school and to provide leadership opportunities for the Student in the culture of the School. Numerous supports had been put in place for the Student, such as check-ins with teachers and a resource block, and at various points they seemed to be working. Disciplinary incidents seemed to have decreased. She believes there were discussions along the way about whether they were seeing enough to warrant a referral, but there was no indication of a learning disability, no diagnosis of an emotional disturbance, and the level of the Student's misbehavior was not different enough from his peers to suggest a disability.

She met with the Student and his mother in February. The Student admitted his use of hate language online, impersonating other students online and to using the computer inappropriately, but he said other students were doing the same things. The Student's mother was angry at the Student, insisted he tell the truth, and tried to get the Student to see that the School was just trying to help him. There was no discussion about a referral to special education.

In March 2016, one of the boys in the Student's group of friends at school told his parents he was being harassed by the Student. Other students corroborated the accusation to her, and she found harassing emails to the boy from the Student. As a result, she suspended the Student for five days. Around this time was when she received an email from the Parents claiming that the School was supposed to have referred the Student to special education. She was surprised by that email, as the Parents were never clear that they wanted a referral. She wasn't sure what the Parents thought an IEP would do for the Student beyond the kinds of support that were already being tried. The School is currently in the process of completing evaluations of the Student.

She believes that the Student wants to remain at the School, and that it's a good school for him. The Student has lately been more engaged with his classwork and the teachers continue to offer their assistance. The Student is somewhat behind in meeting standards, but at the low end of normal; he's making progress.

20. During an interview conducted by the Complaint Investigator with the Student's father, the Student's father stated the following: He believes that the Student is eligible for special education under either the OHI or ED category. The Student has been in therapy with social workers who have confirmed that he has ODD, and this condition adversely affects his ability to learn because he is compulsively prevented from following directions from authority figures in school. At his last school, the psychologist assigned to do the Student's evaluation told them that the Student qualified for services but that she wasn't going to let him get them. The Parents were hoping that the School would develop an IEP that provided a more specialized and individualized base of instruction to address the classes where the Student doesn't have a good grasp of the class materials. When a teacher approaches the Student to offer help with the class material, the Student resists because he's not willing to become beholden to an authority figure.

In a meeting with Mr. Nunez in early November 2015, after the incident with the training knife, the Parents told Mr. Nunez that they wanted a referral to special education. They told Mr. Nunez about the Student's extensive history with special education up until xx grade, and that the Student had a 504 plan. The Parents told Mr. Nunez that the Student needed the services that an IEP would provide, which would include an ed tech who was able to intervene when the Student started to behave inappropriately but who would otherwise not be interacting with the Student. The Student has a history of pushing back against an assigned ed tech. Mr. Nunez said he would be sending an email about proceeding with the referral and they would need to respond, but the email never came.

There were several conversations with School staff members over the following months where the Parents raised questions about reinstating the Student's IEP without getting a legitimate response. The Parents didn't document all of their conversations. The School was a new school with people in positions they hadn't held before, so the Parents were trying to give them a lot of latitude. In early to mid-January 2016, Mr. Nunez told them that when the mid-trimester reports came out in February they would convene an IEP Team for the Student. The Parents got an email from the School expressing concerns about the Student's mid-trimester reports, but nothing was said about an IEP Team meeting. Mr. Nunez asked to meet with the Parents in February (without indicating it would be an IEP Team meeting), but the date he suggested didn't work for them. They offered an alternative date and didn't hear back, and then the Student was suspended again.

On February 12, 2016, he had a phone conversation with Ms. LaForge during which she told him that the Student was being suspended for 10 days and that the School was considering moving towards expulsion. He told her that the Student was a child with a disability, and asked about the status of the referral to special education. Ms. LaForge ended the conversation saying she felt threatened.



The Parents met with Angela Taylor and Ms. LaForge on February 25, 2016 (Mr. Nunez joined the meeting later, but didn't participate much). Ms. Taylor and Ms. LaForge said the School had just gotten a copy of the Student's 504 plan from the prior school, and that they were already doing all these things that were in the plan. There was no discussion about an IEP. The meeting was to discuss the Student's reentry into school after the suspension, and there was nothing to suggest that it was an appropriate venue to discuss an IEP. The School wanted to focus on the 504 plan and the supports being put in place. The Parents made some suggestions about supports, and the School accepted some of those suggestions. When the Student was again suspended in March 2016, the Parents sent an email in which they told the School it had failed to meet its obligation to refer the Student to special education.

Over the months from November to March, School staff members mentioned an IEP referral several times. If the School had ever clearly said they were not going to make the referral, then the Parents would have made certain to request the referral themselves earlier than the email in March.

## **VII. Conclusions**

**Allegation #1:** Failure to identify the Student as a student who may need special education and related services and refer him to an IEP Team to determine eligibility despite evidence that he qualified for those services under the categories of Emotional Disturbance, Other Health Impairment and/or Specific Learning Disability in violation of MUSER §§IV.2.A, IV.2.D, VII.2.E, J and L

### **VIOLATION FOUND**

Under MUSER §§IV.2.A and IV.2.D, each SAU must have a policy under which children who may require special education services be identified, evaluated and referred to an IEP Team to determine the child's eligibility for such services. MUSER §IV.2.E(3) further provides that a parent of a child may refer the child to an IEP Team for evaluation and determination of eligibility at any time. The Parents here claim that the Student was a child who should have been identified by the School as a child who required special education services and referred by the school to an IEP Team, and that they themselves didn't make a referral because they believed that the School would be doing so.

The parties to this Complaint met in early November to review the Student's early struggles in the School and to discuss the Student's history both with special education and 504. The parties came away from that meeting with very different understandings of what had been decided. The Parents believed that Mr. Nunez had agreed to refer the Student for special education evaluation, and that they would be receiving a follow-up email to move that process forward. Mr. Nunez believed that the Parents agreed to first have the School implement general education interventions and supports and see how the Student responded; if the response was not satisfactory, the Student would be referred at a later date. Neither party expressed their understanding to the other in writing.

The School did in fact implement a number of intervention strategies and supports with some signs of improvement, but the Student nevertheless continued to struggle with his behavior and with work completion. Over December, January and February, the Parents claim that they had several conversations with staff members of the School in which a special education referral was mentioned, but there is no documentation of this and the staff members interviewed do not share that recollection. In early February, however, Mr. Nunez decided that it was time to move forward on the referral, and he sent an email to the Parents asking for a meeting (although he didn't state in the email that the meeting was to discuss the referral) and proposing a date. The Parents were unable to meet on the date suggested, and before a mutually acceptable date could be found for the meeting, the Student got suspended again. That led to the meeting on February 25<sup>th</sup>, at which there was no discussion of a special education referral, leading Ms. LaForge to believe that the Parents were in agreement with continuing with general education supports. Another suspension precipitated the email from the Parents that definitively called on the school to initiate the referral.

It is easy to see how the School could have been unclear as to whether the Parents were seeking a special education referral or were in agreement with providing interventions and accommodations consistent with the Student's 504 plan. It is important to note, however, that the referral of a student to special education does not depend on obtaining parents' permission to do so; it is an obligation of the school once it identifies a student as a child who may need special education services. In this case, the School initially had no evidence of a current emotional disturbance diagnosis (just the opposite, they had a recent report stating unequivocally that the Student did not have such a diagnosis) and, although the Student was clearly struggling with compliance issues, the Student's behavior was not dramatically different from a number of other boys his age in the school. In early February, however, it is clear that Mr. Nunez saw the Student as someone who, at least arguably, needed special education services. Instead of asking the Parents to attend a meeting at which he planned to discuss making a referral, Mr. Nunez should have at that point issued a Written Notice to the Parents stating that the Student was being referred to special education, and an Advance Written Notice scheduling the meeting to discuss evaluations to be conducted in connection with the referral. The referral was ultimately made about one month later, in response to the email from the Student's mother.

### **VIII. Corrective Action Plan**

The School will be required to contract with a person holding certification as an Administrator of Special Education (030) to: review its referral policy and practices, providing recommendations as to any necessary revisions or modifications; and conduct a training session for all educational and administrative staff of the School regarding the special education referral process. The School shall document its fulfillment of this plan by: identifying to the Department, with a copy to the Parents, the contracted individual; providing a copy of any report, including any recommendations, of that individual's review; and providing the agenda of the training session, a list of all staff members in attendance, and a copy of any materials distributed as part of the training session.

