

**Complaint Investigation Report**  
**Complainant Xx v. RSU #54**

July 13, 2016

Complaint #16.080CS  
Complaint Investigator: Jonathan Braff, Esq.

**I. Identifying Information**

Complainant: Xx  
Norridgewock, ME 04957

Respondent: Brent Colbry, Superintendent  
196 West Front St.  
Skowhegan, ME 04976

Special Services Director: Ann Belanger

**II. Summary of Complaint Investigation Activities**

The Department of Education received this systemic complaint on May 23, 2016. The Complaint Investigator was appointed on June 10, 2016 and issued a draft allegations report on June 10, 2016. The Complaint Investigator conducted a complaint investigation meeting on June 20, 2016, resulting in a set of stipulations. On June 20, 2016, the Complaint Investigator received 1 page of documents from the Complainant, and another page on June 21, 2016. The Complaint Investigator received a 4-page memorandum and 20 pages of documents from R.S.U. #54 (the "District") on June 29, 2016. Interviews were conducted with the following: Greg Henderson, assistant principal for the District; Ann Belanger, co-director of special services for the District; John Soifer, special education teacher for the District; and Xx, complainant.

**III. Preliminary Statement**

This systemic complaint was filed by the Complainant, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

**IV. Allegations**

1. Having a practice of failing to develop IEPs in conformity with the determinations of IEP teams with respect to providing accommodations to students for assessments in a special education setting in violation of MUSER §VI.2.J(4)

**V. Stipulations**

1. At the IEP Team meeting of March 7, 2016 for the student Yy, the IEP Team determined to provide an accommodation allowing the student to access a special education setting for and during assessments.
2. After the March 7<sup>th</sup> meeting, the special education director for the District wrote the IEP to provide that the student could access a small group setting for and during assessment, without specifying that it be a special education setting.
3. There were other students whose IEP Teams determined to provide an accommodation allowing the students to access a special education setting for and during assessments, after which the special education director for the District wrote the IEP to provide that the student could access a small group setting for and during assessment, without specifying that it be a special education setting.

**VI. Summary of Findings**

1. The Written Notice for a March 7, 2016 IEP Team meeting of student Yy (“Yy”) states that the IEP Team determined that Yy would be provided with an assessment accommodation described as “testing in resource room.”
2. After the March 7<sup>th</sup> meeting, Yy’s case manager, John Soifer, prepared a draft IEP and submitted it to Ms. Belanger. That draft listed an assessment accommodation of “testing in resource room.” Ms. Belanger reviewed the draft and prepared the final IEP, dated March 17, 2016, which includes, in Section 5, an assessment accommodation described as “testing in small group setting.”
3. For several other students in the District during the school year just ended, Written Notices indicating determinations by their IEP Team to provide an assessment accommodation described as “testing in resource room” resulted in an IEP containing an assessment accommodation described as “testing in small group setting.”
4. One such student, Zz (“Zz”), requested to retake two tests in an alternate setting. Mr. Soifer consulted with Zz and his mother, and requested of the regular education teacher giving the tests that Zz retake them in Mr. Soifer’s classroom. The teacher notified his department chair, who consulted with Ms. Belanger. Zz was ultimately told he could retake the tests with no other students present after school and that the test would be administered by the regular education teacher rather than Mr. Soifer.
5. During an interview conducted by the Complaint Investigator with John Soifer, Mr. Soifer stated the following: He is a special education teacher at the School and acted as case manager for students Yy, Zz, and the other students whose IEPs were written to provide assessment in a small group setting despite IEP Team determinations that the assessment accommodation should be in the resource room. Although the students’ school doesn’t have a room designated as a “resource room,” but rather uses the designation “structured study” room, “resource room” was used as the descriptor because it is the more familiar term, so if

the name of the room changes (as it has in the past) or the student moves to another district, the intent of the accommodation will be understood.

Yy experiences anxiety, is very reclusive, and has cognitive issues. When Yy is feeling anxious, it interferes with his memory and results in decreased performance on a test. All the students for whom he proposed the accommodation of taking assessments in the resource room had individualized needs that resulted in that proposal – he doesn't propose that accommodation for every student with an IEP. At the March 7, 2016 IEP Team meeting for Yy, the Team discussed the nature of Yy's disability and, ultimately, the accommodations that he needed in connection with assessment. He proposed an accommodation that would allow Yy to take his tests in the resource room when requested because it is a room familiar to Yy and so will reduce his anxiety, and students like Yy feel more comfortable asking for assistance with a test from a special education teacher because they are trained to work with children with disabilities. There was no disagreement from any of the IEP Team members. He prepared the draft IEP using the same wording that was discussed at the meeting – "resource room." He was not aware that Ms. Belanger had changed the wording to "small group setting" until later. He does not recall being told by her that this was the preferred wording for such an accommodation. Since the IEP was written, Yy has been able to take tests in the structured study room when he requests it.

In April 2016, Zz had failed two quizzes. After speaking with Zz and Zz's mother, he emailed Zz's teacher that Zz wanted to retake the quizzes in the structured study with him. The teacher didn't give her approval, and he eventually involved an administrator saying that this was an accommodation provided in the IEP and had to be honored. The teacher notified the department chair, who met with Ms. Belanger, and they decided that "small group setting" referred only to the number of students in the room, not whether it was a special education room. Zz was told he could take the test after school by himself with a regular education teacher present.

6. During an interview conducted by the Complaint Investigator with Ann Belanger, Ms. Belanger stated the following: She is the special services co-director for the District. During a staffing meeting early in the 2015-16 school year, she let teachers know that she would be writing IEPs using the term "small group setting" with reference to accommodations to provide an alternate setting for taking assessments. She also made Mr. Soifer aware that whenever a student with that accommodation asked to take a test in an alternate setting, the regular education teacher and a special education teacher, together with the student, would decide in which room the test would be taken. There have been struggles between some of the regular education teachers and Mr. Soifer over the issue of students taking tests in Mr. Soifer's room. The teachers were fine with students taking their tests in an alternate setting with a small group of students, but wanted to be the teacher in that setting. She believes that this should not be a problem for students with anxiety, like Yy, as they would already be familiar with the teacher. Those students might prefer to be in a special education room, but she doesn't believe that they require it. Most of the time, when one of these students requests to take a test in a special education room there is not a problem; problems only arise with some teachers when the student wants to go to Mr. Soifer's room.

She understood the determinations of the IEP Teams for this group of students to be that the students should be able to access a special education room when that was needed. The Written Notices for those meetings didn't explain the basis for the determination that the students required a special education room whenever they accessed the alternate setting assessment accommodation. For Yy, there have been times when he didn't want to take a test in a special education room. For Zz, the issue was whether or not he was going to retake certain tests, not the room in which he would retake them. Mr. Soifer convinced him to retake the tests, but she is not aware that Zz (as opposed to Mr. Soifer) expressly requested a special education room.

When she wrote the IEP with the "small group setting" wording, she was not aware that this would be controversial; she thought she was honoring the Team's determination but providing for a little more flexibility. When Yy's mother contacted her and was upset about the wording, she offered to have another meeting to discuss it, but she was told Yy's mother didn't want another meeting.

7. During an interview conducted by the Complaint Investigator with Greg Henderson, Mr. Henderson stated the following: He is assistant principal for the District, and attended the IEP Team meeting for Yy on March 7, 2016 as the representative of the District. He doesn't remember a discussion about testing accommodations for Yy, and there is nothing about this in his notes.

8. During an interview conducted by the Complaint Investigator with Xx, Xx stated the following: She is Yy's mother. Yy has multiple disabilities, including learning disabilities and anxiety disorder. He also has auditory processing problems, so he needs a quiet space because he isn't able to weed out distracting noises. Yy doesn't like to ask to go to a different room as it makes him self-conscious; he hasn't accessed any of the assessment accommodations since the IEP was written. He recently failed a test that he took in a regular classroom with no accommodations.

She can't comment on why it wouldn't be sufficient for Yy to be in a quiet regular education room, but the resource room is the room Yy has always gone to and he is comfortable there. Also, in a neuropsychological report dated October 30, 2014, Dr. Eucker stated the following: "Instruction for Yy should be learning disability specific and ideally with an individual well-versed and educated in learning disability instruction...Due to auditory processing and organizational factors, Yy is a boy for whom oral testing administration should be considered."

## **VII. Conclusions**

**Allegation #1:** Having a practice of failing to develop IEPs in conformity with the determinations of IEP teams with respect to providing accommodations to students for assessments in a special education setting in violation of MUSER §VI.2.J(4)

**VIOLATION FOUND**

It was stipulated that, for several students in the District this past school year, IEP Teams' determinations to provide an assessment accommodation of "testing in resource room" resulted first in a draft IEP written by Mr. Soifer using that wording, but ultimately in issuance by the District of final IEPs providing an assessment accommodation of "testing in small group setting." The District, in its response to the complaint, asserted that the change in wording did not constitute "a substantive change in the accommodations. It only clarified the conditions under which the student would take assessments, while ensuring that his identified needs are met." For a student with a particularized need for the special education setting or for accommodations to be provided by a special education teacher, however, the identification of the space (regular education or special education) where the student will be afforded the accommodation is a substantive aspect of the IEP. Xx, for example, stated that Yy is more familiar and comfortable with the special education classroom. If his IEP Team determined that taking tests in that space was necessary in order for Yy to participate in the regular education curriculum, then the identification of the "resource room setting" would certainly be substantive. On the other hand, it may well be that, as also asserted by the District in its response, for a given student, the crucial component of the assessment accommodation is the alternative, quieter setting that can be provided equally well in either a special education or regular education setting, but that is a determination to be made by the IEP Team.

The District is correct in stating that the Written Notice for Yy's IEP Team meeting of March 7, 2016 did not provide an explanation or description that would enable Ms. Belanger (who did not attend the meeting) to understand what particularized need of Yy led to the determination that he required access to a special education setting for assessments. The District is also correct in stating that the language substituted by Ms. Belanger doesn't rule out a special education setting, but provides greater flexibility when deciding where a student should take a given assessment. Nevertheless, the District recorded in the Written Notice of the meeting the determination to provide a "resource room setting" for assessments, and the person representing the District at the meeting, Mr. Henderson, does not have a contrary recollection of the meeting (or any recollection of the discussion). As such, the District became obligated to write the IEP in conformity with the IEP Team's determinations. As stated in MUSER §VI.2.J(4), it is the IEP Team that is responsible for development or revision of an IEP, and the Team's determinations must therefore not be overridden by an administrator after the fact.

It must be noted that there seems to have been some conflation by the parties of the separate issues of which physical space the students would access for assessment and the training of the teacher who would administer the assessment. Mr. Soifer referred both to the students' familiarity with the special education room and their greater comfort in asking for assistance from a special education teacher. Ordinarily, an accommodation is expected to be provided in the general education setting, and a regular education teacher is qualified to implement accommodations. The designation of a special education teacher as an assessment accommodation should follow only from a determination that a given student has a particularized need for administration of assessments by a special education teacher in order to be able to access the assessment. This is different from a finding that the student would prefer, or would be more comfortable with, a special education teacher.

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

The District shall issue notice to the families of each of those students (with the exception of Yy, whose family resolved the matter through mediation) whose IEP Teams made a determination during the 2015-16 school year to provide an assessment accommodation in the “resource room setting” and whose IEP was written with the substitution of “small group setting” that they may request an IEP Team meeting to review the wording of that accommodation. Determinations on this matter (as to both the designation of the physical space and the teacher administering the assessment) at all such meetings shall be based on the particularized needs of the students involved, and the District shall not impose a blanket resolution that dictates a result. The District shall provide to the Department, within 90 days from the date of this Report, a copy of the notice to each such family, and of the Written Notice accompanying any meeting that results from that notice.