

**Complaint Investigation Report**  
**Parents v. RSU #4**

February 10, 2012

Complaint #12.038C  
Complaint Investigator: Jonathan Braff, Esq.

**I. Identifying Information**

Complainants: Parents  
Address  
City,

Respondent: James Hodgkin, Superintendent  
971 Gardiner Rd.  
Wales, ME 04280

Special Services Director: Will Burrow, Ph.D.

Student: Student  
DOB: xx/xx/xxxx

**II. Summary of Complaint Investigation Activities**

The Department of Education received this complaint on December 14, 2011. The Complaint Investigator was appointed on December 15, 2011 and issued a draft allegations report on December 19, 2011. The Complaint Investigator conducted a complaint investigation meeting on January 13, 2012 (rescheduled from the original date of January 5, 2012 at the Respondent's request), resulting in a set of stipulations. On January 20, 2012, the Complaint Investigator received 92 pages of documents from the Complainants, and a 4-page memorandum and 287 pages of documents from RSU #4 (the "District"). Interviews were conducted with the following: Will Burrow, Ph.D., director of special education; Christine Lajoie-Cameron, principal for the District; Traci Ireland, teacher for the District; Linda Lincoln, teacher for the District; Tony Green, guidance counselor for the District; Diane Knowlton, social worker for the District; Michael Dixon, Ph.D., psychologist contracted to the District; Tammy Fisher, behavioral consultant for the District; and the Student's mother.

**III. Preliminary Statement**

The Student is xx years old and is currently receiving special education under the eligibility criterion Other Health Impaired. This complaint was filed by (the "Parents"), the Student's

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 her to an IEP team to determine eligibility despite evidence that she qualified for those services under the category Other Health Impairment in violation of MUSER §§IV.2.A, IV.2.D and VII.2.J;
2. Failure to complete an evaluation of the Student for initial eligibility and an initial IEP within 45 school days of the parent's consent to evaluate on January 13, 2011 in violation of MUSER §V.1.A(3)(a)(i);
3. Failure to conduct a full evaluation of the Student at no cost to the Student's parents by expecting the parents to obtain a mental health diagnosis in violation of MUSER §§V.1.A(1) and VII.2.E(2)(b);
4. Failure to convene the Student's IEP Team after her removal from school on April 5, 2011 to determine if the Student's conduct in question was caused by, or had a direct and substantial relationship to, her disability, despite the District's prior knowledge that the Student was a child with a disability, in violation of MUSER §§XVII.1.E and XVII.5;
5. Failure to provide advance written notice to the Student's parents of the March 17, 2011 IEP Team meeting at least seven days prior to the meeting in violation of MUSER §VI.2.A;
6. Failure to provide written notice of the proposals or refusals to initiate or change the identification, evaluation, educational placement or provision of FAPE made at the IEP Team meetings of December 20, 2010, March 17, 2011 and March 23, 2011 in violation of MUSER App. 1, 34 CFR §300.503;
7. Failure to provide a copy of Dr. Dixon's evaluation report to the Student's parents at least 3 days prior to the March 23, 2011 IEP team meeting in violation of MUSER §V.4.G.

#### **V. Stipulations**

1. The District first convened an IEP meeting to determine the Student's eligibility on April 29, 2011.
2. April 29, 2011 was more than 45 school days after January 13, 2011.
3. At the meeting held on March 23, 2011, the results of Dr. Dixon's psychological evaluation were reviewed, however, the report itself was not available for review.
4. A copy of Dr. Dixon's report was not provided to the Student's parents at least three days before the March 23, 2011 meeting.
5. March 23, 2011 was less than 45 school days after January 13, 2011.
6. No Written Notices were issued by the District following the meetings held on December 20, 2010, March 17, 2011 and March 23, 2011.
7. When the Student was removed from school on April 5, 2011 and directed not to return on April 6, 2011, this represented the fifth time the Student had been

removed from school during the 2010-2011 school year and brought to 11 the total number of school days the Student had missed due to removal.

8. The District did not convene an IEP Team for purposes of conducting a manifestation determination following the Student's removal from school on April 5, 2011.

## **VI. Summary of Findings**

1. The Student lives in Sabattus with her siblings and her parents, the Legal Guardian, and is presently attending xx grade at Carrie Ricker School (the "School"). She began receiving special education services under the category Other Health Impaired in xx grade.
2. The Student was diagnosed with ADHD by Dr. Jennifer Mogul on or about May 2, 2009, and has been treated medically for that disorder since the beginning of xx grade.
3. During her xx grade school year, the Student had a behavior intervention plan that allowed her to remove herself to a cooling off spot when she required that and that allowed her to earn preferred activities. The Student also met regularly with the guidance counselor. Twice during the year the Student was sent out of her classroom for uncontrollable behavior, resulting in staffing meetings and modifications to the behavior plan.
4. In her xx grade year, the Student began experiencing behavioral incidents starting in September 2010 and was sent home from school on September 24, 2010. At the request of the Parents, the Student resumed meeting with the guidance counselor. A staffing meeting was held on October 13, 2010 to develop an individual crisis plan for the Student, which was circulated on or about November 1, 2010.
5. On November 1, 2010, behavioral consultant Tammy Fisher wrote to Christine Lajoie-Cameron, School principal, that "it is a huge misunderstanding that ADHD only looks hyper and disorganized...it also looks like [the Student]...these kids have a hard time regulating their emotion....She has a low tolerance for frustration and is quick to get angry...that is part of her ADHD....[I]t's part of her ADHD not to be able to cope with a flood of emotions....[W]e need to help [the Student] to get through those high intensity, low frequency times when she just doesn't seem able to deal."
6. During the period from November 15, 2010 to December 20, 2010, the Student had four behavioral incidents of sufficient concern for them to be documented by her teacher, Traci Ireland. The incidents generally involved refusal to correct or complete work. The Student was sent home on December 1, 2010, and the Student's mother was called to take the Student home on December 20, 2010 (although the Student calmed down sufficiently that she was able to remain for the rest of the school day).
7. A meeting was held on December 20, 2010 with the Parents, Ms. Ireland, Ms. Cameron and Mr. Green. The District issued to the Parents on December 13, 2010 an Advance Written Notice for the meeting, which stated the purpose of the meeting as "Other: follow up meeting." The Notice indicated that the meeting would be attended by Ms. Cameron (as

administrator), Ms. Ireland (as regular education teacher) and “Tammy Fisher (SPED consultant)” (as special education teacher). At the meeting, the behavior plan was reviewed, and the District suggested that a psychological evaluation be performed by Michael Dixon, Ph.D. The Parents signed a special education Parental Consent For Evaluation form for Dr. Dixon’s evaluation on January 13, 2011. The Request for Assessment form that the District provided to Dr. Dixon indicated the “Target IEP Meeting Date: 45 days = 3/29/11,” and indicated as the reason for the assessment “for other information” rather than for initial evaluation.

8. On February 9, 2011, Dr. Dixon interviewed the Student in connection with his psychological evaluation of her. Due to miscommunication among District staff and Dr. Dixon, the Student was not prepared for the interview as the Parents had requested and as the District had agreed would happen.

9. During the period from February 10, 2011 to March 15, 2011, the Student had 11 incidents of angry and out-of-control behavior, involving the Student’s being disappointed, displeased with her performance, asked to perform work or upset about a social interaction. In some of those incidents, the Student intentionally hurt herself or threatened to do so. During the incident of March 15, 2011, the Student tried to stab herself with a pen, choked herself, drew blood with a staple, bit herself and threatened to kill herself when she got home.

10. On March 15, 2011, the Student was again sent home and directed not to return to school until she had a note from a doctor stating that the Student was not a safety risk to herself or others. Ms. Cameron also wrote a note to the Parents recommending that they seek emergency hospital treatment for the Student. The Parents provided the requested note from the Student’s family health care provider, Tracy Edwards, APRN, NP, in which Ms. Edwards stated that the Student would be referred back to Dr. Mogul, would begin receiving treatment from a pediatric counselor and would decrease her ADHD medication. The Student’s mother, in an e-mail to which Ms. Edwards’ note was attached, asked whether, since the Student’s behavioral incidents had been occurring in connection with math assignments, there was an “option to have her do some sort of modified assignment or complete them with some additional support within the school...to meet her special needs in this area.”

11. The District convened a meeting on March 17, 2011 at which the Student’s mother, Dr. Burrow, Ms. Cameron, Ms. Ireland, Mr. Green, School social worker Diane Knowlton and several others were present. The District told the Student’s mother that, in addition to the physician’s note, the Student would have to meet with Ms. Knowlton before being allowed to return to school. The Student ultimately was allowed to return to school on March 22, 2011, although she chose to wait until March 23, 2011 to return.

12. In Meeting Notes recorded by Ms. Knowlton from her meeting with the Student on March 18, 2011, Ms. Knowlton refers to the Student’s “IEP meeting...to be held on Wednesday [March 23, 2011].”

13. Attending at the meeting held on March 23, 2011 were most of the same people who attended the March 17<sup>th</sup> meeting. The District issued an Advance Written Notice for the

March 23<sup>rd</sup> meeting, identifying the purpose of the meeting as “Other: staffing to discuss programming plans.” Dr. Dixon discussed his findings from his evaluation, although he did not have a completed report available at the time of the meeting. Ms. Cameron stated that the Student would be permitted to return to school, but would have to leave if she became escalated and was unable to calm down after 10 minutes. It was also agreed that the Student would receive her math instruction in a special education classroom.

14. In addition to his interview with the Student, Dr. Dixon’s evaluation consisted of classroom observation on two occasions, the completion by the Student of the BASC-2 Self-Report Form, and the completion of behavior rating scales by Ms. Ireland and the Parents. In a report dated March 25, 2011, Dr. Dixon found that the results of the BASC-2 and the behavior rating scales of others showed most results in the normal range, with several areas that were rated “At Risk.” The Student’s mother’s ratings for the Student for hyperactivity and depression, however, were both in the clinically significant range, as were several ratings given by Ms. Ireland when asked to complete the scales a second time on March 17, 2011.

15. In the Conclusions and Recommendations section of his report, Dr. Dixon stated that the Student “was evaluated as part of a referral to special education.” Noting that the Parents were seeking updated psychiatric evaluation and counseling for the Student, and that adjustments were being made to the Student’s behavior plan, Dr. Dixon recommended that the Student’s IEP Team hold off on making a decision as to eligibility, or else decide that she was not eligible with the option of revisiting that decision at a later time.

16. After another behavioral incident on April 4, 2011, during which the Student threw her school bag, chair and desk, the Student was suspended on April 5, 2011 for three days. The Student was provided with tutoring, and her return to school was conditioned on her ability to engage appropriately with her tutor and complete the assigned tasks; re-entry to school would be discussed at the point that the Student had been successful in this regard for two weeks. Ms. Cameron, in an e-mail to the Student’s mother, wrote that the Student’s “school team strongly encourages parents to seek counseling and a mental health diagnosis that will provide the team with the knowledge to successfully provide an educational program for her. As I said, the diagnosis of ADHD in itself, is not sufficient in explaining [the Student]’s inability to deal with her emotions or to redirect herself when things don’t go her way. In order to qualify for special education services, we will need to determine that [the Student] has a disability that prevents her from accessing an education without specialized instruction.”

17. The Student’s mother, in an e-mail to Ms. Ireland later that day, wrote that the Parents “were told that since she only has ADHD with impulsive behavior symptoms that this does not qualify her for special education services so are without options at this point.” This e-mail was forwarded to Dr. Burrow, who responded to this statement of the Parents as follows: “To the best of my knowledge you have never requested consideration of special education eligibility. That issue has been raised only in informal discussions among staff. If you believe she is a student in need of specialized instruction then you have the option of making that request in writing to me....As Mrs. Cameron explained, you are encouraged to contact a mental health professional to have your daughter evaluated to determine if she has a qualifying mental disorder....In order to have a qualifying disability there must be a plausible

connection between a diagnosis and the behaviors that require specialized intervention within the school environment.” The Parents wrote back to Dr. Burrow on April 8, 2011 to request that special education services be provided to the Student.

18. On April 25, 2011, the District sent out an Advance Written Notice for an IEP Team meeting scheduled for May 4, 2011. In response to a letter from Katrina Ringrose, the Parents’ advocate, the IEP Team meeting was moved up to April 29, 2011. At the meeting, the IEP Team determined that the Student was eligible for special education services, although the Team did not come to a decision on the appropriate eligibility category (the Parents believed that OHI was appropriate, while the District believed ED was the primary disability). The Team further determined that the Student would return to school initially in the Early Treatment (“ET”) day treatment program, with the potential to increase her time in the regular education environment (with educational technician support) based upon behavioral success. The Written Notice for the meeting states that the Team “agrees that due to [the Student]’s behavior in the classroom and lack of coping skills, [the Student] needs special education support to assist her in learning skills needed to be successful in the regular education setting.”

19. A second IEP Team meeting was held on June 15, 2011. Carolee Smith, the Student’s special education teacher, reported two behavioral incidents in the ET program since the Student returned to school, neither one involving aggressive or self-injurious behavior. Both incidents occurred during math activities, and the Student was able to later process the incidents. No incidents had occurred in the regular education setting. Determinations were made regarding additional assessments to be performed by Dr. Dixon and extended school year (“ESY”) services to be provided. Based upon observations of the Student’s teachers that the Student had difficulty with writing, an informal OT assessment was also ordered. The Team determined that the Student would return in xx grade to the same mix of special education and regular education settings that she had achieved by the end of the xx grade school year. At the time of the meeting, the Student was in the regular education setting for non-academic times, large group activities and language arts.

20. The District prepared an IEP dated June 16, 2011 for the Student. The IEP did not identify a disability category for the Student. The IEP contains one goal as follows: “When upset or frustrated, [the Student] will be able to regulate her feelings and behaviors by applying appropriate problem solving techniques and/or voluntarily leave the regular education classroom by using a signal that she and staff developed 9 out of 10 times by May 2010.” The special education services provided under the IEP include direct instruction (behavioral) in the special education classroom (120 minutes, 5 sessions per week), behavioral consult by a behavior consultant (15 minutes once per month), in-class support (behavior) by a special education teacher to the regular education classroom (180 minutes, 5 sessions per week), and ESY services (240 minutes, 11 sessions per year). A behavior plan was also referenced in Section 3.E of the IEP.

21. By the end of the 2010-2011 school year, the Student had met or exceeded the xx grade standards for her academic work, and her scores on the NWEA and NECAP assessments during that year all were rated “Meets Standards.”

22. During an interview conducted by the Complaint Investigator with Linda Lincoln, Ms. Lincoln stated the following: She is a xx grade teacher at the School, and had the Student in her class for xx grade. She also taught the Student's siblings, and has known the Student since the Student was a toddler. She had no information about the Student before xx grade, other than the Student's older sister telling her: "You're going to have a handful."

On the first day of the school year, the Student had an incident of refusing to follow directions. She spoke with the Parents about it and started developing a behavior plan to motivate the Student. The plan seemed to work okay, although the Student still had ODD-like behavior from time to time. One of the Student's triggers was writing; the Student didn't like to write, but once she got going she would do fine. As the year progressed, the Student started having issues with gym class, and the plan allowed the Student to earn points for good behavior in gym. She also consulted with Ms. Fisher, but not on a regular basis, and with the guidance counselor and social worker. She became aware at some point during the year of the Student's ADHD diagnosis, and that she was taking medication for it. She didn't consider the Student to be one of her serious problem students, however.

In March 2010, the Student's mother visited the class, and the Student had an incident that included throwing chairs, resulting in the Student's mother having to leave the room. There were other parents in the room, and they told her they saw that kind of behavior from the Student all the time in sports and other activities outside of school.

At the beginning of the following year, she gave a packet of information about the Student to Ms. Ireland. She told Ms. Ireland that the Student could be challenging, especially in connection with writing assignments. She said that the Student had difficulty with friendship relations, tending to be "bossy" and trying to always have her way. She told her that the Student's issues seemed to be managed with a behavior plan - that the Student worked for rewards such as having lunch with a teacher or reading to younger children - and she offered to be part of a rewards system (for example, the Student could earn a chance to help out in her classroom). Ms. Ireland didn't take her up on that offer.

She never thought that the Student was a candidate for special education, although if ODD was a special education category then maybe she was. In any event, what they were doing in the classroom worked. She was shocked when she heard that the Student was in the ET classroom.

23. During an interview conducted by the Complaint Investigator with Traci Ireland, Ms. Ireland stated the following: She is a xx grade teacher at the School, and the Student was in her classroom at the start of the 2010-2011 school year. She knew the Parents because she had taught their other children, and the Student's mother commented to her sometime near the beginning of the school year that the Student might be "labor-intensive." Although she hadn't taught the Student prior to that year, she once saw the Student in the Sabbathus Central School office during the 2009-2010 school year having a meltdown; the Student was physically agitated and was saying very mean things to the principal.

Before the school year started, Ms. Lincoln handed off the Student's file to her, but she didn't look at it. She generally doesn't look at those files until she gets to know the students herself. She doesn't recall seeing a behavior plan at the start of the year.

At the start of the year, everything went smoothly with the Student. The Student tended to need a little more attention than the average student, but there were no serious behavior issues until September 24, 2010. There was an assignment that the Student hadn't completed successfully, and the class had been told that they wouldn't be allowed to participate in the next activity (a student auction) unless the assignment was completed. The Student kept saying that she didn't know how to do the assignment, and ultimately scribbled on it and crumpled it up. She didn't expect to have that kind of difficulty with the Student. She runs a very structured classroom, and didn't have a plan for that kind of behavior. She believed that she would be able to talk the Student out of that kind of conflict if it arose. She thinks that the Student was afraid that she wouldn't be allowed to participate in the auction, and was responding to being told "No." The Student's mother told her that it was related to the Student's ADHD, but she has had many ADHD students before and they didn't behave that way.

After that incident, a staffing meeting was held, leading to the development of a behavior plan. The plan described the Student's potential triggers, and told her how to respond when the Student became agitated. The plan wasn't matching what she was seeing, however. The triggers were different, and the Student didn't respond to attempts to distract her. The Student didn't want to talk or to process what was happening, and ignored prompts to take a deep breath or go for a walk. It seemed to her that the triggers were the Student not getting her way. On one occasion, the Student gave an incorrect answer in social studies and was embarrassed, and the Student ended up throwing a student's book bag on the floor.

The December 20, 2010 meeting was another staffing to talk about how things were going and how things could be done differently. The Student's mother was very upset, saying she felt like the School wasn't being proactive enough and staff members weren't responding to the Student's behaviors like they were caused by ADHD. The staff members asked to have Dr. Dixon perform an evaluation because what they were seeing in the Student's behaviors didn't look like typical ADHD. The staff hoped that Dr. Dixon would persuade the Parents that there was something going on with the Student besides ADHD, and then the Parents would get some counseling for the Student and perhaps medication. The staff wasn't thinking about special education for the Student because the Student was functioning fine in her academic work, and just needed support for her sporadic behavioral outbursts. Special education was not discussed at the meeting. The Student was supposed to be prepped for her meeting with Dr. Dixon and was not supposed to be pulled out of class in front of the other students, but the District made a mistake and that didn't happen. Nevertheless, the Student seemed to handle it very well.

After the meeting, the plan for the Student when she became escalated was to coax her out of the classroom (she had a pass she could use to request to leave the room), and then either one of the teachers from the Functional Life Skills classroom, Ms. Fisher or Mr. Green would help process the incident with the Student based on who was available. She also maintained a behavior chart, where the Student could earn points towards a reward. She was consulting



with special education teachers about things she could try with the Student, but she still didn't see the Student as a candidate for a special education classroom because the Student could go for long periods of time without needing support, whereas other students needed support on a daily basis.

She began to notice that the Student's incidents were often related to math activities in the classroom, although earlier in the year they were just as likely to happen during literacy activities. There was nothing in the math curriculum with which the Student should have had trouble, however; she thinks it was more of an anxiety issue.

The Parents had never requested a special education referral. She felt that the Parents wanted their child to be "normal," and wouldn't accept that there was something really wrong with her. She was surprised when the decision was made to move the Student out of her classroom, as she wasn't ready to give up on the Student. She is still not sure that the ET program is what the Student needs.

24. During an interview conducted by the Complaint Investigator with Tony Green, Mr. Green stated the following: He is a school counselor at the School. He first became aware of the Student when she was in xx grade. Her teacher at the time said that the Student was having a hard time with being the partner of another girl in her class. The gym teacher told him that the Student had the same problem with being the girl's partner in gym class, and had difficulty dealing with losing in a contest. The Student would have temper tantrums – would stomp her foot or crawl under a desk.

That year, the Student was allowed to come into his room and deescalate, and it seemed to be working. Eventually, the Student would drop in even when she wasn't escalated.

When the Student was having trouble in xx grade, he wasn't able to work with her and the Student was meeting with a middle school counselor on a regular basis. Anger seemed to be the main issue, with the Student refusing directions and getting upset when she didn't get her way. She was also pulling her hair out at times. He remembers there were a couple of times when the Student was in the school office, upset and refusing directions. He heard that once she kicked the principal.

In xx grade, the Student started having problems early in the year, refusing to do work and pulling her hair. When she wasn't escalated, the Student would be mellow and speak softly, but if she told the teacher she didn't want to do her math work and the teacher told her she had to do it, she couldn't handle that. She would scream "I hate you! This is dumb!" She might push her desk. Sometimes she would refuse to leave the room, and the room had to be emptied. He (or another staff member) would be called in and would speak with the Student and try to calm her down, but he couldn't bring her back down once she had lost it. The behaviors were similar to those in xx grade, but more intense. The Student seemed to be out of control, but also somewhat in control – she might push the desk but be looking at him while she did it. He never had to restrain her.

Ms. Ireland's class is very structured and demanding; Ms. Ireland doesn't give in. If an assignment was supposed to be finished now, the Student had to do it now. In previous years,

if the Student said she didn't want to finish something right then, she would be allowed to do it later. He thinks the Student found this very stressful.

By around mid-year (November or December), he thought that maybe the Student shouldn't be in a regular classroom anymore. She had pushed a desk into another student. The Student didn't need academic support, however; it was all emotional issues. By the time that Dr. Dixon was doing his evaluation, he thinks that the District was probably leaning in the direction of special education for the Student. If there was a meeting and there was discussion about Dr. Dixon taking a look at a child, then generally the staff was thinking about special education. At that point, the Student was pulling her hair and biting herself. On one occasion, he got her to stop pulling her hair only by threatening that if she didn't stop he would have to restrain her. It became increasingly hard to keep the Student in the regular education classroom; academically she could do it, but not emotionally.

At the March 23, 3011 meeting, after hearing Dr. Dixon's report, the diagnosis didn't change; it was still ADHD. Eventually, it was decided that the Student would start her day in the ET class, just to get her back into school after she had been out for a long time. He thinks that it worked well for the Student. He still saw the Student every week. The Student didn't go back to Ms. Ireland's classroom out of concern that she wouldn't feel comfortable there. The other students had seen the Student throwing things and being mean to Ms. Ireland, and going to a new classroom represented a fresh start. He wasn't called in to deal with a highly escalated incident after that.

At some point he spoke to the Student's mother about special education for the Student, and the Student's mother said she would consider it. She wasn't enthusiastic, but she didn't refuse it either. He recalls a meeting with the School nurse and Ms. Lajoie-Cameron, after the Student pushed a desk into another student, and there was discussion about taking the Student out of the regular education classroom.

This year, the Student has chosen not to have regular visits with him. He told the Student she could talk to him any time she wants to, but she hasn't done it so far.

25. During an interview conducted by the Complaint Investigator with Tammy Fisher, Ms. Fisher stated the following: She is a behavior interventionist and consultant for the District. She knew of the Student when the Student was in xx grade. She was in the Student's classroom dealing with other students who were being very aggressive verbally, and she noticed the Student struggling with the same thing.

When the Student was in xx grade, she was in the Student's school a lot as she was working with another student. The Student was getting frustrated during writing and math assignments; the Student was being a perfectionist, and was refusing to finish assignments. By the time Ms. Lincoln started consulting with her about the Student, Ms. Lincoln had already started using a behavior management system. If that could work, she wanted Ms. Lincoln to keep using it, so she made slight adjustments to the system.

She was also directing the school play that year, and the Student had a part in the play. She saw some of the same oppositional behavior at rehearsals, and she could mostly handle the Student and defuse things. She would ask the Student to sit out and calm down. There were a few times when she had to call the Student's mother, including once when the Student's mother had to come and get the Student.

That year, the supports that were in place for the Student were working. There were behaviors of concern – hair pulling and escalated behavior – but giving the Student time and space to calm down seemed to work for her. She knew of the Student's ADHD diagnosis from the beginning of the year, but even if she hadn't, she still would have thought that the Student had that condition. The Student was having difficulty regulating her emotions, managing behaviors and dealing with social interactions. She also spoke with the Student's mother about the Student's anxiety, her need to write perfectly and to always get the right answers. The Student was a nail biter.

She doesn't know of anything that was in place to ease the Student's transition into xx grade. Nothing traveled with the Student to the new school other than whatever Ms. Lincoln may have shared with people. There was an incident involving the Student on a day when the Student's mother was having surgery, and the Student ended up having a meltdown in the School office. She became involved in developing a behavior plan for the Student based on the things that had worked for her in xx grade.

The plan didn't work for the Student like it did the previous year, and it was hard to say why. Besides the change in the building and personnel, there was a whole new mix of children in the Student's class. Everything was different. The Student's meltdowns seemed unpredictable. There were some commonalities, but she couldn't say there was a particular activity that would lead to a meltdown. For example, the Student was very competitive, and when she saw the Student participate in a competitive spelling contest, she expected this might be a problem. When the Student didn't win, however, the Student handled it very well. She wanted the Student to learn to recognize when she was starting to lose it, and she practiced this with the Student over and over again. She had some success with this, but there were times when she was on the cusp of having to restrain the Student due to self-injurious behavior, like digging at her skin.

Special education for the Student was on the horizon towards the end of xx grade. There were many meetings with the Parents that year, and they were resistant to having the Student labeled. She can understand how the Parents may have believed that the March 23, 2011 meeting was an IEP Team meeting, but it was clear that it was not; the usual formalities of an IEP Team meeting were not followed. Dr. Dixon was clear that his report was not yet finished but was willing to discuss his draft report. Hearing his report again opened up the possibility of special education, though it wasn't openly discussed. Dr. Dixon disagreed with the report from Ms. Edwards, and it wasn't clear from his report that the only issue for the Student was ADHD. She had to leave before the end of the meeting, so she didn't hear what decisions were reached. It was clear to her that there would need to be another meeting.

In her mind, the Student fit the profile of a student who could be helped in the ET program, but she didn't bring this up at the meeting because of the resistance to labeling expressed by the Parents the previous year. She was aware that she could initiate a referral of the Student to special education, but she didn't want to do that without the Parents being on board.

This year, she is seeing some of the same issues with the Student, but now there's a safety net in place and the incidents are less traumatic. Seeing the Student in the School, you wouldn't know that she was a student that needed special education, but there are times when the Student needs the support provided in the ET program. Recently, the Student needed to spend the entire day in that classroom.

26. During an interview conducted by the Complaint Investigator with Michael Dixon, Ph.D., Dr. Dixon stated the following: He is a psychologist contracted with the District. He received a request to conduct an evaluation of the Student shortly after January 13, 2011. He was informed that the Student had several emotional outbursts, and the School wanted input to help them figure out how to help her.

In his evaluation report, he did not offer any diagnosis in contradiction to the previous ADHD diagnosis. This was very purposeful, based on his concern about the amount of polarization he sensed between the Parents and the School over this issue. The Parents were not happy with how the School was dealing with the Student's issues, and the School felt that the Parents were not acknowledging how disruptive the Student's behavior was to the class and to herself, and were not on board with the School's efforts to deal with it. He was trying to get the two sides to be on the same page, but it became apparent that was not going to happen.

Although emotional outbursts are not the primary effect of ADHD, some children with that diagnosis have those sorts of emotional difficulties. Often ADHD doesn't result in a handicapping condition for special education purposes, but may result in a 504 plan. The diagnosis applies to children in a pretty wide range. There are some driven, idiosyncratic children, almost on the autism spectrum, who receive that diagnosis. This was not what he was seeing in the Student, although she could be very rigid at times. For other ADHD children, the primary issue is attention and processing issues, sometimes related to learning disabilities. This was not the Student either. There is another group of ADHD children where there is a co-morbidity with diagnoses such as ODD or mood disorder. He saw the Student as belonging in that group. She was having emotional meltdowns where she lost emotional control and engaged in self-injurious behavior.

The Student's behavioral incidents continued to escalate, with more safety issues. There was another meeting in March 2011 to discuss adjusting the Student's behavior plan. The adjustments didn't work. He wondered whether the Student belonged in special education, but at the March 23, 2011 meeting it was clear to him that discussion of special education was premature because the District was still engaged in general education interventions. He also wasn't sure that a referral to special education was going to be possible because he thought the Parents might resist the idea. He's not sure if he heard this from the Parents, or if someone told him this. He was told that the Parents initially resisted signing the consent for

his evaluation. Two weeks later, in early April, it was clear that the general education interventions were not going to work.

At that point, the Student's mother contacted him to ask about special education. She expressed confusion about whether or not the Student was already in the special education process. His statement in his evaluation report that the Student was being evaluated as part of a referral to special education indicates that he was also confused as to the nature of the referral at that point. It looked like an IEP referral. At some point, it was clear to him that the Student was not in the special education process.

The meeting on April 29, 2011 was the first real IEP Team meeting. At the meeting, the District suggested that the Student might be eligible under the Emotional Disturbance category, and the Parents' advocate strongly resisted that. The polarization between the parties was then at its height, but the important thing was to get the Student back into school. He didn't see the value in insisting that the Student be in a particular category - the Student could have been identified under either the ED or OHI category - but something had to be done. The Team decided to leave the category undetermined, but that the Student would be moved to the ET program setting. The Parents wanted further evaluation, particularly to look at whether there was a learning disability. That hadn't been on his horizon before and he did no testing for that. At the next couple of meetings, it appeared that the Student was responding to the ET program blended with time spent in the regular education setting.

27. During an interview conducted by the Complaint Investigator with Christine Lajoie-Cameron, Ms. Lajoie-Cameron stated the following: She is the principal of the School. She had no knowledge of the Student until the Student started xx grade at the School. On September 24, 2010, when the Student had her first incident of significance, she was called to the classroom. The Student was in the hallway, with Ms. Ireland trying to coax her back into the classroom and the Student refusing. She asked the Parents to come get the Student. The next day, she asked the Student what was going on and told her "We just don't do that at [the School]." She didn't know who the Student was at that point.

She met with the Parents on October 13, 2010. She expressed her concern about the Student's behavior, and the Parents said the Student had ADHD and received a lot of support the previous year. She told the Parents the School didn't have the same kind of support available in terms of staff that the Student had last year. Ms. Fisher was not going to be available at all times; Mr. Green could meet with the Student, but he wasn't always going to be available. She said that the Student needed a different plan. She wanted to express to the Parents that the Student's behavior was not typical behavior for children, even for children with ADHD. She agreed to get Ms. Fisher involved to help develop a plan to deal with the Student's behavior.

At the meeting, she said that there were other things the District could do, including an evaluation to determine what kind of supports can be put in place. The Parents' said at that meeting (or perhaps at a subsequent meeting) that their concern was that they didn't want the Student to be labeled, they didn't want her to stand out. She said to them that the Student was

already standing out in that she was in the hallway due to the incident in the classroom, but they responded that the Student didn't see herself that way.

When, at the December 20, 2010 meeting, they decided to have Dr. Dixon do an evaluation, it was based on the District's concerns that the Student's behavior was not typical. They wanted Dr. Dixon to see whether the Student was a child with emotional issues. From the beginning, she thought the Student's behaviors were the result of the Parents having accommodated and given in to the Student so much that now the Student was too much in charge. She thought the Parents were too indulgent and that the Student was not being held accountable. Ms. Lincoln, too, was known for being very accommodating to the children in her class; she might have done that too much for the Student. 99% of the time, the Student did fine and looked like all the other children; there was only a problem whenever the Student didn't get her way.

When Dr. Dixon gave his report on March 23, 2011, he didn't come to any clear decision or diagnosis; no anxiety disorder or anything on that axis. His recommendations were to continue the behavior plan and the kind of supports that were already in place. They adjusted the behavior plan in the hopes of getting the Student to choose to leave the classroom when she became agitated. By that time, she had changed her view of the Student. The School has a big special education staff, and they do a lot of interventions for children who are not identified as special education students. Those teachers are trained in de-escalation techniques. There was by then a team of people who were made available to respond to the Student when she had her incidents. Even so, during the March 15, 2011 incident, no one could get the Student to de-escalate and get her out of the hallway. The Student was making herself bleed and threatening suicide. She told the Student's mother she should take the Student to a crisis center and have her evaluated, thinking that the Student needed mental health care.

By the time of the April 29, 2011 meeting, they had run out of options. Ms. Ireland was ready to have a breakdown. She still had the feeling that the Student was not being held accountable the way that School staff were. Every time things didn't go quite right, the Parents always attributed it to the District not doing their part correctly. The District was trying to help the Student, but the Student needed to learn that things weren't always going to go her way. The Student's behavior was also taking a toll on the other children in her class and on the staff. Before that day, she doesn't think that the Parents would have ever considered having the Student in the ET class. Even at that meeting, the Parents still couldn't accept an emotional disturbance diagnosis. Since then, the Student's program has been very successful, and she's now in a very good place.

During the course of that year, there was no explicit discussion about general education interventions. The School doesn't use the Tier I, II and III rubrics. When children have needs, the School calls together a team (based on the Student Assistance Team model) to put interventions in place. Ms. Ireland was collecting data and was working with Ms. Fisher. There was regular e-mail communication between Ms. Ireland and the Parents. The Student would be going along fine and then there would suddenly be an incident or a cluster of incidents. The Student's grades were good, and she was successful academically.

28. During an interview conducted by the Complaint Investigator with Diane Knowlton, LCPC, Ms. Knowlton stated the following: She is director of a day treatment program in the District, performs risk assessments and other assessments, and counsels students. Her first involvement with the Student came during the Student's xx grade year due to incidents raising safety issues, including self-injurious behavior. The District had tried some interventions, and the Student was now out of school. She was asked to speak with the Student and the Student's mother to ascertain whether they felt that the Student was able to cope with returning to school. It was an informal risk assessment; the District wanted to help the Student return. When Ms. Lajoie-Cameron was giving her background information about the Student in preparation for the informal assessment, she told her that the Parents didn't want the Student in special education because they didn't want her to be labeled.

The Student was not very forthcoming, and couldn't really self-determine whether she could go back and do better. The Student seemed immature, emotionally younger than her age. She may have been without the coping skills and resiliency normal for her age. She didn't see any atypicality in the Student, however. She saw the Student's mother as very caring, but not knowing what to do at that point to help her daughter. By the end of the meeting, the Student was saying that she was ready to come back on a ½ day schedule, and that was her recommendation. After meeting with the Student and her mother, she gave the information and her recommendation to Ms. Lajoie-Cameron, who had to make the decision whether to allow the Student to return. At that point, the question was really whether the Student could come back to school on the next Monday and Tuesday, because the next Wednesday (March 23, 2011) a big meeting was scheduled. She doesn't recall whether it was a staffing or a Step I IEP Team meeting.

29. During an interview conducted by the Complaint Investigator with Will Burrow, Ph.D., Dr. Burrow stated the following: He is director of special education for the District. He first became aware of the Student when he was copied on e-mails concerning the request for an evaluation by Dr. Dixon. At that time, Ms. Lajoie-Cameron said that the staff wasn't sure what was driving the Student's behavior, that they were trying to sort things out, but it looked like they could manage within the regular classroom structure. He determined that it was not a special education situation because there had been no referrals from staff and no request from the Parents. Had he received either, there would have been a Written Notice within 15 school days that the Student was being considered for special education and what the District proposed to do. As far as he was aware, there was no indication that the Student needed specialized instruction.

At the March 17, 2011 meeting, the focus was on how the staff was going to manage the Student's behavior, and what would be the next steps. No one raised the question of whether to take the Student out of the classroom. Not long afterwards, he wrote to the Student's mother that if she wanted special education for the Student, they should talk about it and decide what information they would need. The District's approach is to get a student what the student needs, do what was needed to move the student forward, whether it was academic or behavioral. Every student has a right to make progress. He believes that the Student got what

she needed when she needed it. The Student has made continuous progress in the general curriculum, and her grades and test scores show this.

Dr. Dixon, in his report, said that he didn't think it was the time to make a diagnosis. This raises a doubt about whether the District should have known this was a special education student. There were questions that needed to be addressed and resolved before a referral was made. When the decision was made that the Student would do her math work in a special education setting, the decision was based on a need for safety, and was viewed only as an interim measure.

He can understand how the Parents might have been confused when they received the Advance Written Notice form to confirm a meeting. As a result of this case, his office no longer uses special education forms unless a student has been referred to special education. If general education intervention is involved, they will use standard school stationery or blank paper. If it is a 504 case, they now have a form for that.

After the Student's suspension on April 5, 2011, the District did not conduct a manifestation determination review because the Student was removed from school for safety reasons, rather than as a disciplinary action. Furthermore, a manifestation determination review assumes that the District was moving on a special education course, and that was not the case. At some point, when the issue was raised, the District provided tutoring to the Student.

Regarding his e-mail to the Student's mother that she should have the Student evaluated by a mental health professional to determine if she has a qualifying mental disorder, his intention was not to tell the Student's mother that she needed to get an evaluation in order to qualify the Student for special education. His e-mail was based on this not being a special education referral situation. The parties were very frustrated with each other at that point, and the e-mail came out of that frustration. He admits that the e-mail could have been worded better.

30. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: The Student's behavior started presenting issues in xx grade (at Sabbatus Primary School), including one in-school suspension during that year. The behaviors were essentially the same set of behaviors she continued to exhibit over the subsequent years. The school staff developed a behavior plan and the Student began having sessions with Mr. Green. Towards the end of that year, the Student was diagnosed with ADHD, and the Parents made sure that the school staff was aware of that diagnosis and of the medication being prescribed for it.

In xx grade (at Sabbatus Central School), Ms. Fisher became involved in the behavior planning for the Student. She consulted to the Student's classroom teacher, Ms. Lincoln. The Student's behavior plan basically established some rewards that the Student could earn, and identified the times during the day when the Student could earn points towards those rewards. In March of that year, Ms. Lincoln requested a staffing because the supports that had been in place weren't working anymore. At the meeting, the Parents asked what a "staffing" meant, and what additional support was available for the Student. They asked what other families with children like the Student did about such behavior issues. The Parents were relying on the



District to tell them what they needed to do, and they weren't even aware that special education was an option at that point. No one ever said that they had to specifically ask for special education services. The only time she can recall saying anything about labeling was later when the Parents were trying to point out that the Student had a disorder and the District was saying that the Student's ADHD was not a disability. Labeling has never been a concern of the Parents, other than when they were disagreeing with the District which category of disability the Student belonged in.

The Student's behavior plan was changed at the meeting to identify places within the school where the Student could go to calm down when she needed to; the emphasis was on getting her calm so she could return to the classroom, with consequences in place for any inappropriate behavior. The District agreed that all staff working with the Student, including substitutes, would be made aware of the plan. There was a female guidance counselor at the school, and the Parents requested that the Student begin seeing her instead of Mr. Green. There was also discussion about the Student's transition to xx grade at the School, and the Parents were assured that the behavior plan would travel with the Student to the new school.

The Parents expected that the Student's transition to the School would be challenging. They made sure that the School nurse had the Student's medication information. They made sure that Ms. Ireland knew of the Student's diagnosis, and knew that Ms. Fisher, Mr. Green and Ms. Lincoln (who all also moved to the School) could be resources. They learned, however, that the behavior plan did not, in fact, travel with the Student to the School. Ms. Ireland didn't have it, but she told the Parents that she would prefer to get to know the Student herself; she didn't like to put labels or judgments on students right away.

Unlike in the previous schools, where the Student was given time and space to calm down so she could return to the classroom, at the School when the Student's behavior escalated they called the Parents and told them to take the Student home. At least through December 2010, the Student's behavioral incidents were of the same kind and degree as the previous year; the behaviors hadn't changed, only the school's response to them. In xx grade, the Student sometimes initiated leaving the classroom, or responded to prompts to do so, and went to the Office or guidance counselor to cool down. In xx grade, the Student didn't know where she could go, or what the consequences would be if she left the classroom; she was afraid that she would be sent home.

The Parents asked for a meeting in October 2010 to discuss what supports could be put in place for the Student. At the meeting, Ms. Cameron said "We had no way of knowing this would happen," and that the Student was "not the biggest problem at the School so she wasn't on their radar." Ms. Fisher explained that the Sabbathus Central School staff had worked together to develop a plan, and that the plan should have been in place at the School. Ms. Fisher said that she lost track of the Student in the confusion surrounding the reorganization within the District that year. The Parents understood that Ms. Fisher was part of the District's special education staff, so they believed that special education was being duly considered for the Student. The Parents asked why the response to behaviors at the School was to remove the Student from school rather than to provide support so the Student could return to the classroom, and stressed that the Student needed to understand the plan and what the

consequences would be for her behavior. The staff said that a new behavior plan would be developed, but the Parents didn't see one until December 6, 2010, the third time the Student was sent home.

The next meeting was on December 20, 2010. The Parents received an Advance Written Notice for this meeting from the special education office, and the Notice said that it was an IEP Team meeting. The purpose of the meeting was to review the Student's behavior plan, but Ms. Fisher wasn't at the meeting so not very much was accomplished. Ms. Cameron requested that the Parents agree to have a psychological evaluation conducted of the Student. It was clear that Ms. Cameron did not believe that the Student had ADHD – that she had a more severe psychological disorder. Ms. Cameron said that ADHD alone was not a reason to provide a student with special education, that lots of children had ADHD. The Parents said they would consider whether or not to consent to the evaluation. She later spoke to Ms. Fisher about the evaluation, and Ms. Fisher asked her whether the Parents were open to the Student attending the ET program. When she responded that they were, Ms. Fisher was happy the Parents weren't opposed to special education for the Student, and she said that the Parents didn't care what it was called as long as the Student got the help she needed. Based on this comment, as well as the fact that the consent form was a special education form, the Parents believed that the evaluation was for special education purposes.

By the time the Student was sent home on March 15, 2011, it was clear that the frequency and intensity of the Student's behavioral incidents had increased, although the Student was still responding to the same triggers. This was the sixth time that year she was removed from school. It wasn't called a suspension, but the Student couldn't return without a medical note saying that the Student was safe. There was still no real behavior plan in place. Ms. Cameron didn't want the Student disrupting Mr. Green's schedule, so she expected the Student to cool off in her office; the Student wasn't comfortable there, however. They asked why the Student couldn't go to the nurse or the ET room to cool off, but the District only wanted to talk about the medical note. The focus was on what the Student needed in order to be able to return to the School, not on what she would do once she came back.

The next meeting was on March 23, 2011, when Dr. Dixon talked about the evaluation. The Parents at that point still believed that they were in the special education process. Dr. Dixon basically said that he didn't see any reason to disagree with Dr. Mogul's diagnosis. He said that there could be a co-existing condition emerging, but that he didn't see it yet. He did say that 10 minutes was not sufficient time to allow the Student to calm down once she was escalated. Ms. Cameron said that she didn't have the resources to attend to the Student for longer than that. The Parents noted that, since xx grade, the Student's behavioral incidents were most often triggered when she became frustrated during math instruction, and they asked whether the Student could do math in a different setting. It was agreed that the Student could do her math in the Functional Life Skills classroom.

The Student was suspended again on April 5, 2011. The District didn't seem concerned that the Student was missing so much of her instructional time. When the Student again returned to the School, Ms. Cameron wanted her to go to a different classroom rather than returning her to Ms. Ireland's class. The Parents thought well of Ms. Ireland, but wanted most of all for

the Student to return to school. The Student's new teacher, Ms. Chuprevich, immediately recognized the Student's difficulty with math instruction and with writing.

The Student has so far been sent home twice this year, but staff members are helping the Student learn how to handle those situations better. They're helping the Student understand that if she takes a time out to calm down, she won't be penalized. There's an educational technician ("ed tech") in the classroom that enables the Student to spend more time in the regular education classroom; she can signal to the ed tech or respond to the ed tech's prompt if she needs a break. The Student's math instruction is different this year, and she's getting organizational support to help her understand where she needs to be and what work she has to complete. There are behavioral supports in place – the Student can go to the ET classroom if she becomes frustrated, and the Student feels safe there. All the Student's teachers have a copy of the IEP and the behavior plan; they know the Student has a disability and a plan that provides support. She believes that the District should have referred the Student to special education in September 2010, the first time she was sent home from the School, or made clear to the Parents that they had to specifically request a referral in writing.

## **VII. Conclusions**

**Allegation #1:** Failure to identify the Student as a student who may need special education and related services and refer her to an IEP team to determine eligibility despite evidence that she qualified for those services under the category Other Health Impairment in violation of MUSER §§IV.2.A, IV.2.D and VII.2.J

### **VIOLATION FOUND**

MUSER §§IV.2.A and IV.2.D describe what is referred to as the "Child Find" responsibility, namely, that the District has the obligation to identify children who are in need of special education and related services and evaluate them at public expense. Where the Child Find process indicates that a child "may" require special education and related services, the child is to be referred to an IEP Team to make the determination whether the child is in fact eligible for those services. The District takes the position with reference to the Student that it was not required to make such a referral because: the District was providing the Student with the services she needed through general education interventions; and the Parents discouraged the District from considering such a referral. Neither of these explanations satisfactorily explains the extent of the delay experienced by the Student before her eligibility could be reviewed.

The Student began displaying behaviors of concern in xx grade, and received an in-school suspension. By xx grade, as those behaviors continued to manifest, the District was informed that the Student had been diagnosed with and was being medicated for ADHD. The Student was removed from her classroom several times during xx grade, and was involved in an incident where the Student threw chairs. Ms. Fisher, during the Student's xx grade year, observed that the Student was having difficulty regulating her emotions, managing behaviors and dealing with social interactions. Certainly, the response of the District to seek to provide interventions (a behavior plan that involved provision of time and space for the Student to

cool off) within the general education setting was appropriate, and seemed to be working reasonably well.

The Student's transition to xx grade illustrates one way in which special education provides benefits that go beyond those associated with general education interventions. Instead of the Student having an IEP with specific behavioral goals, services and accommodations which would have accompanied the Student when she moved from xx grade to xx grade, and of which Ms. Ireland would have to have been made aware, Ms. Ireland received a folder of materials (which presumably included the Student's xx grade behavior plan) from Ms. Lincoln which she was at liberty to choose to ignore until she got to know the Student herself. Consequently, Ms. Ireland was surprised and unprepared when the Student, on September 24, 2010, refused to complete an assignment. That incident caused the Student to be sent home, and led to a reiteration of the behavior plan. This is not to say that the obligation to refer the Student to special education had necessarily arisen by the time the Student was entering xx grade, but simply to underscore one important difference to a student between services received through general education interventions versus through special education.

Over the next three months, there were at least four more behavioral incidents of note involving the Student, and at least two occasions when the Parents were called to take the Student out of school. Ms. Ireland felt that the behavior plan wasn't matching up with the Student's responses. Mr. Green was by that time thinking that the Student shouldn't be in a regular education classroom. The District at that point seemed curiously focused on the etiology of the Student's behavior, and requested that Dr. Dixon conduct an evaluation in the hopes that he would uncover some underlying emotional disturbance in the Student, with the result that the Parents would obtain psychological treatment and/or medication for the Student. Ms. Lajoie-Cameron, in particular, seemed convinced that a diagnosis of ADHD was insufficient to explain the Student's emotional outbursts, although the District's own behavior consultant, Ms. Fisher, assured her that it was. Despite the District's belief that the Student likely had an emotional disturbance, Dr. Dixon's evaluation was not associated with a referral to an IEP Team to determine whether the Student was eligible for special education. Rather, it was intended to inform the District (and the Parents) as it continued to provide general education interventions.

Before Dr. Dixon could complete his evaluation, the Student had 11 more behavioral incidents, culminating in the incident of March 15, 2011 when the Student's self-injurious behaviors reached a level that prompted Ms. Lajoie-Cameron to recommend to the Student's mother that she seek emergency hospital treatment for the Student, and resulted in the Student not being allowed to return to school until the Student's safety (and the safety of others in the School) could be assured. Despite very clear indication that the interventions in place for the Student were not being successful, there was still no referral of the Student to an IEP Team by the District.

Ms. Fisher felt that the discussion of Dr. Dixon's evaluation at the meeting of March 23, 2011 raised the possibility of special education for the Student, and Dr. Dixon also wondered whether the Student needed special education, yet it wasn't discussed. One result of the meeting was that the Student, when she returned to School, would do her math work in a

special education setting. Even the recognition that there appeared to be some connection between the behavioral incidents and certain academic tasks (that the Student's behaviors tended to be associated with math and/or writing assignments was noted by Ms. Fisher and Ms. Ireland), and the staff's decision to allow the Student to do her math work in a special education setting, didn't prompt further discussion about the Student's possible need for special education evaluation. Not even after the Student's suspension on April 5, 2011 (the fifth time she had been removed from school that year), did the District make such a referral. Rather, it was only as a result of a desperate e-mail from the Student's mother to Ms. Ireland, saying that she believed that special education was not available to the Student and that she was therefore without options, that Dr. Burrow informed the Student's mother that she could initiate such a referral.

While it was completely appropriate for the District to initially seek to provide support to the Student through general education interventions, the fact that it was engaged in the process of doing so did not relieve the District of the Child Find obligation as it became increasingly clear that those interventions were not enabling the Student to be successful. As stated by the U.S. Office of Special Education Programs ("OSEP"), "it is critical that [the identification of children with disabilities who are in need of special education and related services] occur in a timely manner and that no procedures or practices result in delaying or denying this identification." *Memorandum to: State Directors of Special Education*, 56 IDELR 50 (OSEP, Jan. 21, 2011). Specifically, local educational agencies such as the District "have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI [general education intervention] strategy." *Id.*

The U.S. Office of Civil Rights ("OCR") reviewed a situation very similar to that presented by this case in *Harrison (CO) School District Two*, 57 IDELR 295 (OCR, July 20, 2011), where a student, diagnosed with ADHD, had a series of behavioral incidents resulting in suspensions to which the school district responded with general education interventions. As the student's behavior escalated, the school's interventions intensified. In finding that the school district failed to provide the student with FAPE by not conducting a timely evaluation, OCR stated that although "the initiation of RTI strategies may have been justified to identify promising instructional strategies to benefit the Student, RTI does not justify delaying or denying the evaluation of a child who, because of a disability, needs or is believed to need special education or related services." *Id. Cf. Powers v. Woodstock Bd. Of Education*, 572 F. Supp. 221, 50 IDELR 275 (D. Conn. 2008)(Although a school district did not refer a student for special education evaluation, the district did not violate special education law where the student was responding well to general education interventions).

As to the matter of the failure of the Parents to refer the Student, first, the law is clear that the obligation to identify and evaluate a student for special education eligibility is directed to school districts, and is independent of parents' right to request that it do so. This is not to say that the District should not have considered whether it had the Parents' support for such action, but at some point, it becomes necessary for a school district to refer a student to an IEP Team where the need for evaluation for eligibility can be fully discussed by the appropriate

staff members along with parents. Even where parents have expressed reluctance to have their child identified, such a meeting may persuade them to change their mind.

Furthermore, it is not at all clear that the Parents were in fact reluctant to have the Student be identified. Any statements they made to that effect (and the Parents deny that there were any) were purportedly made when the Student was in xx grade, or were made early into the xx grade year, before the Student's behaviors escalated and before it became apparent that the supports the District was offering were not able to prevent the Student's meltdowns. The issue of whether the Parents were willing to make a referral was further clouded by practices of the District (particularly use of special education forms to schedule evaluations and meetings that were not intended to be special education events) that could easily have led and did lead the Parents to believe that special education for the Student was being duly considered. Even when it was clear in April 2011 that the Parents mistakenly (but understandably in light of the communications they were receiving from the District) believed that special education was not available for the Student, the District put the onus on the Parents to request the referral.

**Allegation #3:** Failure to conduct a full evaluation of the Student at no cost to the Student's parents by expecting the parents to obtain a mental health diagnosis in violation of MUSER §§V.1.A(1) and VII.2.E(2)(b)

**VIOLATION FOUND**

Having decided that the District was obligated to refer the Student for evaluation for special education eligibility, it follows that the District was required to provide that evaluation at no cost to the Parents (MUSER §V.1.A(1) clearly makes it the school district's obligation to conduct the evaluation). The bases for Allegation #3 are the e-mails from Ms. Lajoie-Cameron and Dr. Burrow encouraging the Student's mother to seek a "qualifying disability" from a mental health professional. Beyond the issue of the wholly incorrect suggestion that a student could not qualify for special education with a diagnosis of ADHD, the import of this language was that it was the Parents' obligation to, at their own expense, have the Student evaluated to facilitate the determination whether the Student was eligible for special education. Dr. Burrow suggests that this statement somehow passes muster because the Student was not then in the special education referral process, but the first part of Dr. Burrow's e-mail was directed at telling the Student's mother how to go about making such a referral. Once that referral was made, an IEP Team would consider whether any additional evaluations were necessary in order to enable the District to make the eligibility determination and develop appropriate programming for the Student, and any such assessments would be conducted by the District or at its own expense.

Having first confused the Parents as to whether the Student was being considered for special education eligibility, and then having misled the Parents to believe that the Student's ADHD diagnosis rendered her ineligible for those services, the District was now improperly directing the Parents to obtain an evaluation that should have been the District's obligation to obtain. Such conduct violated both the letter and the spirit of special education law.

**Allegation #2:** Failure to complete an evaluation of the Student for initial eligibility and an initial IEP within 45 school days of the parent's consent to evaluate on January 13, 2011 in violation of MUSER §V.1.A(3)(a)(i)

**Allegation #5:** Failure to provide advance written notice to the Student's parents of the March 17, 2011 IEP Team meeting at least seven days prior to the meeting in violation of MUSER §VI.2.A

**Allegation #6:** Failure to provide written notice of the proposals or refusals to initiate or change the identification, evaluation, educational placement or provision of FAPE made at the IEP Team meetings of December 20, 2010, March 17, 2011 and March 23, 2011 in violation of MUSER App. 1, 34 CFR §300.503

**Allegation #7:** Failure to provide a copy of Dr. Dixon's evaluation report to the Student's parents at least 3 days prior to the March 23, 2011 IEP team meeting in violation of MUSER §V.4.G

**NO VIOLATION FOUND**

The above allegations refer to legal obligations that attach to the special education process. As the District had not initiated this process for the Student during the times in question, those obligations did not arise. As previously indicated, the practices of the District reasonably caused confusion among not only the Parents, but also staff members of the District, as to whether the Student was in the special education evaluation process. Dr. Burrow has indicated that the practices of his office have been changed so that confusion of this sort should no longer be occurring in the future.

**Allegation #4:** Failure to convene the Student's IEP Team after her removal from school on April 5, 2011 to determine if the Student's conduct in question was caused by, or had a direct and substantial relationship to, her disability, despite the District's prior knowledge that the Student was a child with a disability, in violation of MUSER §§XVII.1.E and XVII.5

**VIOLATION FOUND**

The Student's suspension on April 5, 2011 brought the total days of school missed by the Student to more than 10, a length of time which triggers certain protections made available to special education students under MUSER §XVII. Pursuant to MUSER §XVII.5, even a student who has not already been determined to be eligible for special education may assert those protections where the district "had knowledge" that the student was a child with a disability. A district has knowledge when either a parent of the child requested a special education evaluation, the parent "expressed concern in writing to supervisory or administrative personnel...or a teacher of the child, that the child is in need of special education," or the teacher of the child or other personnel "expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education...or to other supervisory personnel." Among the protections afforded under Title XVII of the regulations is the requirement that an IEP Team make a determination as to whether the behavior that led to the disciplinary action was a manifestation of the student's disability, with certain consequences attendant upon that determination, most importantly the conducting of a

functional behavior assessment and return of the student to her former setting (MUSER §XVII.1.F).

Here, while the Parents may not have specifically requested a special education evaluation (although, again, the Parents may have reasonably believed that they did so when they signed the consent form for Dr. Dixon to evaluate the Student), both the Parents and staff expressed concerns regarding the Student's behavior sufficient to satisfy MUSER §XVII.5's standards for knowledge. Under very similar circumstances, the Court in *Jackson v. Northwest Local School District*, 55 IDELR 104 (adopting the magistrate's report at 55 IDELR 71) found that increasing evidence that the school district's general education interventions were being unsuccessful, leading to a referral of a student diagnosed with ADD to an outside mental health agency, provided a sufficient basis for imputing to the district the requisite knowledge of the student's disability.

Accordingly, the District, upon issuing the suspension to the Student on April 5, 2011, was required to convene an IEP Team for purposes of conducting a manifestation determination under MUSER §XVII.1.E. Dr. Burrow's contention that this procedure was inapplicable because the removal of the Student was for safety rather than disciplinary reasons is belied by Ms. Lajoie-Cameron's letter (provided by the District to the complaint investigator) dated April 7, 2011 to the Parents discussing the terms of the suspension, which states: "As in all good schools, discipline procedures are in place that hold students accountable for behavior that infringes on the rights of others....Disciplinary action may be taken against students who violate policies, rules, or laws, and/or whose conduct directly interferes with the operation, discipline, or general welfare of the school."

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

1. The District shall conduct two in-service trainings for all District special education staff and for administrative staff at the School. The first training shall cover the following topics:

- a) Child Find, including the District's independent obligation to refer a student for evaluation, and the extension of that obligation to students receiving general education interventions;
- b) the District's obligation to conduct evaluations to facilitate special education eligibility determinations at no cost to parents; and
- c) disciplinary procedures for students eligible for special education, including students not yet identified as eligible. This training shall be conducted by an attorney licensed in the State of Maine who specializes in special education law.

The second training shall cover the topics of the signs and symptoms of ADHD in the school-age population, and de-escalation techniques that may be effective with children who have ADHD and who have difficulty regulating their emotions. This training shall be conducted by an individual with a LCSW or more advanced qualifications with significant experience in that area.

The District will document the conducting of these trainings by submitting to the Due Process Office, the Parents and the Parents' advocate for each one: a copy of the syllabus of the



training; copies of all hand-outs distributed in connection with the training; the identity and qualification of the person(s) who conducted the training; and a list of the names and job titles of all those who attended the training.

2. The District shall send a copy of its Child Find policy to the Due Process Office. The DOE will review the policy for its adherence to the Maine Unified Special Education Regulations. If the DOE is not satisfied that the policy adheres to MUSER, it shall be returned to the District for revision, with an explanation of the Department's findings, and then resubmitted to the Due Process Office. Upon completion of such revision to the satisfaction of the Department, the District shall present the amended policy to the RSU #4 School Board for adoption.
3. Since the District has already altered its practice of using state-required special education forms for non-MUSER related purposes, no CAP item on that subject is necessary.