

Complaint Investigation Report
Parent v. Scarborough Public Schools
Complaint 19.066C
Complaint Investigator: David C. Webb
March 29, 2019

The Department of Education received this complaint on February 11, 2019. The Complaint Investigator reviewed all documents, information, and responses from the parties. Interviews were held with the Parent on March 20 and 21, 2019. Interviews with the District's Special Education Administrators, as well as staff from the Center for Autism and Developmental Disabilities and Maine Department of Education staff, were held on March 21, 22, 25, 28 and 29, 2019.

FACTUAL FINDINGS

1. The 12-year old Student is in the sixth grade and resides in Scarborough with her family. She is the educational responsibility of the Scarborough Public Schools ("District") and she qualifies for special education and related services as a student with autism. Her mother identifies her as a "typically happy student who is mostly non-verbal with academic and social delays."
2. Before moving to Scarborough with her family in November of 2017, the Student resided in Steep Falls, Maine and attended the George E. Jack School in Standish, Maine (MSAD #6).
3. On January 24, 2018 the Student's IEP team determined that the Student needed a day treatment placement in order to access her education.
4. On February 13, 2018 the Student's IEP team determined that she would be placed at the Center for Autism and Developmental Disabilities in South Portland, Maine. ("CADD"). The Student began attending CADD on March 5, 2018.
5. In an interview with the Complaint Investigator, the Parent stated that she is happy with CADD, which she believes is a highly specialized and appropriate program for the Student.
6. A Functional Behavior Analysis (FBA) was conducted by CADD for the Student on July 18, 2018.
7. On August 27, 2018, the IEP team convened because the Student had her third incident of restraint or seclusion. The written notice from this meeting noted that despite the

behavior issue that prompted the meeting, the current behavior plan did not need to be amended insofar as it was “flexible enough to meet her needs and has led to a downward trend in her behaviors.”

8. On September 11, 2018 the IEP team, which included the Parent, met to review the FBA. At this meeting, the team agreed to amend the Student’s behavior plan to add components of the FBA conducted by CADD. At this meeting, Allison Ginn, a Behavior Specialist from CADD, reported on several items from the FBA that she recommended be incorporated into the Student’s behavior plan, including “visuals [picture stimuli and visual prompts], especially if she is working towards a preferred activity or tangible item” and clarifying that the “team needs to be explicit and clear with [the Student] about what you don’t want her to do.” Ms. Ginn also suggested an approach for group work where “the amount of expected time on task is reduced so she can have a successful end to group work, and then rapidly increase the expected time on task from there (backward chaining).”
9. The September 11, 2018 written notice specified that “no changes needed to be made to the Student’s IEP at this time since the current IEP is meeting her needs.” The written notice stated that the team “discussed that her IEP will be updated at her upcoming annual review in October.”
10. The IEP team met on October 16, 2018 for the Student's Annual IEP Review. The Parent attended this meeting. The team agreed to keep the same level of service for direct instruction, OT, speech, social work and specialized instruction.
11. At the October 16, 2018 IEP meeting, Section 4 of the IEP was changed to incorporate information from the July 18, 2018 FBA that was discussed at the September 11, 2018 meeting. The written notice prepared in connection with the October 16, 2018 IEP team meeting did not reference the July, 2018 FBA results or the changes to the IEP discussed at the September, 2018 meeting.
12. The October 2018 written notice stated that the goals for the Student proposed by CADD would be implemented, with the understanding that the social work goals would be redrafted since the social worker was not present at the meeting and additional input from the social worker was needed to make sure that the information in the goals was accurate.¹

¹ The Parent received a copy of the draft goals and agreed on November 16, 2018 to amend the IEP without a formal IEP meeting to include the changes to the social work goals.

13. In an interview with the Complaint Investigator, Chris Rohde, the Assistant Director of Special Services for the District, said that the agreed changes to Student's behavior plan from the September, 2018 IEP team meeting did not substantively change the services and supports within the Student's IEP.
14. At the October 16, 2018 IEP meeting, the IEP team also agreed to add the following Extended School Year ("ESY") services to the Student's IEP: 27 hours per week of direct instruction, 60 minutes per week of speech/language services, 60 minutes per week of occupational therapy services, 60 minutes per week of social work services and specialized transportation twice per day for 30 minutes. These ESY services were not included in the Student's revised October 16, 2018 IEP, although they were discussed at the meeting and identified within the October 16, 2018 written notice.
15. On November 29, 2018 the District received documentation from the Department of Education ("DOE") that an audit had been conducted at CADD which noted following items that were incorrectly left out of the Student's IEP:
 - The results of initial or most recent evaluations of the child, and
 - A statement of how the child's disability affects the child's involvement and participation in the general education curriculum.
16. In an interview with the Complaint Investigator, Elaine Tomaszewski, the IEP Coordinator at CADD, stated that she is responsible to oversee CADD's response to the DOE audit regarding the Student.
17. In an e-mail to Ms. Tomaszewski on December 7, 2018, Mr. Rohde proposed that the District would correct the reference to the Student's ESY services at the same time that changes were made in connection with the DOE audit. In a December 20, 2018 e-mail to Mr. Rohde, Ms. Tomaszewski stated that only the correction to add ESY services to section 8 of the Student's IEP needed to be made by January 5, 2019. Ms. Tomaszewski stated that she is not aware of any conversations between the District and DOE before the notice was sent to the District on November 29, 2018.
18. In an interview with the Complaint Investigator, Stacia Fowler of the Maine Department of Education stated that she understood that the District could wait until next IEP team meeting to address the other audit issues since the Student's ESY services were added to the Student's IEP.
19. In an e-mail to the Parent on January 7, 2019, Alison Marchese offered to hold an IEP team meeting to discuss the proposed corrections to the Student's IEP. The Parent

responded that she would agree to the amendment to include the ESY services in the IEP, but would not agree to adding the other two proposed amendments stemming from the DOE audit.

20. On January 14, 2019, Mr. Rohde sent the Parent a written notice documenting the amendment of the IEP to include the ESY services agreed upon at the October 16, 2018 IEP team meeting. No changes were made to the two sections cited in the DOE audit. In an interview with the Complaint Investigator, Mr. Rohde said that the Student's current IEP does not contain the changes to the two sections cited in the DOE audit, nor has an IEP team meeting been scheduled to address these changes.
21. In an interview with the Complaint Investigator, Dr. Stephanie Brackett, Clinical Director of CADD, said that the Student has made significant progress since she was placed there last year. Dr. Brackett stated that the Student has transitioned from elementary level to middle school level last summer and that her challenging behaviors are less frequent and with shorter durations than when she began the program. She stated that she believes that CADD is a "good fit" for the Student at this time, and she has no concerns with the Student's IEP.
22. In an interview with the Complaint Investigator, Allison Marchese, the Director of Special Services for the District, stated that the Parent has always been actively involved in all of the Student's IEP team meetings. Ms. Marchese has heard from the Parent that she is happy with the services provided by CADD.
23. In an interview with the Complaint Investigator, Julie Kukenberger, Ed. D., the Superintendent of Scarborough Schools, said that she has had direct contact with the Parent on numerous occasions to discuss programming for both the Student and the Student's brother, who is also a student in the District. She said that she was aware of the findings from the DOE audit. She noted that while she understands that some of the documentation was inadvertently left out of the Student's IEP, she believes that the Parent was properly notified and actively involved with all decisions made with regard to the Student's programming. She said that she is not aware of a "pattern" of missing information on IEP's or other documentation relating to students who receive special education services.
24. In an interview with the Complaint Investigator, the Parent stated that she is very involved with the Student's education and has been an active participant at each of her IEP team meetings.
25. In an interview with the Complaint Investigator, the Parent stated that she is happy with CADD, which she believes is a highly specialized and appropriate program for the Student. She stated that her primary concern is the District's "alteration" of section 4 of the

Student's October 16, 2018 IEP, which she believes added information from the FBA results discussed at the September 11, 2018 meeting without notifying her with regard to this change. The Parent said that she agrees with the amendments to the Student's behavior plan, and that she was not pursuing any claims with regard to the DOE audit. The Parent stated, however, that she is concerned that the District may have communicated with DOE prior to the October 16, 2018 IEP with regard to the audit findings, and then attempted to "alter the IEP" in order to be in compliance with the audit.

DETERMINATIONS

1. Changing the Student's IEP without involving her parents, in violation of MUSER §§VI (2)(B), (H);
2. Failure to adequately consider the concerns of the parents in the IEP decision making process in violation of MUSER §§V1.2(I) and IX.3.C(1)(b);
3. Failure to provide the parents with proper prior written notice of the District's proposals regarding the Student's educational program in violation of MUSER VI.2.I and MUSER App. I (34 CFR §300.503).

NO VIOLATION; NO DENIAL OF FAPE FOUND.

Children with disabilities are afforded certain rights and protections under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and the Maine Unified Special Education Regulations ("MUSER"). These rights include the development of an Individualized Education Program ("IEP"), and the delivery of special education services and supplementary aids in the least restrictive environment.

MUSER §§VI (2)(B) and (H) provide, in relevant part, that the IEP team must include the child's parents who must be afforded the opportunity to participate in all IEP team meetings. As set forth in MUSER §§V1.2(I), "The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions" regarding:

- (1) The child's needs and appropriate goals;
- (2) The extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and
- (3) The services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP Team must consider the

parents' concerns and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.

MUSER §§V1.2(I)

Determinations with regard to special education services and supports must be made by an IEP Team that includes representatives from the school district and the student's parents. MUSER VI (2)(B). All members of the IEP team, including parents, are equal participants and are charged with making "joint, informed decisions...with regard to the extent to which the child will be involved in the general curriculum and participate in the regular education environment..." MUSER VI(2)(I)(2). The IEP team, subject to subparagraph (3), must consider the concerns of the parents for enhancing the education of their child. MUSER §IX.3.C(1)(b).

In the present case, there is no evidence that the District changed the Student's IEP without involving the Parent, who has been an active participant at all of the Student's IEP team meetings, including the meeting on September 11, 2018 where the FBA was discussed and the Student's behavior plan modifications were approved by the IEP team, as well as the IEP team meeting on October 16, 2018.

The Parent stated that she was surprised to see the added FBA language in section 4 of the October 16, 2018 IEP although she agreed with the behavior plan modifications addressed at the September 11, 2018 IEP team meeting. While this change was not addressed in the October 16, 2018 written notice, the September 11, 2018 written notice specified that the team "discussed that her IEP will be updated at her upcoming annual review in October." The September 11, 2018 written notice further specified that the IEP team determined that no changes needed to be made to the Student's IEP at this time since the current IEP is meeting her needs.²

Pursuant to MUSER Appendix 1 and 34 CFR §300.503, a school administrative unit must give parents written notice at least 7 days prior to the date the school administrative unit proposes to initiate or to change the provision of a free appropriate public education (FAPE) to a child. Among other requirements, this notice must describe the action regarding the referral, evaluation, identification, programming for a Student. In the present case, this notice describing the FBA results was provided to the Parent more than 7 days prior to the time the District planned to implement this change.³

² Although the Parent was concerned that the District may have discussed the findings of the audit with the DOE before the October, 2018 IEP team meeting, there is no evidence that any such conversation took place. Elaine Tomaszewski, who coordinated the District's response to this audit on behalf of CADD, stated that she is not aware of any conversations between the District and DOE before the audit finding notice was sent to the District on November 29, 2018.

³ Although the written notice for the September 11, 2018 meeting referenced that it would add the Student's FBA results to the October, 2018 IEP, it is recommended that for the future any proposed changes be referenced within the written notice prepared in connection with the date of the IEP team meeting at which the modification is made.

4. Failure to properly identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d).

NO VIOLATION; NO DENIAL OF FAPE FOUND

MUSER §IX.3.A (1)(d) defines the term “individualized education program” and provides, in relevant part, that it is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes: ...

- (d) A statement of the special education (Section X of this rule) and related services (Section XI of this rule) and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with (a) and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be educated and participate with other children with disabilities and non-disabled children in the activities described in this subparagraph;

Required items within an IEP include a student’s present level of academic and functional performance, measurable annual goals, the extent to which a student will participate with non-disabled peers, and a statement of special education and related services that the student needs to meet these goals. MUSER, IX(3)(A)(1).

The Student’s IEP team agreed to change the Student’s behavior plan to reflect the FBA recommendations, as was reflected in the September 11, 2018 written notice. These changes were specifically agreed to by the Parent. These changes were incorporated within the updated IEP developed on October 16, 2018, and subsequent agreed modifications. Accordingly, there is no violation of MUSER §IX.3.A (1)(d).⁴

Such reference should include the same information as included in the previous written notice and the date of the meeting that the determination was made.

⁴ There were several procedural errors within the Student’s IEP that were not the subject of the Parent’s complaint. First, the Student’s ESY services were not included in the Student’s revised October 16, 2018 IEP, although they were discussed at the meeting and identified within the October 16, 2018 written notice. These ESY services were added with notice and agreement from the Parent on January 14, 2019. In addition, the Department of Education audit revealed that following items that were incorrectly left out of the Student’s IEP:

- The results of the Student’s most recent evaluations, and

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

As there are no finding of any violations by the District under this complaint, there is no corrective action that must be completed by the District.

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- A statement of how the Student's disability affects the child's involvement and participation in the general education curriculum.

Although the Parent stated that these audit issues are not the subject of the instant complaint, she has not agreed to the inclusion of these additional items within the Student's IEP without a meeting. In the absence of the Parent's agreement to make these changes without an IEP team meeting, it is recommended that the District convene an IEP team meeting within the next 30 days to address and incorporate these changes required by the DOE audit.