

**Complaint Investigation Report**  
**Parent v. RSU #14**  
**Complaint 19.103CS**  
**Complaint Investigator: David C. Webb**  
**June 17, 2019**

**I. Identifying Information**

Complainant: [REDACTED] Parent

Respondent: RSU #14  
Sanford Prince, Superintendent; Lisa Garneau, Special Education Director;  
Eric Herlan and Laura O’Neill, Attorneys for RSU #14.

Student: [REDACTED]  
DOB [REDACTED]  
Other unnamed students within the District potentially impacted by  
extracurricular policy.

**II. Summary of Complaint Investigation Activities**

The Department of Education received this systemic complaint on April 24, 2019.<sup>1</sup> The Parent alleges that his son and other students were denied FAPE because of a policy that requires middle and high school students to maintain a 2.0 in classes in order to participate in sports. In addition, the Parent alleges that the District requires students impacted by this policy “to stay after school to bring their grades up to passing” which further restricts affected students from participating in extracurricular activities.

The Complaint Investigator was appointed and issued a draft allegations report on April 29, 2019. The Complaint Investigator conducted a complaint investigation meeting on May 13, 2019. The Complaint Investigator received 178 pages of documents from the District.

---

<sup>1</sup> On March 25, 2019, the Parent filed both an individual and a systemic complaint regarding the Student’s ineligibility for the swim team. The MDOE issued closure letters as to these complaints, and the Parent re-filed individual and systemic complaints on April 3, 2019. On April 24, 2019, the parties reached a settlement agreement with respect to the second individual complaint in which the parents released all claims and RSU 14 agreed to re-convene the IEP team to discuss the “need for extra adult support” in Science and Social Studies, a Behavioral Support Plan, and other items.

Interviews were conducted with the following individuals: Lisa Garneau, Special Education Director; Laura Grace, School Psychologist; Drew Patin, Principal, Windham Middle School; Jill MacDonald, Special Education Teacher and Case Manager; Ben Williamson, Social Studies Teacher and Erin Beal, Science Teacher.

### III. Preliminary Statement

The 13-year old Student is in the seventh grade and resides in Windham with his family. He is the educational responsibility of RSU #14 (“District”) where he qualifies for special education and related services as a student under the category of other health impairment. This systemic complaint was filed by the Student’s parent (“Parent”) alleging that the District violated the Maine Unified Special Education Regulations (“MUSER”).

The Investigation of this systemic complaint is guided by OSEP Memorandum 13-08, dated July 23, 2013 which states, in relevant part:

if a systemic complaint names certain children and alleges that the same violations apply to a class, category, or similarly situated children, the SEA [School District] must review all relevant information to resolve the complaint, but *would not need to examine additional children if no violations are identified in the policies, procedures, or practices for the named children.* (emphasis added).<sup>2</sup>

In the present case, the Complaint Investigator reviewed information relating to the named child as well as the applicable District policies regarding participation in extracurricular activities. As noted herein, the investigation did not find that the District violated MUSER or the IDEA with regard to applying this policy to the Student. Accordingly, no additional files relating to other children were reviewed.

### IV. ALLEGATIONS

1. Failure to prepare an IEP that is reasonably calculated to enable students to make progress in light of their circumstances in violation of MUSER IX(3)(A) and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988; *RE-1*, 2017 WL 1066260 (Mar. 22, 2017).
2. Failure to ensure that the Student’s educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;
3. Failure to ensure that a continuum of alternative placements is available to meet the Student’s educational needs in violation of MUSER §X.2.B; and

---

<sup>2</sup> U.S. Department of Education, Office of Special Education and Rehabilitative Services #13-08, July 23, 2013

4. Failure to fully and adequately implement the Student's IEP in violation of MUSER §IX.3.B(3).

**V. FACTUAL FINDINGS**

1. The 13-year old Student is in the seventh grade and resides in Windham with his family. He is the educational responsibility of the Windham Public Schools ("District") and he qualifies for special education and related services as a student with an "Other Health Impairment." The Student has a diagnosis of ADHD (combined-type, moderate). The Student has received special education services in RSU 14 since he was in kindergarten
2. An IEP was developed for the Student on April 2, 2018. This IEP called for the following special education services:
  - 500 minutes per week of specially-designed instruction in language arts;
  - 300 minutes per week of specially-designed instruction in math;
  - 15 minutes per week of behavioral consultation
  - supplemental aids, services, modifications, and/or supports, including:
    - i. Extra cuing
    - ii. Redirection
    - iii. Check-ins for comprehension
    - iv. Scribe
    - v. Reduction in homework
    - vi. Visual Supports
3. Although not identified in any of the Student's IEPs as an accommodation or support, the Student has participated on the school swim team during the 2017-2018 school year and the 2018-2019 School year.
4. The District's grading system works on a 4 point scale, with a mark of "2.0" being the equivalent of a "70" on a 100 point grading scale, and marks below 2.0 considered a failing grade.
5. The District's Athletic/Co-Curricular Eligibility Policy IGDJ (hereinafter "eligibility policy" attached as Exhibit 1) requires middle school students to "maintain an average of 2.0 in all courses" to be eligible for participation in co-curricular activities, including after-school sports. Under the policy, a student who receives a score below a 2.0 in any

class is placed on probation for a three-week period, if the student does not raise the grades above 2.0<sup>3</sup>

6. The eligibility policy further provides that students who did not receive a 2.0 or higher during the preceding quarter shall be placed on academic probation and assistance, but may be considered eligible if the student meets at least two of the following criteria in all current courses:
  - The student is demonstrating proficiency on a majority of the academic standards.
  - The student is demonstrating proficiency on a majority of the habits-of-work standards.
  - The student is participating in an intervention program which includes all applicable in-school, out-of- school, and vacation intervention programs designed to get the student on track to demonstrate proficiency on all expected standards by the end of a course, learning experience, or grade level.
7. All students placed on academic probation will be required to develop a plan with appropriate teachers, coaches, counselors, administration, parents or guardians. The Athletic Administrator will meet with all ineligible students to articulate the expectations of their eligibility and to help support their plan.
8. The ineligible student will be given three weeks to demonstrate progress and satisfy the eligibility criteria of this policy. During the initial three-week probationary period, students may practice with their team and attend games or performances, but they are not allowed to participate in Maine Principals' Association (MPA) sanctioned activities. If the student is failing any classes after the three-week period, they are not allowed to practice, play or participate in any manner with their team. If the student satisfies the eligibility criteria during the probationary period, the student will be reinstated for full participation in the athletics and co-curricular activities at the end of the three- week period.
9. The eligibility policy provides that an appeal may be made to the Principal if a student believes extenuating circumstances have impacted their ability to pass a course. Students must be able to document a learning difficulty, efforts to access assistance and/or other interventions.

---

<sup>3</sup> While the District's policy states that "all regulations of the Maine Principals' Association (MPA) concerning eligibility for interscholastic activities shall be enforced, MPA Eligibility rules apply to all secondary school interscholastic varsity athletic events, and therefore are not considered in the context of the allegations pertaining to this Student, who did not participate in secondary school varsity athletics.

10. In the Written Notice prepared in connection with the Student's April 2018 IEP team meeting, the Student's mother remarked "[The Student] just finished with swimming and that was a great motivator for him to keep his grades up. He will be signing up for outdoor track as well, so she is hoping that participating in another sport will continue to be motivating for him."
11. In an interview with the Complaint Investigator, Ben Williamson and Erin Beal, the Student's regular education social studies and science teachers, observed a change in the Student's work habits during the second quarter of his seventh-grade year. Mr. Williamson commented that the Student "seemed to have pulled out" during that quarter. Ms. Beal stated that the Student "checked out and was not engaged." Both Mr. Williamson and Ms. Beal referenced comments that the Student made that the Student's father "would take care of" any issues arising from his poor school performance that could impact his academic or extracurricular involvement.
12. In an interview with the Complaint Investigator, Erin Beal, the Student's regular education science teacher, said that the Student was "positive and wonderful to have in class" and that she has seen growth in his academic and social skills. She said that while he demonstrates a good understanding of the course material, his grade report was impacted during his seventh-grade year by his failure to turn in large "summative" projects. She spoke to the Student's father who agreed that the Student could stay after school on Wednesdays to get some additional help and make up the lost work. Ms. Beal said that the Student stayed late on two Wednesdays for additional help, and that he now has a 3.0 grade in science.
13. In an interview with the Complaint Investigator, Jill MacDonald, the Student's special education teacher, stated that the Student had a relatively strong start to the 2018-2019 school year. She said, however, there was a period in middle of year where the Student was "stagnant" and that his grades "dipped down". She said that at times he would comply, but then at other times he didn't, and said "his dad said he didn't have to do this."
14. In an interview with the Complaint Investigator, Lisa Garneau stated that she and Principal Drew Patin spoke to the Student's father about a comment made by the Student that "he didn't need to work as hard" as his father would "fix" the extracurricular policy that was preventing him from competing on the swim team. Ms. Garneau said that the Student's father apologized and said he would speak to the Student with regard to this concern.

15. The Student's second quarter (11/5/2018-2/1/2019) seventh grade report indicated that the Student had a failing grade of 1.6 in his Exploratory Foreign Language class which triggered disqualification with regard to the Student's participation in the school swim team.
16. On February 27, 2019, Principal Drew Patin and the Parent discussed a plan that the Student would be placed on a probation during which he would be able to continue to participate in swim team practices but not swim meets. Mr. Patin told the Parent that the District would offer after school support for the Student to help the Student improve his grades and complete assignments.
17. An academic evaluation report prepared by Jillian McDonald, M. Ed. dated February 28, 2019 determined that the Student's overall achievement was below average, and concluded that the Student was "not transferring or applying his skills to his reading across content areas."
18. A psychoeducational report prepared by Laura Grace on March 13, 2019 continued to identify the Student's disability as ADHD and further noted:

It appears that the previous difficulties, which contributed to the identification under the exceptionality of an Other Health Impairment (ADHD) in the past, continue to be present across environments and to an observable degree. What continues to challenge [the Student] across all settings is challenges with general focus, initiating tasks, inhibiting impulses, monitoring his own progress, and planning and organizing.
19. In an e-mail to the Parent on March 13, 2019, Mr. Patin stated:

After our conversation two weeks ago we had an agreement that [the Student] could practice and compete until another grade check two weeks later and we both expected [the Student's] grades to be passing. I checked grades today with him and he is failing Science and Reading with Ms. MacDonald. It does not appear that [the Student] stayed any late nights last week or the week prior. I have also not seen any weekly emails from [the Student] to his teachers regarding his grades as we had agreed to. At this point, [the Student] is benched from competition until his grades are brought up to passing. I have included his coach on the email, so she is aware he is not able to compete until further notice.
20. At an IEP Team meeting held on March 19, 2019, the team discussed the Student's academic concerns and determined to modify the Student's IEP as follows:

- The 15 minute weekly behavioral consultation service will be replaced with 30 minutes of 1:1 social work services per week and 30 minutes of group social work services per week;
- [the Student] will also have 15 minutes per day (during Applied Arts) where he receives direct instruction in executive functioning, specifically planning and organization;
- The Student will have a math goal targeted on expressions and equations at the 7th grade level; a writing goal targeted towards the development and elaboration of his writing at the 5th grade level; a reading fluency goal targeted at the 6th grade level and a reading comprehension goal targeted on identifying main ideas, details, and character development.
- The IEP team also determined that the Student will have a goal focused on organization and a social work goal focused on appropriate peer interactions.

21. At the March 19, 2019 IEP Team meeting, the Student's science teacher, Ms. Beal, noted that "the Student's scores are low because he does not turn in assignments...he struggles with blurting and task initiation." the team also discussed the Student's participation in extracurricular activities and sports and determined that an accommodation will be made in the Student's grading so that scores of 2.0 or higher in content classes will be determined to be sufficient for sports eligibility, and applied arts classes will be PASS/FAIL through 8th grade and will not adversely impact the Student's eligibility to access extra-curricular activities, including sports.<sup>4</sup>

22. In an interview with the Complaint Investigator, Lisa Garneau stated that as a result of the Student's poor grades he missed three swim meets. She stated that the Student did not miss any practices. Ms. Garneau added that the Student now has a positive behavior support plan in place and that the Student's grades have improved.<sup>5</sup>

23. In an interview with the Complaint Investigator, Laura Grace stated that she believes the Student's IEP was appropriate for the Student. Ms. Grace stated that the Student's poor grades were primarily the result of his lack of effort, which changed from the previous year. Ms. Grace said that the Student was not required to stay after school for extra help, and that the timing of the after-school assistance still allowed him to participate in practices for the swim team.

---

<sup>4</sup> Applied arts classes include Spanish, P.E., Health, Computer and Art class.

<sup>5</sup> The Student's May 28, 2019 progress report reveals that although the Student received a 0 in art due to his failure to turn in projects, he received grades of 2.8 in math, 2.8 in reading, 2.7 in social studies, 2.0 in P.E and 3.0 in science.

24. On May 6, 2019, the Student's IEP team re-convened team and approved a Behavior Support Plan that focused on "disruptive (blurring) behavior, difficulty starting tasks, and refusing to complete assigned tasks. The parties also reached an agreement as to future eligibility for sports participation. Pursuant to the agreement, the Student will not be barred from sports participation due to incomplete work caused by his attention disability. In contrast, the Student could become ineligible for sports if he is failing a class due to incomplete work caused by work refusal, in which case the school would work with the Student and his parents to develop a plan for catching up on missed work.

### **DETERMINATIONS**

1. Failure to prepare an IEP that is reasonably calculated to enable students to make progress in light of their circumstances in violation of MUSER IX(3)(A) and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988; *RE-1*, 2017 WL 1066260 (Mar. 22, 2017).
2. Failure to ensure that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;
3. Failure to ensure that a continuum of alternative placements is available to meet the Student's educational needs in violation of MUSER §X.2.B; and
4. Failure to fully and adequately implement the Student's IEP in violation of MUSER §IX.3.B(3).

### **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.J.(4) provides that one of the Major IEP Team Responsibilities is to develop or revise an Individualized Education Program as described in IX to provide each identified child with a disability a free appropriate public education. MUSER §IX.3.C provides in relevant part:

(1) In general.--In developing each child's IEP, the IEP Team, subject to subparagraph (3), must consider:

- (c) The results of the initial evaluation or most recent evaluation of the child; and
- (d) The academic, developmental, and functional needs of the child.

The First Circuit Court of Appeals has declared that "the IDEA entitles qualifying children to services that target 'all of [their] special needs,' whether they be academic, physical, emotional, or social." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1<sup>st</sup> Cir. 1993) "Educational performance in Maine is more than just academics." *Mr. and Mrs. I v. Maine*

School Administrative District No. 55, U.S. Court of Appeals, First Circuit 06-1368 06-1422 107 LRP 11344, March 5, 2007.

The Supreme Court recently held that educational programming must be “appropriately ambitious in light of a student’s circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Andrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017).

In Roland M. v. Concord Sch. Comm., 910 F.2d 983, 989 (1<sup>st</sup> Cir. 1990), the First Circuit Court held:

Congress indubitably desired “effective results” and “demonstrable improvement” for the Act’s beneficiaries. *Burlington II*, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficiency of educators’ policy choices...The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, “related services,” 20 U.S.C. § 1401(17), are required to address a Student’s needs. *Irving Independent School Dist. V. Tatro*, 468 U.S. 883, 889-90 (1984); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir.), cert. denied, 464 U.S. 864 (1983).

Among the related services which must be included as integral parts of an appropriate education are “such development, corrective, and other supportive services (including psychological services . . . and counseling services) as may be required to assist a handicapped child to benefit from special education.” 20 U.S.C. § 1401(17).

MUSER §VI.2.I provides that the SAU has ultimate responsibility to ensure that the child’s placement is in the least restrictive educational placement. MUSER §X.2.B further defines the criteria for the determination of the Least Restrictive Environment and provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services.

[20 USC 1412(a)(5) and 34 CFR 300.114]

MUSER §IX.3.B(3) provides in relevant part as follows:

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30

days after the IEP Team's initial identification of the child as a child with a disability in need of special education and supportive services... If a school unit is unable to hire or contract with the professional staff necessary to implement a child's Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options.

In this case, an IEP was developed for the Student with a combination of specially-designed instruction in language arts and math and a variety of supplemental aids, services and modifications. Under his IEP, the Student was with his non-disabled peers approximately 58% of the time. Although not identified in any of the Student's IEPs as an accommodation or support, the Student participated on the school swim team during the 2018-2019 school year.<sup>6</sup> The Student's teachers were consistent in reporting that overall they have seen growth in the Student's academic and social skills during the 2018-2019 school year, except for missing or being unprepared for several "summative" projects which significantly impacted his grades, especially during the second and third quarters of his seventh grade year.<sup>7</sup>

When concerns developed with regard to the Student's school performance during the second and third quarters of his seventh-grade year, he was at risk of being disqualified from participation on the school swim team according to the School's athletic eligibility policy. Mr. Patin, the school principal, contacted the Parent and made an arrangement that the Student could

---

<sup>6</sup> Although not applicable in the present case since the Student's swim team participation was not part of his IEP, a school district may be required to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. 34 CFR § 300.107 provides as follows:

(a) Each public agency must take steps, including the provision of supplementary aids and services *determined appropriate and necessary by the child's IEP Team*, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available. (emphasis added)

*See also, Socorro Independent School District*, Texas State Educational Agency, 36 IDELR 180, February 4, 2002, noting that the participation of a student with a disability in nonacademic services and extracurricular activities is generally not a FAPE issue under the IDEA unless the IEP team agrees the student needs such services as a part of his or her program. *See also, Wyoming City Schools* Ohio State Educational Agency 57 IDELR 85, March 31, 2011.

<sup>7</sup> The District's progress/grading system identifies formative progress notes, which identify progress in day to day areas like homework and class participation, and summative progress, which identifies progress or grades with respect to large projects or tests that have a greater weight in overall grading/progress.

practice and compete for an additional two weeks to bring up his grades. Mr. Patin and the Student's teachers offered to help the Student after school.<sup>8</sup>

When the Student's grades didn't improve following the two-week period, the District disqualified him from the swim team under the athletic eligibility policy on March 13, 2019.

The IEP Team discussed the Student's academic and sports participation concerns at the Student's March 19, 2019 IEP meeting, even though the Parent did not file a formal appeal to the Principal as allowed under the eligibility policy. Furthermore, the District addressed these concerns even though there was conflicting information as to whether the Student's work refusal issues were related to his disability.<sup>9</sup>

The Student's IEP team nonetheless made substantive additions to the Student's IEP, including behavioral consultation services, additional goals focused on organization, additional social work services and additional direct instruction in executive functioning, planning and organization.

At March 19, 2019 meeting, the Student's IEP team also determined that an accommodation would be made in the Student's grading so that scores of 2.0 or higher in content classes will be determined to be sufficient for sports eligibility. In addition, it added an accommodation that applied arts classes would be PASS/FAIL through 8th grade and will not adversely impact the Student's eligibility to access extra-curricular activities, including sports.<sup>10</sup>

In short, even though the Student's participation in extracurricular sports was not required for him to receive a FAPE, the District responded to the Student's work refusal and school performance concerns with timely modifications to his IEP specific to his work refusal and planning issues. Additionally, the Student's team revised his grading structure in order to create a pathway for the Student to become eligible to compete on the swim team.<sup>11</sup>

---

<sup>8</sup> The District's response to the Student's potential disqualification is consistent with its athletic eligibility policy, which provides in relevant part that all students placed on academic probation will be required to *develop a plan* with appropriate teachers, coaches, counselors, administration, parents or guardians.

<sup>9</sup> The Student's teachers, Ben Williamson, Erin Beal and Jill MacDonald all reported that the Student's grades suffered as a result of failing to turn in projects in content areas where the Student had demonstrated competence. All three teachers also uniformly stated that the Student told them that the Student's father "would take care of" any issues arising from his poor school performance.

<sup>10</sup> On May 6, 2019, the IEP team re-convened and approved a Behavior Support Plan for the Student which focused on disruptive (blurting) behavior, difficulty starting tasks, and refusing to complete assigned tasks. On May 6, 2019 the District and the Parents also reached an agreement that the Student would not be barred from sports participation due to incomplete work caused by his attention disability, although he could become ineligible for sports if he is failing a class due to incomplete work caused by work refusal.

<sup>11</sup> It is noteworthy that the IEP team did not simply give the Student a "free pass" to participate in extracurricular sports, but rather maintained some "supported incentives" to help motivate him to focus on his academic responsibilities. It appears from the record that the Parents supported this concept, as the Student's mother stated at

Accordingly, there is no evidence that the District denied the Student a FAPE due to its application of its athletic eligibility policy.<sup>12</sup>

**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. As the investigation did not find that the District violated MUSER or the IDEA with regard to applying the District's Athletic/Co-Curricular Eligibility Policy to the Student, no additional files relating to other children were reviewed.

---

the April 2018 IEP team meeting that the Student's success in keeping his grades up was due in part to the athletic eligibility policy.

<sup>12</sup> The Parent's claim that the District requires students impacted by this policy to stay after school to bring their grades up to passing which further restricts affected students from participating in extracurricular activities is without merit. While the District offered the Student extra assistance after school, it did not require that he accept this assistance in order to remain on the team or participate in competitions. Furthermore, there is no evidence that the Student missed practices as a result of the two times that he stayed after school for extra help. Witnesses confirmed that the timing of the after-school assistance still allowed him to participate in swim team practices.