

Complaint Investigation Report
Parent v. RSU #16
Systemic Complaint 19.035CS
Complaint Investigator: Jeannette Sedgwick
December 12, 2018

The Department of Education received this systemic complaint on October 18, 2018. This complaint involves special education policies and procedures that affect many students in the District.¹ The complaint investigator conducted interviews with the District’s Superintendent, special education director, Principal of the elementary school, a special education teacher of one of the Students, the District’s social worker, and the general education teacher who had taught at the now-closed Future Leaders Program. All documents, information, and responses from the parties were considered for this report.

FACTUAL FINDINGS

1. At the start of the 2018-2019 school year, the District offered a substantially separate program the Future Leaders Program (“program”), for students who have social-emotional or behavioral challenges. The program was staffed by two co-teachers, a special education teacher, and a general education teacher, both of whom were hired approximately two weeks before the 2018-2019 school year started. In order to assist these teachers, a former District employee was hired for consultation to help the teachers set up the program.
2. Staffing for the program also consisted of educational technicians. In the first few weeks of school, at least one educational technician left the program and one was hired, which resulted in the number of educational technicians ranging from 2-4 in the first month of school.
3. The Students who attended the program live in the District and are in grades ranging from grade 2 to grade 6.² After the staff realized that the classroom climate was often not conducive to learning, the younger Students received education separately from the older Students.
4. In June 2018, the special education director found that the special education coordinator had not written IEPs for many of the Students in this program and that the IEPs had

¹ The issues raised in this investigation were also raised in an individual State complaint investigation having to do with an individual child.

² The Students in the program will be listed by number for this Report. Student 1 is ■■■, Student 2 is ■■■, Student 3 is ■■■, Student 4 is ■■■, Student 5 is ■■■, Student 6 is ■■■, Student 7 is ■■■, and Student 8 is ■■■. The details of the Students’ disabilities and how the program closure affected them is detailed in the determinations section of this report.

expired. The special education director scheduled IEP meetings in September 2018 for those students in the program whose IEPs had expired to conduct the overdue annual reviews.

5. District staff interviewed for this complaint generally agreed that the program was not meeting Students' needs.
6. The District's social worker stated that during the first month of school, he was unable to provide individual social work services as specified on the Students' IEPs because of the constant tumult in the classroom.
7. The program's general education teacher, who is in her first year of teaching, stated that the younger Students generally did not exhibit behaviors that were disruptive to the entire class, but that the older Students had difficulty maintaining focus. According to staff, restraints were often occurring for reasons having to do with noncompliance with teacher directives. The Principal of the Elm Street School, where the program was housed, reported that the program required her assistance nearly every day because of the classroom's climate.
8. At some point in September 2018, the program's special education teacher left the District. After his departure, there was no specialized instruction for the children with disabilities in the program.³
9. Late in the day on Saturday, September 22, 2018, the District's Superintendent wrote an email to the special education director and other District staff that stated he was closing the program immediately. He explained that his reasons for closing the program included the lack of staff, the Students not being served properly, and non-compliance with Students' special education programming. In this email, the Superintendent unilaterally ordered changes to IEPs for all Students in the program. The Superintendent further altered responsibilities of staff, so that tutoring would be performed by current staff. When interviewed, the Superintendent stated that he believed the children in the program had not been served for a long time and that he wanted the Student's educational needs to be met. One of the Superintendent's goals in his first year in the District was to ensure that all children were educated according to their abilities.
10. The special education director contacted the parents of all eight children in the program through email and telephone calls on Sunday, September 23, 2018. One email states, "the Superintendent has decided to close the program that [the Student] has been attending at Elm Street School effective immediately due to the safety of the students. Please do not send [the Student] to school Monday. I will call you tomorrow so we can schedule an emergency IEP and figure out the best educational setting for [the Student]." The special education director told the parents that because of program closure, parents of Students in

³ Because the special education teacher who taught at the program is no longer employed by the District, the investigator could not determine what kind of special education programming was offered to the Students during the first month of the 2018-2019 school year.

the program should keep their children home and that IEP Team meetings would be scheduled to discuss the Students' education.

11. Through September 2018, IEP Team meetings were held with parents of the Students in the program. All of the Students' IEPs were amended to include tutoring services. Many of the meetings also functioned as annual meetings because IEPs had expired the previous school year. Written notices show that in many of these meetings, the IEP Teams focused on the crisis of educational placement and did not discuss whether the Students' annual goals were being achieved or whether the IEP should be revised to address the lack of expected progress.
12. Tutoring for some Students was established beginning in the middle of the week of September 24-28. The general education teacher, who was tutoring one Student, stated that she was responsible for compiling work for the educational technicians who were tutoring the Students. Tutoring occurred primarily on-site during school hours, but in at least one instance, occurred off-site during non-school hours. In another instance, the District requested that a family member accompany a Student during tutoring because the tutor could not teach the Student without support.
13. Tutoring was generally conducted for ninety minutes each day or ninety minutes three times each week in accordance with the parents' schedules.
14. In the weeks after program closure, two Students continued their education within the District, one in a substantially separate program and one in the general education program. Other Students were placed at out-of-district educational programs in late October, and two Students remain at home, one of whom has been receiving tutoring.

Other relevant details are included in the determinations below.

DETERMINATIONS

1. In September 2018, the District closed an in-District program for students with disabilities and told parents to keep their children at home for a period of time. This resulted in several weeks of no educational programming for the students with disabilities enrolled in this program. MUSER IX(3)(B)(3); MUSER IX(3)(D).
NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.

Districts must provide a free appropriate public education to all children with disabilities whose parents reside within the District.⁴ The District violated law and regulation when it instructed certain students with certain disabilities to not attend school. The Department notes that the discriminatory action of not allowing children with certain disabilities to attend school

⁴ MUSER I and MUSER IV(4). See *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

also violates several federal and State civil rights laws and regulations, including Section 504 of the Rehabilitation Act of 1973, as amended, and its implementing regulations at 34 CFR 104.1; the Americans with Disabilities Act and its implementing regulations at 28 CFR 36.202(b); the Individuals with Disabilities Education Act, as amended, and its implementing regulations at 34 CFR 300.1, et seq.; and the Maine Human Rights Act, 5 M.R.S.A. §§ 4601-4602.

Without advance warning to parents or staff, the District closed an in-district special education program and ordered eight Students to not come to school. This decision fully disregarded the District's responsibility to educate the students with disabilities in that program. The Students' IEPs were not implemented for some Students for weeks, and in two instances, for months. The District violated MUSER I, MUSER IV(4), and MUSER IX(3)(B)(3).

By changing Students' programming outside of the IEP Team process, the District also violated MUSER VI(2)(A); MUSER VI(2)(B); MUSER VI(2)(H) and MUSER VI(2)(J). Law and regulation clearly define the members of the IEP Team and its responsibilities to develop, review, and revise an IEP for a child with a disability. Parents of children with disabilities must have a part in all decision-making regarding their child's education.⁵ Further, districts must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.⁶ In this case, the Superintendent changed eight Students' IEPs outside of the IEP Team process. This unilateral decision was not in compliance with provisions of Maine's regulations that state that the IEP meetings serve as a "communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions" regarding the child's educational needs."⁷

Tutorial instruction is not an appropriate response to a District's staffing issues. Tutorial instruction is to be considered as a component of a least restrictive environment for a child with a qualifying disability. Tutoring may be appropriate for students who require an abbreviated day educational program or, in certain circumstances, in conjunction with education after disciplinary proceedings regarding certain violations of a code of conduct.⁸ In this instance, however, the District's ordering of tutoring did not comply with MUSER X(2)(A)(4).

⁵ 34 CFR 300.321; 34 CFR 300.322; 34 CFR 300.501; MUSER VI(2)(A); MUSER VI(2)(B); MUSER VI(2)(H).

⁶ 34 CFR 300.327; 34 CFR 300.501; MUSER VI(2)(I).

⁷ MUSER VI(2)(I).

⁸ MUSER X(2)(A)(4); MUSER X(2)(B). "When students are out of school because of discipline, an abbreviated school day, or medical reasons, tutoring may be provided as a short-term measure to ensure that students receive instruction." Tutoring is not specially designed instruction. Schools should make every effort, including re-entry plans and proposals for definitive placements, to ensure that students with disabilities are enrolled and attending school. "Tutoring for students who receive special education." <https://mainedoenews.net/2017/11/15/tutoring-for-students-who-receive-special-education/>.

Because of program closure and lack of implementation of Students' IEPs, the District has not provided a free appropriate public education (FAPE) to seven of eight of the Students because of the reasons discussed below.

Student 1, who qualifies for special education and related services based on the disability of emotional disturbance, was placed in another substantially-separate classroom within the District two days after the program closed. This Student's IEP continues to be implemented. The District notes that the IEP for this Student appears to have expired in March 2018 and was re-written in early September 2018 without a thorough discussion of the Student's progress towards goals and the general education curriculum. Despite the procedural violations related to rewriting the IEP, no substantive denial of FAPE has occurred for Student 1.

Student 2 qualifies for special education and related services based on the disability of emotional disturbance. After the program was shut down, this Student's parents brought him to school on Monday, September 23, 2018 and District staff instructed them to take the Student home. Student 2's IEP was amended on September 27, 2018 to include the provision of tutoring until the student was placed in an out-of-district placement. Tutoring for this student did not go well. This Student had outbursts while being tutored and did not attend tutoring after the first week. On October 23, 2018, Student 2's IEP Team met to discuss educational placement of the Student at an out-of-district placement which started on October 24, 2018. Student 2 did not receive any meaningful educational services from September 23, 2018 to October 23, 2018 approximately four weeks. This lapse in educational services constitutes a denial of FAPE.

The District did not provide FAPE to Student 3 as detailed in individual State complaint investigation report 19.036C. The Department has ordered corrective action for the denial of FAPE in that report.

Student 4 qualifies for special education and related services based on the disability of Other Health Impairment ("OHI") for the disability of ADHD. Two days after the program closure, on September 26, 2018, Student 4 began receiving education in the District in the general education setting with some pull-out supports and instruction. The Student's previous IEP, which had expired in June 2018, contained goals for sustained, independent work in writing and math with ed. tech. support and accessing coping strategies and following adult directions with the help of social worker. The service delivery grid mandates SDI in math, writing, and academics by a special educator, 1x30 mins/week of social work services by a social worker, and transportation. The most recent evaluations demonstrate that Student 4 performed at an at-risk level in the areas of social skills, study skills, functional communication, adaptive skills and others and clinically significant for hyperactivity, aggression, conduct problems, anxiety, depression, attention problems, and adaptability.

Student 4's IEP Team met on September 26, 2018 for a placement meeting and an annual review. The resulting IEP removed SDI in all subjects, replacing it with special education consultation for 1x30/week. The change from SDI to consultation occurred without data or new

evaluations and in seeming response to the placement crisis rather than the Student's needs.⁹ The IEP states that this Student is "working on" grade level standards and that she is following adult directions, although she struggles to manage her emotions. The IEP also states that this Student has made significant growth in the last year in participating with peers and following teacher directives. However, when interviewed, District staff indicated that this student may not be able to experience success in a general education setting even with a 1:1 ed. tech. The District did not provide FAPE to Student 4.

Student 5 qualifies for special education for the disability of specific learning disability. Student 5's last evaluation was his triannual evaluation in June 2018. The evaluations state that the Student is in the very or extremely limited range in reading skills, reading fluency, written expression, and mathematics. The IEP team decided in September 2018 that an out-of-district placement would be most beneficial for the Student. Tutoring was to occur for 45 minutes three days/week and Student 5's grandmother had to be present at the tutoring sessions.¹⁰ On October 22, 2018, Student 5 started school at an out-of-district placement. Lack of appropriate education for approximately one month resulted in a denial of FAPE for Student 5.

Student 6 qualifies for special education with the disability of OHI based on ODD and ADHD. Characteristics of his disability include being distracted and impulsive. According to the IEP, this Student does not have aggressive reactions and does well within a structured classroom. The annual IEP meeting for Student 6 was held in January 2017 and the IEP was amended in April 2017. On September 27, 2018, Student 6's IEP Team met for a program review. Written notice from this meeting states that the District "can't meet [Student 6's] needs appropriately in District programming."

On October 16, 2018, the IEP Team for Student 6, including this child's case manager and BHP, met because of a parent request to discuss placement. The District offered to place Student 6 at a special purpose private school beginning in January 2019. The District also offered a part-time placement at the special purpose private school beginning in mid-November.

The parent informed the District that this Student started attending an outpatient program that focuses on short-term intervention for children who require immediate counseling and therapy, but whose needs are not severe enough for inpatient treatment. Student 6's parent is hesitant to send the Student to an out-of-district school. At the time of this report, to the investigator's knowledge, Student 6 remains in the outpatient program and no educational

⁹ Written notice for this meeting states, "The meeting was scheduled as an annual review as [the Student's] IEP expired at the end of the last school year and was not renewed at that time. Since scheduling the meeting, changes were made to the Future Leaders Program so the team had to reconsider how to best support [the Student] at Elm Street School."

¹⁰ The Department notes that providing FAPE includes the District's responsibility to provide education without mandating family presence in the educational process.

services are in place either during out-patient treatment or after this Student leaves outpatient treatment. The Student has not received FAPE from September 23 to the present.

Student 7 qualifies for special education and related services based on the disability of OHI based on ADHD. Student 7's annual review occurred on April 27, 2018 and the Student's IEP Team determined that a self-contained classroom was the best setting to meet this Student's needs. The IEP for this child was not created until September 2018. This IEP states that this Student's reading, writing and math skills are "several grade levels behind." Written Notice for this meeting shows that Student 7 is currently reading at a first- or second-grade level although this Student is in the fifth grade. On October 17, 2018, Student 7's IEP Team met to discuss the Student's placement at a special purpose private school, where the Student started attending on October 24, 2018. This Student did not receive FAPE from September 23, 2018 to October 24, 2018.

Student 8 qualifies for special education and related services with the disability of OHI for ADHD. The documentation shows that this Student is working at grade level and does not require SDI. Evaluations for this Student demonstrate that this Student had average or above average scores in all academic areas. The IEP for Student 8 contains no academic goals and states that this Student has made progress in all of his functional/behavioral goals with the exception of a goal involving recognizing feelings and using self-calming measures.¹¹ Student 8 did not receive FAPE from September 23 to October 22, 2018, when he was placed in an out-of-district program.

¹¹ Despite not needing specially designed instruction ("SDI"), Student 8's IEP mandated SDI in a self-contained, special education setting. This indicates that he was removed from being educated with his general education peers for no academic reasons, raising a question of least restrictive environment. MUSER X(2).

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

The Department offers technical assistance with the corrective action ordered.¹²

1. The following Individual Student Compensatory Plans are due to the Department by **January 16, 2019**.
 - A. For Student 2, who received no academic instruction between September 24, 2018 and October 23, 2018 when the new educational placement occurred, the District must provide the following:
 - 50 hours of SDI by a special education teacher in conjunction with the Student's current educational programming, as determined by the Student's current IEP Team.
 - B. For Students 5, 7 and 8, who missed approximately 4 weeks of school until new educational placements occurred,
 - 35 hours of SDI by a special education teacher in conjunction with the Student's current educational programming, as determined by the Student's current IEP Team.
 - C. For Student 4, whose IEP reflected a removal of all specially designed instruction without evaluations or data as a basis for that decision,
 - The District must send consent forms for new evaluations of the Student to determine current educational need;
 - IEP Team must convene to write a new IEP based on all relevant information.
 - D. For Student 6, whose IEP is currently in dispute, the District must do the following:
 - Provide 35 hours of SDI by a special education teacher, at a time and place to be determined by the Student's current IEP Team.
 - Hold an IEP meeting with the parent and providers for the Student, if available, to discuss current academic needs;
 - If an abbreviated day is necessary for academic or medical reasons, the IEP Team should discuss abbreviated day in accordance with regulations and create a plan for the Student based on the criteria in the regulations.
 - If an abbreviated day is not warranted for academic or medical reasons, the IEP Team must determine how the District will meet the Student's academic needs.
 - If the parent and District continue to disagree about education needs and placement, the IEP Team must discuss the possibility of mediation as a voluntary dispute resolution mechanism in order to find a solution. If mediation is not agreeable to both parties, the District must propose an IEP that addresses the Student's current needs and present it to the parent by January 16, 2019.

¹² The Department has ordered corrective action for Student 3 in the Complaint Investigation Report for 19.036C.

- E. For all Students in the program whose IEPs listed social work services in September and October 2018, the students' current IEP Teams must determine the best way to provide the hours missed from September 23, 2018 until the time the Students began new educational programming, given each Student's individual circumstances.
- F. For Students in the program whose IEPs had expired during the 2017-2018 school year, the District must align the annual date of the IEPs with the date specified in the IEPs created in the 2016-2017 school year.
2. A District-wide plan containing internal processes that will ensure that IEP evaluations and annual meetings occur prior to the expiration dates of the IEPs is due to the Department by **January 16, 2019**.
3. The Superintendent and special education director must receive training by an attorney or member of the Department regarding specific special education regulations. Evidence of training is due to the Department by **March 15, 2019**. Training must review the following regulatory provisions:
- MUSER I and MUSER IV(4)
 - MUSER VI(2)(A-B), MUSER VI(2)(H), MUSER VI(2)(J)
 - MUSER IX(3)(B)(3)
 - MUSER X(2)(B)