

Parent v. RSU #1
Complaint 19.108C
Complaint Investigator: Jeannette Sedgwick
June 28, 2019

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on May 8, 2019. The complaint investigator reviewed all documents, information, and responses from the parties. On June 17, 2019, the parent was interviewed and on June 18, 2019, the following District staff were interviewed: The District's special education director, the Student's case manager and special education teacher, and the principal of the school where the Student attends. The investigation covers the time period from May 8, 2018 - the present.

FACTUAL FINDINGS

1. The Student, who is eight years old, attends the second grade in the District. He qualifies for special education and related services with the qualifying disability of emotional disturbance based on diagnoses of Posttraumatic Stress Disorder and Child Physical Abuse.
2. The Student has experienced significant trauma in his life. District staff understand the parents' requests to use trauma-informed practices, such as not restraining and secluding the Student, and have worked with the parent to address the Student's needs while he is in an emotional crisis.
3. The Student's IEP in place in the beginning of the 2018-2019 school year provided specially designed instruction in social skills, OT and social work for 30 minutes/twice weekly and transportation. Goals on the IEP included four social skills goals and three occupational therapy goals specific to the needs listed in the Student's evaluations. The Student was receiving educational services both in the elementary school's special education self-contained classroom (called the "Hive") and the second grade general education class.
4. From September 2018 through November 2018, behavioral data collected by the District shows the Student's two target behaviors of not following directions and not engaging in behaviors that could cause harm to self or others, had improved in accordance with his goals.

5. The teacher of the behavioral classroom explained that she teaches coping skills consistently throughout the day. Personnel also use many behavioral strategies in the classroom, such as switching preferred staff and non-preferred staff, offering quiet spaces, and creating individual plans for each child in the room. For instance, the special education teacher utilized apple juice and time in a beanbag chair as a calming strategy for the Student, strategies that worked well for a good portion of the fall of 2018.
6. The IEP Team met for the Student's annual review on November 8, 2018.¹ The service delivery grid on the Student's IEP specifies direct instruction in emotional regulation by a special educator for 15 minutes/twice a day, SDI in social skills for 20 minutes/twice each week; OT for 30 minutes/twice a week, 30 minutes of social work /once a week; and transportation. On this IEP, the Student is reported to be not compliant with engaging in academic tasks or transition between activities, lying on the floor, and throwing materials on the floor for an average of 20% of the school day. The November IEP includes goals for behavior and safety, occupational therapy, and improving appropriate peer interaction skills. The adult support that was listed on the previous IEP was not included on this IEP.² The IEP team agreed at this meeting that the District would provide a psychological evaluation and create a positive behavior support plan for the Student.
7. Beginning in approximately early December 2018, the Student experienced a slight increase in unsafe behaviors and District staff became concerned about safety issues such as running around the classroom and hitting staff. The District gathered data on the time of day the Student was having the most difficulties.³ On the whole, the data collected showed that the Student's successful behavior in the areas charted (safety and compliance) had diminished in the month of December.
8. In December 2018, the District conducted a psychological evaluation of the Student as part of his re-evaluation. The evaluator observed the Student and interviewed District staff as part of the evaluation. The WISC-V showed average to high average ranges of functioning in most areas. The results from the BASC-3 demonstrated that the Student scored in the clinically significant range for aggression and in the moderately significant range of anxiety and adaptability.

¹ The IEP was sent to the parent on December 18, 2018, beyond the timeline for providing written notice.

² The District stated that it had provided the adult support through programming even though the IEP did not have it listed as an accommodation or related service.

³ The District found that mornings from approximately 9-11 a.m. the Student experienced more escalations than at other times and used this rationale in its subsequent decisions.

9. In January 2019, after returning from vacation, the Student exhibited some troubling behaviors and was restrained for safety reasons on January 2, January 16, January 22, and February 8, 2019.⁴
10. On January 18, 2019, the IEP Team met to discuss the results of the psychological evaluation, which showed that the Student's scores showed clinically significant range in aggression. The evaluation stated that stability of scheduling was very important for the Student. This recommendation had also been noted in the Student's previous evaluations. During this meeting, the OT provider stated that she did not see any troublesome behaviors in her 1:1 OT sessions and the special education director stated that the Student feels safer in the general education classroom instead of the behavioral classroom. The Student's special education teacher discussed strategies she had used, such as quick reinforcement for work completion, breaking up reading time, giving extra support, and working through escalations. The Team also discussed staff being alert for cues that people could look for prior to the Student reaching a crisis.
11. At the January 2019 meeting, the Team discussed the Student beginning an abbreviated day educational programming. Written notice states that the Student "would attend school on half days to help improve behavioral stability and compliance with his daily schedule".⁵ The Team agreed to meet in 20 days in accordance with MUSER. The IEP did not note the requirements for an abbreviated day programming listed in the special education regulations. The abbreviated day programming was at first provided in the mornings, but then switched to afternoons after a few weeks. Ultimately, the parent requested morning instruction because she had difficulties transporting the Student certain times of the day.
12. Transportation for the Student was not implemented consistently in accordance with his IEP. The District stated that it offered transportation and the parent reported that the driver refused to pick up the Student. The parent provided information about why she

⁴ Restraint reports show that restraints occurred when the Student, after being offered alternatives and calming activities, became unsafe to himself and others. When escalated, the Student punched and slapped staff, threw chairs, and climbed on top of tables. Aggression was often directed at the Student's special education teacher. After these outbursts, the Student would often sleep for an hour or two and then take the bus home. The parent stated that she believes the Student's escalations were triggered by restraint protocols used by the District. District staff stated that the Student's climbing, running, and injuring others resulted in restraints only as a last resort and after other interventions had been attempted.

⁵ Written notice from the January 2019 IEP Team meeting states that the Student had "as significant decline in behavioral stability. He has been experiencing crisis level behaviors, with significant aggression towards staff on almost a daily basis since returning from the holiday break."

believes the driver refused to pick up the Student for school.⁶ The parties disagree about what has been offered and provided, especially during the second half of the school year.

13. On March 6, 2019, the IEP Team met for a program review and again determined that half days continued to be appropriate as a “*behavioral intervention*”⁷ (italics added). The Student’s IEP Team referred the Student for an FBA and the Student’s “crisis plan” was amended at this time. The plan details several interventions for target behaviors. The plan also included a provision for the parent to pick up the Student when the crisis lasted a certain amount of time.
14. In March 2019, the parent stated that the Student was secluded and she saw District staff holding the door to the seclusion room closed from the outside with no adult inside the room. She stated the District administration viewed the Student’s actions as “behaviors” and also suggested that police intervene, rather than come up with solutions to support the Student when he was in crisis. The District, on the other hand, stated that the District had utilized many strategies in working with the Student, and that personnel had been teaching him coping strategies and other ways to engage in the classroom. During this time, the Student was still engaging in abbreviated day programming.
15. An FBA on the Student was completed on April 1, 2019. The IEP Team met and determined that the Student would attend his half-day programming in the mornings for three times each week and would attend full days twice each week. The provision of ESY 180 minutes a day, 4 days/week for four weeks was also added to the IEP.
16. The parent assisted the Student with his classwork while the Student was at home on abbreviated day programming from January 2019- May 2019.
17. The District referred the Student to a possible out-of-District placement on April 12, 2019. The Student was not accepted to that program.
18. In May 2018, the Student was still not attending school full-time. On May 20, 2019, the IEP Team met again. Consent to send the Student’s referral information to four other out-of-district programs was signed on that day. The District offered a tutor to begin working with the Student on May 28, 2019.⁸ The District discussed other potential placements

⁶ Those concerns are being addressed in a different forum.

⁷ The team discussed alternating the half day programming to the mornings and afternoons based on the Student’s current rates of behavioral outbursts (the afternoon was the time of more compliance).

⁸ Written notice for this meeting states that the District had been unable to find a tutor prior to this meeting.

with the parent. The District did not provide information about why the Student did not continue his educational programming in school while awaiting acceptance at an out-of-District placement. On June 7, 2019, the parent revoked consent for certain referrals.

19. The Student's attendance record shows the Student had 68 excused absences from September 2018 to May 2019.⁹
20. The parent believes that the behavioral health professional (BHP) that she had requested earlier in the year would have eliminated the need for placing the Student out of District. She also stated that she believes that the restraints on the Student added to the Student's trauma. The parent believes the Student's emotional disability and trauma could have been appropriately managed at the District level in the substantially separate setting with appropriate supports.
21. The Student's IEP specifies ESY for the summer of 2019. The special education director stated that because the Student has been referred to an out of district placement, that the Student would not be attending the District's ESY program.
22. On June 12, 2019, the IEP Team was to meet to discuss day educational placement options for the Student. This meeting did not occur.

DETERMINATIONS

The complainant alleged the following:

The District has not provided FAPE to the Student because of the following:

1. Supports on the Student's IEP, specifically, a BHP and educational technician during recess, were removed from Student's IEP during the 2018-2019 school year despite the Student requiring those supports for access to the general curriculum. MUSER I; MUSER II(13); MUSER IX(3)(A)(1)(d). **NON-COMPLIANCE FOUND.**
2. While at school in the past year, the Student was not able to access the general education curriculum and make progress towards the goals on his IEP because the Team did not use positive behavioral interventions and supports and other strategies to address the Student's behavioral needs. MUSER I, MUSER II(13); MUSER IX(3)(C)(2)(a). **NON-COMPLIANCE FOUND.**

⁹ The number of the Student's excused absences was greater by the time the 2018-2019 school year ended.

Regulations state that the IEP Team shall: (a) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.¹⁰ Additionally, IEPs must contain information about special education and related services to advance appropriately toward attaining the annual goals.

The Student's IEP Team considered and District staff implemented several positive behavioral interventions for the Student during the 2018-2019 school year. For instance, staff utilized all of the strategies of the behavioral classroom, such as using points, motivators, and rest times. Behavioral supports included a visual schedule, a token board allowing him to earn preferred items or activities, adult support, a "calming basket", and scheduled breaks. The District stated that the adult support that had appeared on the IEP prior to the Student's annual review was in fact still provided to the Student during lunch, recess, and writing class, although that service was not listed on the IEP.

While the Student was attending school, he was supported by very specific and individualized strategies and was attended to by his teacher and other adult support. Provision of a behavioral health professional may have improved the Student's educational experience; however, the teacher's and principal's actions consistently maintained a safe and comfortable place for the Student. The District's use of behavioral strategies up until January 2018 appeared to be working for this Student while he was in school.

The District conducted its FBA while the Student was on an abbreviated day program in March 2019.¹¹ Some of the observations from the evaluator were that the Student's most problematic interfering behavior as task refusal. The highest rates of "interfering behaviors" occurred during literacy or reading time. The Student was observed to remark, "I hate reading." The report also states, that "data collected suggests [the Student] is most likely to be noncompliant in response to a direction given, during literacy." This data suggests that the FBA, which was a snapshot of behaviors only during an abbreviated day, demonstrates that the Student may need specific instruction to address literacy skills. Documentation suggests that the Student could have benefitted from an FBA or possibly a different educational setting, prior to April 2018.

As discussed below, during the second half of the 2018-2019 school year, the District improperly used abbreviated day programming as a behavioral intervention. When the Student's behavior became "intense," as described by the special education teacher, the District restricted the Student's access to educational programming.¹² The evaluator who conducted the FBA wrote

¹⁰ MUSER IX(3)(C)(2)(a).

¹¹ In March, 2019, the District also created a "Crisis Plan" that if the Student's crisis went on for 30 minutes, the parent would pick the child up from school.

¹² The Student's running away from classrooms presented a significant safety concern for District staff. An example of that was an incident on September 14, 2018, when the Student left his classroom without

about the IEP Team’s decision for abbreviated day programming: “It was decided Abe's behavior *did not warrant a full day program* due to the fact that he continued to exhibit significant interfering behaviors during the reduced schedule (italics added). This statement demonstrates the view that the Student must “earn” his education, rather than the view that the District must educate all children even when behavioral interventions appear ineffective.¹³

Ultimately, the lack of a full day of educational programming and loss of the behavioral strategies specified in the Student’s IEP resulted in the Student not being able to access the curriculum and make progress in his goals.¹⁴ When successful support strategies no longer worked, the District sent the Student home rather than look to other options, such as beginning a referral process to a different educational setting.

3. The District has not implemented the specially designed instruction and related services on the Student’s IEP since January 2019. MUSER I, MUSER II(13); MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

Documentation and information gained in interviews demonstrates that the Student did not receive SDI in social skills for 20 minutes/twice each week; OT for 30 minutes/twice a week, 30 minutes of social work /once a week as specified on the Student’s IEPs while the Student was on abbreviated day programming. Emails between the District and the parent show that while the Student was in school, the Student attended his second grade classroom and completed some academic work, but that work was impeded by task refusal and some unsafe behaviors.

The parent stated that she worked diligently to continue educational services at home and stated that she believes the Student’s work does not compare to the types and quantity of education the Student would have received in the second grade classroom had he been allowed to attend school. The District stated that the Student was receiving academic work to be completed at home and that the work corresponded with second grade work occurring in the classroom. Given the amount of time the Student missed school because of improper abbreviated day programming, the District did not provide specially designed instruction and related services. Additionally, the District stated that it did not intend to provide ESY at the District.

asking and when the teacher sat with him in the back of the behavioral room, the Student was screaming at the teacher that the teacher should get out, that she had locked him in, and that the teacher should leave him alone. An email from the District to the parent explains that the teacher, who had not locked the Student in a room, utilized de-escalation practices such as reading books and scheduled a break for him each day at that time. The special education teacher worked closely with the Student and family.

¹³ *Andrew F. v. Douglas County Sch. Dist.*, 137 S.Ct. 998, 1002 (2007); *Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Plans*, 68 IDELR 76 (August 1, 2016).

¹⁴ The Department notes that the District collected a good deal of data regarding the Student’s behaviors in order to appropriately address those behaviors. However, it appears that the District used data not to support any increase in services.

4. While the Student was out of school, he did not receive educational materials that allowed him to progress towards the goals on the IEP or in the general curriculum. MUSER I, MUSER II(13); MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

The goals on the Student's IEPs included increasing compliance with adult directives, demonstrating safe behaviors, improving gross motor core strength and motor skills, and increase positive social skills with peers and adults. When the IEP Team determined abbreviated day programming was necessary, the Team did not discuss how the Student would meet the system of learning results and receive full access to the general curriculum and services on the IEP, as determined by the Student's need. The time in school was not sufficient for the Student to progress towards the goals on the IEP and tutoring was not offered until May 28, 2019. The District did not submit documentation showing progress in goals during the 2018-2019 school year.

Additionally, the IEP Team agreed upon a different educational placement of day treatment program in March 2019. The Team determined that tutoring would be available.¹⁵ However, in this case, tutoring was not provided.

5. The Student did not receive transportation for educational programming from January 2019- the present, which did not allow him to access to the general curriculum. MUSER I, MUSER II(13); MUSER IX(3)(C)(2)(a). **NO FINDING.**

Documentation submitted for this investigation and the information gained through interviews demonstrates that for most of the time the Student was attending a full-day program (September 2018 – December 2018), the Student received transportation, and when there was an incident with the bus driver, the District offered other transportation. The District contends that the parent rejected that transportation in the fall of 2018. The issues and allegations regarding transportation in the fall of 2018 are being resolved in a different forum.

Divergent points of view also exist regarding transportation during abbreviated day programming from January through the end of the 2018-2019 school year. The Student's IEPs call for transportation and the parent stated that she had to transport the Student to and from school while he was on abbreviated day programming. The District has provided email documentation that the parent was utilizing transportation some of the time in the spring of 2019. In all, there is little documentation supporting compliance or non-compliance regarding transportation throughout the school year. There is no finding regarding this allegation.

¹⁵ Tutoring can be used in conjunction with abbreviated school day. MUSER X(2)(A)(4).

6. Half days of education that were provided to the Student (through an abbreviated day schedule and sending the student home) were not adequate to allow him to gain access to the general curriculum or progress in the goals on his IEP. MUSER VI(2)(J); MUSER VI(2)(L). **NON-COMPLIANCE FOUND.**

Maine regulations require that children with disabilities are expected to attend school the equivalent amount of time each day as children without disabilities in the same school and/or school program.¹⁶ An abbreviated school day can be initiated only by the IEP Team for one of two reasons: 1) based upon the child's individual educational needs or 2) based upon the child's individual medical needs.¹⁷

If the team considers that an abbreviated school day is appropriate and necessary, the IEP Team must document that it has done the following:

- (a) Address how the child will meet the system of learning results (which may include a core of standards in English language arts and mathematics for kindergarten through grade 12 established in common with other states), and receive full access to the general curriculum and services on the IEP, as determined by the individual child's need;
- (b) Address how the child will participate in local and statewide assessments;
- (c) Develop a revised IEP with a re-entry plan for the child to return to a full-time school day within a reasonable period of time, no longer than 45 calendar days; and,
- (d) Delineate in the revised IEP with the re-entry plan the actions the SAU will take to assist the child to participate in a full day of school; and
- (e) Document in the Written Notice the basis for the determination of an abbreviated school day and how the determination is based on the individual needs of the child.

The Student's goals on his IEPs from January 2019 to the end of the school year include specially designed instruction in emotional regulation 15 minutes/twice a day, specially designed instruction in social skills for 20 minutes/twice each week; OT for 30 minutes/twice each week, and social work services 30 minutes/once a week.

¹⁶ MUSER VI(2)(L).

¹⁷ MUSER VI(2)(J).

In this case, the IEP Team created a re-entry plan for the Student to return to school full time for some of the week; with abbreviated day scheduling for part of the week. The IEP Team met regularly to discuss the Student's needs during the second half of the 2018-2019 school year. The IEPs and written notices, however, do not show all the requisite information listed in the regulations.

The time the Student was placed on abbreviated day programming on January 18, 2019 until the end of the school year was approximately double the maximum time specified in the regulations, approximately 90 days. This number alone shows non-compliance with regulation. Importantly, the District used abbreviated day scheduling as a behavioral intervention, as evidenced by its own documentation. The provision of ESY is on the Student's current IEP and the District informed the investigator that the Student should be taking part in out-of-District ESY programs.¹⁸ In total, the District has not provided education such that the Student could make progress on his goals.

CORECTIVE ACTION THAT MUST BE COMPLETED BY THE DISTRICT

1. In order to compensate the Student for lack of educational opportunity during the five months the Student was improperly on abbreviated day programming, the District must immediately enroll the Student in the District's 2019 ESY program. A statement of assurances that the District will provide ESY must be given to the Department is due by **July 15, 2019**.
2. The Dike-Newell Elementary School administration and the Special Education Director must receive training by a special education attorney or a member of the Department about the following regulations by **September 1, 2019**:
 - MUSER IX(3)(C)(2)(a)
 - MUSER IX(3)(A)(1)(d).
 - MUSER IX(3)(B)(3).
 - MUSER X(2)(A)(4).
 - MUSER VI(2)(J).
 - MUSER VI(2)(L).
3. The District must provide compensatory educational services to the Student in core academic subjects of English/Language Arts and mathematics for 10 hours each subject in addition to the services on the Student's IEP. Given the Student's low tolerance for academics based on his disability of emotional disturbance, the District must provide the

¹⁸ As of May 2018, the District has offered to refer the Student and has not received consent to send some referral packets. The District's perspective is that because it has offered an out-of-District ESY, it must not necessarily provide in-District ESY because its offer to send referrals was rejected by the parent.

Student with programming suited to his needs and must supply transportation to that programming. The District must submit that plan to the Department **by July 15, 2019**.

4. As a member of the IEP Team, the parent must consider information about all educational programming that has been proposed by the District and the reasons for those proposals based in the documentation during this investigation. If a disagreement about future placement continues beyond July 31, 2019, the parties may wish to proceed to a due process hearing to determine appropriate placement.