

Complaint Investigation Report
Parent v. RSU #15/MSAD #15
Complaint 19.044C
Complaint Investigator: Jeannette Sedgwick
January 7, 2019

This investigation examined a public school District's responsibility for a state agency client who was placed in a residential home located within the District for non-educational reasons.¹ The Department of Education received this complaint on November 9, 2018. Interviews were conducted on December 12, 2018 with the complainant and on December 17, 2018 with the Student's residential clinician. On December 19, 2018, the investigator interviewed the District's special education director and the special purpose private school's Director of Training who has worked with the Student. The investigator reviewed all documents, information, and responses from the parties.

FACTUAL FINDINGS

1. The Student is a 19 year old with Autism and an Intellectual Disability. Since November 2018, he has lived in the Granite Bay Care Home in Gray where he was placed by the parent and DHHS. His residential placement qualifies him as a state agency client.
2. Evaluations of the Student were conducted in January 2016. These indicate that the Student's disabilities significantly impact his education. The GARS-3 results show that the Student requires substantial or very substantial support, as he performed below the first percentile (the low adaptive level) in all tested domains. The Student's age equivalency at the time of testing was under age 3 in receptive and expressive communication skills and interpersonal relationships. The Student's age equivalency in academic skills was approximately age 2. The 2016 evaluation recommended continued 1-1 support for daily living activities.
3. The Student has been able to communicate his wants and needs to adults who are familiar to him through a combination of PECS and gestures. The Student has sensory-related disabilities and is very sensitive to noise and external stimulus.
4. The Student's mother is his legal guardian. She would like for the Student to remain in his current residence because he is doing well there.

¹ The dispute resolution procedure of a State complaint investigation is available to those who wish to seek enforcement of special education law and regulation. 20-A M.R.S.A. §7006; MUSER I. See *Bd. of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982) ("Congress sought primarily to make public education available to handicapped children").

5. During the past year, the Student has experienced a variety of educational placements. After moving into the District, the District placed the Student at a special purpose private school in Portland (“first private school”).
6. The educational placement at the first private school was not appropriate and the Student was dismissed after one month, on February 28, 2018, on the date of the 30-day meeting. The dismissal was due at least in some part to the safety issues presented by the Student to himself and others.
7. The District referred the Student to another special purpose private school (“second private school”) immediately after the February 28, 2018 IEP Team meeting. From February 2018 to May 2018, the Student waited for an educational placement.
8. The Student’s IEP Team met again on May 5, 2018, when it learned about the acceptance to the second private school, and created an IEP to reflect educational programming at the second private school. The Student was accepted on May 9, 2018, and school was to begin on May 21, 2018.
9. The Student’s IEP created in May 2018 calls for the following:
 - Specially Designed Instruction (“SDI”) by a special educator 6.5 hours/day, 5 days/week
 - Speech and Language services by a speech language therapist 60 minutes/week
 - Occupational Therapy services by an occupational therapist 60 minutes/week
 - BCBA 12 hours/quarter
 - ESY
 - Other services and supports, including communication skills and support with the Student’s PECS book.
10. An amendment to the IEP created on June 8, 2018 added transportation details to the IEP. Once it was able to find suitable transportation for the Student to attend the second private school, the Student started attending school on June 11, 2018.
11. Between February 2018 and June 11, 2018, the Student did not receive any educational services while he was awaiting placement at the second private school.
12. The private school created a temporary positive behavior support and crisis/safety plan when the Student arrived.
13. On July 19, 2018, the IEP Team held a 30-day review of placement. Information shared at the meeting included the second private school’s data that the Student was beginning to communicate with staff willingly, that he averaged 13 acts of aggressive behavior each day, and that he engaged in self-injurious behaviors for an average of 37 times each day.
14. The second private school conducted an FBA. Observations for the FBA occurred in May, June, July and August 2018 and tracked data about the Student’s behaviors that interfered with his education. The FBA stated that the Student is not often able to access peers, that the Student’s interfering behavior can be unpredictable, that there is no reliable response to the interfering behavior, and that the Student engages in isolated or pursuant aggression. The FBA recommended continuing to provide the existing

functional communication training protocol, instruction in tolerating denials and delayed access to preferred items, and staffing the Student with three adults at all times to minimize danger to himself and staff. The report also indicated that the Student engages in “directed aggression with arms overhead, kicking, biting, and scratching another person.”

15. The Student’s positive behavior support and crisis/safety plan was amended in August 2018 to include information from the FBA.
16. While working with the Student, the staff at the second private school wore protective clothing and helmets to decrease the risk of injury. Despite these measures, multiple staff members at the second private school experienced significant injuries caused by the Student during the fall of 2018, including concussions.
17. The IEP Team met on October 22, 2018 for the Student’s annual review. At this meeting, the Team discussed the results of the FBA, an evaluation of the assessment of functional Living Skills completed in October 2018, and a summary of OT skills.
18. At the annual meeting, the second private school told the Student’s IEP team that it was terminating the Student’s placement as of the date of the meeting. In the notice, the District noted that the Student can focus on table top activities for 60 seconds at a time. Written notice also states that the Student’s IEP would be updated to reflect tutoring services for a short time each day given the Student’s attention span and abilities until a new placement could be found.
19. At the annual meeting on October 22, 2018, the District offered a residential placement to address the Student’s academic and functional needs. The parent rejected this offer because she wants the Student to continue living near her and because he is doing well at his existing residence.
20. The District continued to look for day treatment programs that would accept the Student. When the District offered tutorial services involving functional and academic skills, the parent rejected the tutoring because of the time and place of the tutoring.²
21. The IEP Team met in December to discuss a thorough transition plan that would focus on functional skills and time in the community. Although the details of the transition plan are not final, the proposed transition services have been created to address the Student’s unique and individual needs. The District expects that some time in February 2019, the plan could be put into place.
22. The Student did not receive educational services between February 2018 and June 2018 and October 23, 2018 to the present.

Other relevant facts are included in the determinations below.

DETERMINATIONS

The complainant alleged the following:

1. The District did not provide educational services to the Student between February 2018 and June 2018. MUSER I; MUSER II(14); 34 CFR300.101(a).

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND.

Students who are state agency clients become residents of the District when they are placed at a residential placement for non-educational reasons.³ When a District sends a child with a disability to an educational program that is located out of district, the sending District has administrative responsibility for the education of the child, including initiating annual and 30-day reviews, reviewing and revising the IEP as the result of any meetings, and ensuring parental involvement in the IEP Team meetings.⁴

As the District acknowledged during interviews, a free appropriate public education must be provided to children with disabilities by public entities who receive federal funding.⁵ At a minimum, Districts must provide “instruction and support services sufficient ‘to permit the child to benefit educationally from that instruction.’”⁶ Further, Maine regulations state that when an IEP is unable to be implemented, Districts must reconvene an IEP Team to identify alternative service options.⁷

Documentation shows that the Student, who is a state agency client because of his residential placement for non-educational reasons, did not receive educational services between February 28, 2018 and June 11, 2018, approximately 13 weeks of school. The IEP in place at this time called for SDI and related services to be provided as noted in the facts above.⁸ After February 28, 2018, the District did not offer any educational program for the Student while it sought another placement. Simply keeping the Student at home while waiting for an available placement after one referral, with no discussion of educational need by the IEP Team, did not constitute an offer of FAPE for this Student.⁹

³ MUSER II(40); MUSER IV(4)(E).

⁴ MUSER IX(3)(I).

⁵ *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct.988, 1000-1001 (2017).

⁶ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990) (quoting *Board of Ed. v. Rowley*, 458 U.S. 176, 203 (1982)).

⁷ MUSER IX(3)(B)(3).

⁸ Special purpose private schools, because they are private entities, have the right to dismiss students whose needs are not met by the private school’s programming. Public schools, on the other hand, must ensure that all students who reside within their districts, including state agency clients, receive special education services. MUSER IX(3)(H).

In its response, the District stated that developing an interim program for this Student was not feasible or safe for the Student or his providers. It could be that the safety issues presented by the Student precluded the Student's participation in District on-site programming; however, determination of the LRE would be a decision for the IEP Team. Between February and June, however, some alternative option should have been explored by the Student's IEP Team when the Team knew services on the Student's IEP could not be provided.

Corrective action is detailed below.

2. The District did not provide educational services to the Student from October 2018 to the present. MUSER I; MUSER II(14); 34 CFR300.101(a). **COMPLIANCE FOUND.**

While public school districts have the responsibility to provide educational services to state agency clients, districts cannot require private schools to accept or retain students. Additionally, Districts cannot mandate that parents agree to a proposed educational placement.¹⁰ Districts can offer what they believe to be appropriate educational programming. When the parent disagrees, parents may file dispute resolution procedures such as complaint investigations, as occurred here.

In her interview with the complaint investigator, the parent stated that she did not want the Student to live elsewhere because his current residential placement was appropriate and going well. The parent would like the student to receive a full day of educational services and would like the Student to be interacting with his peers. The parent stated that an appropriate, in-District program that could take into account the Student's sensory needs would be a good outcome. The Student's residential clinician also believed that tutoring experiences within the residence would have been disruptive to the Student's residential treatment.

The IEP Team determined that FAPE could be provided in a residential setting. Knowing that two private school educational placements were inappropriate in large part because of the Student's disabilities that involve harm to self and staff, the IEP Team evaluated the functional and educational needs of the Student. At the Student's annual IEP Team meeting in October, the District offered residential educational placement that could address the Student's functional and academic needs in a 24-hour setting. This offer was well documented in the Written Notice from the October 2018 meeting. This kind of placement was appropriate given the Student's extensive functional and behavioral needs and requirement for 3:1 staffing to ensure the safety of himself and others. The specific functional needs of the Student, as demonstrated by the most recent evaluations and FBA, would be met in an educational residential setting. The parent, however,

¹⁰ "Educational placement, as used in the IDEA, means educational program – not the particular institution where that program is implemented." *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003).

did not allow the District to send referral packets and therefore, the District was not able to provide FAPE in a residential setting.¹¹

The District has complied with MUSER I; MUSER II(14); and 34 CFR 300.101(a) from October 2018 to the present.

3. The District has not maintained the student's "stay-put" during the pendency of this State Complaint investigation. MUSER XVI(20). **COMPLIANCE FOUND.**

Maine regulations state that during the pendency of any state complaint investigation, the child involved must remain in his or her current educational placement.¹²

The parent stated that this "stay-put" provision should apply to educational placements at private schools because some entity needs to be responsible when the Student's private school placement ended. This regulation does not apply to the private school, however, because it is a private entity.¹³ Additionally, as explained in note 10 above, educational placement is different than a particular institution. The District could not force the private school to continue to serve the Student; the District's obligation was to identify another school to serve the Student. The District has complied with MUSER XVI(20).

¹¹ The District also offered tutorial programming within the Student's existing residence, and the parent, based on recommendations from Student's providers, told the District that she did not want that experience for the Student. The Student's parent and residential clinician's reasoning, that the Student's home had been working well and that the Student should have a longer day program, is also supported by the facts in the record. Given the specific facts of this case, the District's offer for tutoring and an abbreviated day was appropriate in light of the Student's attention and skills.

¹² MUSER XVI(20).

¹³ The IDEA imposes requirements on public agencies, which are defined at 34 CFR 300.2 as state educational agencies, local educational agencies, educational service agencies, public charter schools, other state schools run by state agencies, and state and local juvenile and adult correctional facilities.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. The District must add 6 weeks of additional community-based transition services, as specified in the transition plan that was being developed at the December 2018 IEP Team meeting, to the Student's annual educational program. The additional 6 weeks must occur during dates or times the Student would not ordinarily take part in his educational program and must occur prior to the Student's aging out of special education services pursuant to Maine law.
2. By **January 30, 2019**, the District must submit the plan for community-based transition services and a narrative of how the District will implement the plan, including the additional 4 weeks ordered by the Department.