

Parent v. MSAD 60
Complaint 19.115C
Complaint Investigator: Jeannette Sedgwick
July 26, 2019

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on May 28, 2019. The complaint investigator reviewed all documents, information, and responses from the parties. On June 27, 2019, the investigator conducted interviews with the parent and the District's special education director. On July 1, 2019, the investigator conducted interviews with the Student's teacher, and on July 10, 2019, interviewed the middle school's social worker.

The investigation covers the time period from May 28, 2018 - the present.

FACTUAL FINDINGS

1. The Student is twelve years old and was in the District's sixth grade during the 2018-2019 school year. She qualifies for special education and related services with the qualifying disability of emotional disturbance based on diagnoses of post-traumatic stress disorder, general anxiety disorder, autism spectrum disorder, and attention deficit hyperactivity disorder. The complainant is the Student's legal guardian and grandparent.
2. The Student, who has been in the District since first grade, receives most of her educational instruction in the general education setting.
3. In 2016, the Student performed below average in all but one of the Key Math subtests. A WISC-V administered in April 2016 showed average skills in all but Working Memory Index, and the Vineland-2, also administered in April 2016, showed a moderately low adaptive Behavior Composite score. The WIAT-III administered in April 2016 demonstrated the Student's composite total achievement score was below average. The Student could not tell time to the nearest minute more than 50 percent of the time, and could not count money to \$20 with 50% accuracy. The Student scored in the 57th percentile and 37th percentile in the STAR Reading and Mathematics evaluations in November 2017.
4. At the Student's annual review in May 2018, the IEP Team decided to change and increase accommodations and services regarding the Student's emotional/behavioral needs. The present levels of functional performance section of the resulting IEP indicated progress in the skill of processing appropriate and inappropriate choices. The Student's needs included gaining independence with calming strategies and using appropriate communication. The IEP Team discussed the Student's statements about harming herself and others as ways of communicating her anger with other people.

5. The Service Delivery Grid on the May 2018 IEP, which was in effect in the beginning of the Student's sixth grade year, includes specially designed instruction in mathematics four times/week. Related services on this IEP included the following:
 - Speech/language services 1 hour/month
 - Occupational Therapy 180 minutes/month
 - Social work services 8 hours/annually
 - Supervision by a BHP-trained educational technician

Behavioral supports were provided through a behavioral plan and supports provided by the social worker.

6. Prior to school starting in the fall of 2018, District staff arranged the Student's transition to the middle school to include the social worker meeting the Student, staff conducting transition meetings, and middle school teachers establishing a lunch group for the Student when she entered the sixth grade.
7. District staff in the middle school stated that staff is aware of the Student's mental health issues. Staff stated that while those issues sometimes interfere with peer interactions, the Student performs well in structured academic time. The Student's sixth-grade special education teacher and coordinator reported that the Student was attentive in class and always worked well during classroom time. While in sixth grade, the Student was working below grade level in mathematics, received specially designed instruction in that subject, and was at grade level in all other areas.
8. During the 2018-2019 school year, the Student made statements such as "I want to kill myself," and has expressed the intent to harm others in the school. These statements occurred most particularly when peer interactions were not going well, such as when the Student's romantic interests were not reciprocated. The District has responded to the Student's statements of harming herself or others by keeping close communication with the Student's guardian, arranging for the guidance counselor and the school's social worker to frequently check on the Student, and creating multiple check-ins daily in order to ascertain the Student's level of anxiety.
9. The guardian stated that she believed the increase in the Student's mental health issues increased in the sixth grade when the Student transitioned to middle school.¹ The guardian believes that negative interactions with peers contributed to the Student's mental health status during this school year. The guardian stated that the Student had been bullied in the fall of 2018 and offered that the Student's friends stated that they wanted to keep their distance from the Student.

¹ The guardian expressed that the Student's fifth grade teacher had offered the Student extra accommodations that did not appear on the IEP, and that the Student had done so well in the previous year that she had won the "Most Improved Student" award.

10. The IEP Team met on November 5, 2018. At this meeting, the Team reviewed safety protocols because the guardian was concerned the Student and others were not safe in school based on the Student's remarks to the guardian.
11. Staff have instituted teaching and coping strategies to assist the Student in interactions with peers. Documentation supports this: In an email from the Student's social worker to the guardian, the social worker explained one such situation when the Student was discussing her anger in inappropriate terms after the Student interpreted a social situation with her peers. The social worker and other District staff used the opportunity to encourage the Student to verbalize her feelings in different ways.
12. The Student had unexcused absences for approximately five days at the end of October 2018 and attended school for most of November 2018.
13. The Student was psychiatrically hospitalized from December 5, 2018 to December 13, 2018 based on an incident in school when she threatened to harm other students.² When she was discharged from the hospital, the Student's medical doctor wrote that the Student was no longer expressing thoughts of harming others.
14. The IEP Team met on December 2018 to review the Student's needs after being released from the hospital. The IEP Team created a safety plan that addressed protocols when the Student exhibited threatening or unsafe behavior.³
15. The guardian removed the Student from school on December 14, 2018. The guardian continued to keep the Student out of school except for a few days in the next months. The guardian cited safety concerns as the reasons she kept the Student from returning to school and expressed her genuine concern that the Student would harm herself or her classmates.
16. The IEP Team created a new IEP for the Student in January 2019 that contained the following:
 - Description of present levels of academic performance in math as approximately 1-2 grades below current grade level.
 - 10 measurable, specific goals in math computation.
 - Description of present levels of functional/developmental performance as seeking and accepting support when needed and difficulties using positive coping strategies.
 - 3 measurable, specific goals in social pragmatics.
 - Specially designed instruction 55 minutes/4 times each week.

² The District indicated that this incident occurred when there was an unrequited romantic interest with a peer and when there were social interactions during lunch involving sitting with peers.

³ Protocols included the Student being monitored during lunch and recess, with an educational technician and social worker checking in during and after those unstructured times, as well as at the beginning and end of each school day. The plan also included, if the Student made a suicidal or homicidal statement, immediate communication with the guardian and communication with the Student's external case manager.

- 17 hours annually of social work services.
 - 180 minutes/month of speech and language services.
17. The Student's IEP Team met again on February 25, 2019 to review an assessment and revise the Student's safety plan. The IEP was modified to include multiple accommodations, such as carrying her cell phone and the addition of more frequent motor and sensory breaks. The Team updated the safety plan to include more frequent check-ins with adults. At this meeting, the parent stated that she would allow the Student to return to school once the guardian felt the safety plan was appropriate. After the District sent home a truancy letter, the Student returned to school beginning on March 14, 2019.
 18. When the Student returned to school in March 2019, the District recorded the Student's five-times-a day check-ins as "thumbs up" or "thumbs down" based on the Student's feedback. All but two of these check-ins were "thumbs up," and where they were not, the District involved staff who could discuss the situation with the Student. The Student attended school for approximately two weeks in March.
 19. The guardian removed the Student from school on March 26, 2018 because of a school-based incident.⁴ The guardian expressed her concerns about supervision and requested a certified BHP as an educational technician to supervise the Student.
 20. The Student returned to school on March 29, 2019. The IEP Team met again on April 1, 2019 for a program review and discussion of transition back to school. The IEP Team discussed revising the safety plan to include fewer check-ins because the Student had expressed frustration with adults supervising her throughout the school day.
 21. The Student attended school for most of April 2019 and the beginning of May 2019. The Student served an in-school suspension on May 8-10, 2019 for threatening peers.⁵ The Team met again for a program review on June 3, 2019 at the guardian's request. At this meeting, the parent requested a more restrictive educational placement. District staff reported that although the Student requires prompts to see the social worker in order to regulate her emotions, things were generally going well. The District stated that the established interventions are working well for the Student because they teach her about social skills and peer interactions.
 22. In all, the Student did not attend school for over 80 days during the 2018-2019 school year. This number includes both excused and unexcused absences.
 23. The guardian stated that she would not send the Student to ESY this summer even though ESY is on the Student's IEP. The District believes the Student would benefit, as she has in the past. The IEP Team will meet in the beginning of the 2019-2020 school year to discuss a recently-conducted neuropsychological evaluation of the Student.

⁴ On March 26, 2019, the Student pushed a peer in the classroom and later stated that she "tapped him." The guardian described this incident as an "assault" on a peer and was very concerned about the Student harming others.

⁵ This incident occurred after a relationship between the Student and a romantic interest ended.

Other relevant facts are included in the discussion below.

DETERMINATIONS

The complainant alleged the following:

1. The District has not considered the use of positive behavioral interventions for the Student, whose behavior impedes the child's learning or that of others. MUSER IX(3)(C)(2). **COMPLIANCE FOUND.**

When developing an IEP for a child with a disability, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior In the case of a child whose behavior impedes the child's learning or that of others.⁶

The IEPs in place during the 2018-2019 school year demonstrate that the IEP Team considered the use of positive behavioral interventions for the Student. The IEPs contained accommodations that were very specific to the Student's behavioral needs.

When interviewed, the Student's teacher stated that when the Student entered middle school, she had met or partially met most of her behavioral goals so that even while the teacher monitored her behavior, the Student acted appropriately towards others in the first half of the year and generally through the year. The social worker at the middle school worked closely with the Student during the transition into sixth grade and monitored her throughout the year with frequent check-ins, meetings, and provision of services on the IEP.

The Student's evaluation from January 2019 contained the following information: the Student experienced a crisis following an incident in December 2018 when she reacted to her perception that her peer group did not want to interact with her. The report stated that the Student may at times have difficulty identifying the emotions of others in their facial expressions and "may lack the ability to grasp their perspective... [resulting in] not accurately assess the motives and intentions of others." Recommendations included the District monitoring the Student's interactions with specific individuals, making support staff available to the Student when she is feeling that she has been teased, and searching her backpack daily upon entering school. Importantly, the evaluator also recommended that the Student "participate in supervised school activities so that she can increase her social skills and develop a greater sense of comfort in the school environment." The report ended with the suggestion that "school staff might consider developing goals for [the Student] that would include assisting her in acquiring social skills, building confidence and assisting her in assuming responsibility for her behavior."

After the IEP Team met to discuss the report, the IEP was amended to include services and the safety plan was updated. Establishing safety plans and protocols meant that the Student

⁶ MUSER IX(3)(C)(2). *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

could continue to interact with others in the school environment, just as the report recommended. The District continued to work with the Student on social skills, dealing with emotions, and positive peer interaction during speech and language sessions as well as through the social worker who saw the Student on a regular basis. According to District reports, the Student continued to make strides in her communication skills. The teacher reported that the Student engaged appropriately in the general education classes, worked well with her peers, and was up-to-date in her academic work.

The IEP Team continued to meet throughout the spring of 2019. By this point, the guardian was no longer as concerned with the Student's academics, which seemed to be going well, as she was with the Student's mental health issues. During the interview for this investigation, the guardian expressed that the Student's academic skills were not behind the skills of other students and that her main concern was adequate supervision of the Student at school. The guardian's perspective is that the Student's mental health does not make her safe to be unaccompanied or unsupervised at any time during the school day. The District, however, maintains that with the proper supports in place, the Student is able to manage her social pragmatics and can participate with her peers in the least restrictive environment.⁷ In all, the IEP Team considered and implemented multiple behavioral strategies for the Student which were available during the 2018-2019 school year.

2. The Student's IEP is not sufficient to enable the Student to progress towards her goals and access the general education curriculum. Specifically, the complainant alleges that there are insufficient supports based on the Student's diagnoses of autism and emotional disability and that bullying has interfered with the Student's access to education. MUSER IX(3)(C). **COMPLIANCE FOUND.**

Special education and related services offered in an IEP amount to a FAPE if they are "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁸

The evaluation of the Student conducted in the winter of 2019 noted that the Student wanted to return to school so that she could have contact with a romantic interest, but that her

⁷ *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (citing *Polk v. Cent. Susquehanna Intermed. Unit 16*, 853 F.2d 171, 185 (3d Cir.1988) (progress must be reasonable with respect to the particular child's potential); *Contra M.K v. E.L. Haynes Pub. Charter Sch.*, 292 F. Supp. 3d 413, 420 (where student with history of multiple violent incidents resulting in serious bodily injury, court emphasize public safety).

⁸ *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *See C.D. v. Natick Pub. Sch. Dept.*, 924 F.3d 621, 629 (1st Cir. 2019) ("*Andrew F.* used terms like 'demanding,' 'challenging,' and 'ambitions' to define 'progress appropriate in light of the child's circumstances,' not to announce a separate dimension of the FAPE requirement").

guardian clearly indicated that she could not return to school until “various issues were resolved.” The guardian also removed the Student from school for long periods of time in the spring of 2019 based on the Student’s comments to her.

The documentation does not support allegations that the Student’s IEP was inadequate or that the Student experienced bullying such that access to her education was affected. Evaluations and other documentation shows that the Student may have difficulties interpreting social situations based on her disability of autism spectrum disorder. The guardian may have used the term bullying to characterize the Student’s perceptions of certain events; the Student experienced a crisis in December when her romantic feelings were not reciprocated and peer interactions became difficult. Comments about the Student could have been based on the Student’s disability or about her social interactions, but it is difficult to determine how those comments affected the Student’s overall well-being and performance in school based on the two or three times the Student acted inappropriately towards others. She continued to make academic progress while she was in school. The social worker stated that the Student, who was a priority for her, could generally interact with her peers and experienced only intermittent episodes where social and behavioral pragmatics became very difficult for her.

The IEPs in place during the 2018-2019 school year matched the Student’s needs. The goals on the May 2018 IEP, which was in effect at the beginning of the 2018-2019 school year, and the January 2019 IEP contained several very specific goals, as well as an increase in related services. Behavioral plans were written in response to current evaluations and the individualized needs of the Student following her hospitalizations and removals from school by her guardian. The District has created IEPs that were aligned with the Student’s academic, functional and behavioral needs. The IEP Team created an opportunity for an educational benefit, and the removal of the Student from school made it difficult for the Student to take full advantage of the specialized instruction and related services listed in the IEPs during the 2018-2019 school year.

3. The District did not provide written notice of its response to the request for a different placement on April 1, 2019. 34 CFR 503(a)(1). MUSER App. at 220.

NON-COMPLIANCE FOUND.

Districts must document when the IEP Team refuses to initiate or change the identification, evaluation, or educational placement of a child with a disability.⁹ The guardian requested a different educational setting in April 2019. The District had not understood the conversation about day treatment settings to be a request and did not note the conversation in the written notice. The District did not comply with regulation regarding this allegation.

⁹ 34 CFR 503(a)(1); MUSER App. at 220.

4. The District did not provide an educational placement appropriate to meet the Student's needs for special education and related services. MUSER X(2)(B).

COMPLIANCE FOUND.

The disagreement underlying this allegation is whether the Student can access her education through general education classes, specially designed instruction in mathematics, and behavioral supports, or whether she requires a more restrictive setting.

A child with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.¹⁰ The Student has been diagnosed with post-traumatic stress disorder, general anxiety disorder, autism spectrum disorder, and attention deficit hyperactivity. These adversely impact her ability to progress in the general education curriculum.¹¹ The guardian's concerns about perceived bullying and the Student's reactions to peer interactions provide the basis for her request for a more restrictive environment. The District believes the Student can be adequately supported and can progress in the District with the proper supports, such as an adult prompting her to understand when she requires time to process a social situation. District staff emphasized that the Student should not be restricted from her general education classes based on what could potentially happen. The social worker stated that when the Student is in school and getting the support she needs, "she shines."

Based on information gathered in this investigation, the District has articulated how the Student's IEPs are reasonably calculated to enable the Student to make progress given her emotional disability.¹² The Student's February IEP contains 10 measurable, specific goals for mathematics computation and social pragmatics, specially designed instruction for nearly an hour each week, and the related services of social work and speech and language, which focused on communication skills.

The Department notes that the District is legally obligated to monitor the Student's attendance for truancy. If the guardian continues to disagree about educational placement, the parties may wish to opt for mediation through the Department's dispute resolution systems to resolve the disagreement.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

By **September 13, 2019**, the District must send a memorandum to District staff who conduct IEP team meetings and write notices that states when the IEP Team refuses to

¹⁰ 34 CFR 300.116; MUSER X(II)(B).

¹¹ *Doe v. Cape Elizabeth Sch. Dep't*, 832 F. 3d 69, 85 and note 6 (D. Me. Apr. 4, 2019).

¹² MUSER X(2)(B); *Andrew F.*, 137 S. Ct. at 1000.

initiate or change the identification, evaluation, or educational placement of a child with a disability in accordance with 34 CFR 503(a)(1) and MUSER App. at 220. The District must provide a copy of that memorandum to the Department by the same date.