

Parent v. RSU/MSAD 61

Complaint 19.120C

Complaint Investigator: Jeannette Sedgwick

August 8, 2019

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on June 11, 2019. The complaint investigator reviewed all documents, information, and responses from the parties. On July 9, 2019, the investigator conducted interviews with the parent. On July 10, 2019, the investigator interviewed the school's principal and assistant principal, the District's special education director and the Student's social worker.

The investigation covers one year, from June 11, 2018 - the present.

FACTUAL FINDINGS

1. The Student attended the District's eighth grade from mid-September 2018 to the present. When she transferred into the District, she qualified for special education and related services with the disability of specific learning disability (SLD). At the end of the school year, the Student's IEP Team determined she qualified for special education and related services with the disability of OHI based on Social Anxiety Disorder and Separation Anxiety Disorder. The Student is described as highly engaging, thoughtful, funny, kind, and helpful with peers.
2. In the Student's previous school, the Student had a behavioral plan that incorporated strategies for staying in the classroom and utilizing approved places for the Student to calm herself when she became aggressive or upset.
3. The District implemented the former school's IEP and behavior plan when the Student entered the District. The Student received educational services with day-treatment level support. On October 17, 2018, the District held a transfer IEP meeting and amended the Student's IEP to increase the amount of time the Student spent with peers. Written notice for this meeting states that This IEP contained the following:
 - Specially designed instruction in ELA and mathematics 55 minutes for 5x/week, and in personal management in the special education setting for a little over 10 hours/week
 - Social work services 60 minutes/week
 - OT 30 minutes/week
 - Behavioral consult to the Student's teachers 30 minutes/month

- Adult support on a regular transportation vehicle with a bus behavior plan
 - Other aids and modifications
4. On December 4, 2018, the IEP Team met for a program review. The Student's IEP Team determined that the Student had made significant progress and could access some of her educational programming in a less restrictive setting. District staff at the meeting stated that the Student was working at or near grade level. The Student was showing improved ability in being able to wait for support advocate for her needs. The parent noted at the meeting that she is calling home less often; in the past, the Student had called her multiple times a day and now was not calling every day. Teachers reported that she was doing well in ELA and had scored 3/8 correct at 8th grade level mathematics in a recent short assessment.
 5. During the school year, the Student was disciplined for violations of the District's code of conduct and received out-of-school and in-school suspensions. Two of those incidents were transportation-related (3-day in-school suspension for threats and intimidation and 2-day out of school suspension for bullying a peer while riding the bus). On December 6, 2018, the District created a bus plan and a temporary plan for extra support for the Student because of reasons having to do with interactions with peers. The Student's later IEPs called for specialized transportation instead of transportation with her peers.
 6. Progress reports for the Student dated February 4, 2019 stated that the Student was making adequate progress in her written language goal, mathematics goal, social work goal, and two behavior goals. She was making limited progress in the reading goal of reading and comprehending grade 6-8 written material. Evaluations and reports indicate that the Student's reading comprehension is well below grade level.
 7. The parent signed consent to evaluate on March 15, 2019. The annual review IEP Team meeting took place on March 18, 2019. At that meeting, the team determined to continue to identify the Student as a student with a specific learning disability until the evaluations could be completed.¹ As of the date of this meeting, the Student had not wished to be tested and testing remained incomplete. The special education teacher reported that the Student's skills were below grade level in reading and that she was falling behind in effort.
 8. The District attempted to perform further educational assessments for the Student in the spring of 2019. The Student did not fully engage in the assessments and most were incomplete. The evaluator who conducted the evaluations wrote that the qualitative observational data provided by the teachers was varied. The report also stated the following: "Specific to [the Student's] current identification as a student with a Specific Learning Disability, sufficient data points were not able to be collected as part of this

¹ The IEP from this meeting, sent to the parent on April 10, 2019, states OHI as the qualifying disability. The investigator understands this to be the result of writing over the IEP and that the written notice accurately reflects the Team's determination to keep SLD as the Student's primary disability while evaluations were completed.

current evaluation to fully examine the current, potential existence of SLD. It is, however, believed by this examiner that [the information from the Student's previous assessments] ... likely provide the most appropriate, available framework from which to examine [the Student's] processing abilities."²

9. The Student assaulted a peer on May 23, 2019 and received an out-of-school suspension for 5 days. A positive behavior support plan was established on May 29, 2019. A manifestation determination meeting was held on May 29, 2019.
10. During the interview with the complaint investigator, the parent stated that she was very pleased at the progress the Student has made this year. She stated that the Student has made a "tremendous amount of improvement" and "huge progress" this past school year. The parent expressed that she trusts and respects District personnel. The parent also stated that she was happy with the Student's educational programming during this past year and filed the request for a complaint investigation because of the educational programming for the Student that was proposed in May 2019, and therefore, some of the allegations below applied only to the proposed placement.
11. The Student's behavior affects her learning and the learning of others. During the past year, she would go to the nurse, be late to class, and switch seats in class without permission in order to socialize with her peers. The District's evaluator hypothesized that these were task-avoidance behaviors. The Student did not attend her social studies class for several months and received instruction in that subject with another staff member, even after she was offered a reduced workload. The parent stated that the Student refused to enter that class because of a peer in that class. The District stated that the Student's anxiety about missed work prevented her from attending social studies class.
12. According to the most recent evaluation, the Student's behavior during unstructured time sometimes included disruptive behaviors such as verbal aggression, verbal abuse, attempts at intimidation, intense non-compliance, leaving areas without permission, and/or physical aggression toward peers. The most recent evaluation of the Student stated that one staff member believes that the Student presents with characteristics consistent with an Oppositional Defiant Disorder.
13. The Student's parent stated that there have been several incidents this year when the Student has been subjected to racial taunts and other forms of harassment, particularly

² The Student was assessed in May 2016. The WIAT III shows that the Student scored in the below average range for total achievement, with below average scores in the subtests of oral language, total reading, basic reading, reading comprehension and fluency, written expression, and mathematics. Math fluency was in the "low" range. The WISC-V showed reading comprehension at 73, verbal comprehension at 73, fluid reasoning at 69, working memory at 76, and processing speed at 83. The CTOPP-2 showed rapid symbolic naming at 104, letter naming at 12, and digit naming at 9, with phonological awareness at 71.

during unstructured times during the school day.³ The parent stated that the proposed educational placement of day treatment services is too restrictive and that she believes the placement is a result of the Student's suspension in May 2019. The parent believes the District has proposed this educational placement, which is too restrictive, because of the Student's disciplinary incidents and not because of the Student's needs.

14. At the most recent IEP Team meeting for the Student, the annual review on June 14, 2019, the Team discussed the Student's needs and qualifying disability. The resulting IEP from that meeting included the following:
 - Specially designed instruction delivered in the amount of 100 minutes/week for reading, 50 minutes/week for written language, 50 minutes/week for math, and 300 minutes for behavioral/personal management
 - Social work services for 60 minutes/week
 - Consultation from the school psychologist 30 minutes/month
 - Positive behavioral supports plan
 - Special transportation
 - Accommodations
15. District staff stated that the Student can access educational opportunities when she is present in class and uses appropriate supports.

Other relevant facts are included in the determinations below.

DETERMINATIONS

The scope of this investigation has been somewhat narrowed based on the complaint investigator's discussion with the parent regarding the Student's progress during the 2018-2019 school year. The parent expressed that the proposed placement for the Student made in June 2019 was one basis for this complaint and that allegations 3 and 4 relate to the proposed placement and not to the 2018-2019 school year.

1. Procedures for a manifestation determination review in May 2019 were not correctly followed. MUSER XVII(1)(E); MUSER XVII(1)(F). **COMPLIANCE FOUND.**

³ The parent stated that one peer in particular had called the Student a "f-ing nigger" and threatened to "kick her ---." That peer's behavior ceased at some point in the year after the District's interventions. During the interview with the complaint investigator, the parent had to interrupt the conversation because the Student's peers had driven by her house yelling racial epithets at the Student while driving by the Student's house. The parent stated that the Student had been subject to bullying in the lunchroom and on social media.

During the 2018-2019 school year, the Student was suspended for two days for bullying a peer in January 2019, had a 3-day in-school suspension for threatening others in February 2019 had a one day in-school suspension for inappropriate and disrespectful behavior to District staff in March 2019, had a 2-day in-school suspension for inappropriate and disrespectful behavior to District staff in April 2019, and a five-day suspension in May 2019 for hitting a peer.⁴ The District's response indicated that the District does not believe an in-school suspension should be counted as a change of educational placement in accordance with MUSER and 34 CFR 300. 531. When Students have the opportunity to continue to appropriately participate in the general curriculum, receive the services specified on the IEP, and participate with nondisabled children to the same extent as when attending school, in-school suspensions may not constitute a pattern of exclusion resulting in a change of placement.⁵

The procedures for conducting a manifestation meeting are:

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the SAU, the parent, and relevant members of the child's IEP Team (as determined by the parent and the SAU) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

- (a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (b) If the conduct in question was the direct result of the SAU's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the SAU, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (E)(1)(a) or (1)(b) of this section was met.

(3) If the SAU, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (E)(1)(b) of this section was met, the SAU must take immediate steps to remedy those deficiencies.

⁴ The incident involved the Student angrily approaching a peer, yelling and swearing, and mentioned involvement of other students in gossiping. After the Student threatened the peer, she pushed the peer and hit her in the face even though a teacher had stepping in between the two students.

⁵ U. S. Department of Education, *Dear Colleague Letter on Supporting Behavior of Students with Disabilities*, 68 IDELR 76 (August 1, 2016).

On May 29, 2019, the District held a manifestation determination meeting to discuss the relationship between the Student's disability and her violation of a code of conduct and if a lack of IEP implementation caused the conduct. At this meeting, the Team discussed whether the violation of the code of conduct that occurred on May 23, 2019 was a manifestation of the Student's specific learning disability and whether the conduct was the result of the District's failure to implement the IEP.⁶

The parent stated that the IEP Team should have considered the Student's anxiety, not her SLD, in making the determination that the Student punching a peer was not a manifestation of her disability; however, SLD was the disability on the IEP at that time and the District conducted the manifestation determination meeting even when a pattern of exclusion had not reached 10 days. There has been no violation of law or regulation regarding this allegation.

2. The Student's disability of emotional disturbance was not included in IEPs during the 2018-2019 school year and the Student's IEPs during the 2018-2019 school year do not address the Student's social/emotional needs in a way that allows her to progress in the general education curriculum. MUSER IX(3)(C)(2); MUSER VI(2)(I).

COMPLIANCE FOUND.

The District completed its evaluation of the Student in June 2019 for a three-year evaluation.⁷ The evaluator of the educational assessment wrote about the possibilities of potential qualifying disabilities. In the report, the evaluator stated, "it is the opinion of this examiner that the members of [the Student's] IEP team should explore the possibility of several potential educational disability labels before ultimately making a determination with regard to continued eligibility. Specific to [the Student's] current identification as a student with a Specific Learning Disability (SLD), sufficient data points were not able to be collected as part of this current evaluation to fully examine the current, potential existence of SLD.... On balance, while this examiner was not able to collect sufficient data to confirm the current existence of an SLD, the same data is equally insufficient to deny its current existence."

The Student's IEP Team discussed this report, as well as the possibility the Student would qualify for special education services with other qualifying disabilities, when they met on June 14, 2019. Written notice from this meeting details the Team's careful thought and assessment of the evaluation data with regard to the Student's needs and disability category. The team discussed the difference between emotional disturbance (ED) and social maladjustment and concluded that the Student did not qualify for special education with the disability of ED based

⁶ The Team discussed the violation of the code of conduct and the Student's disability of SLD, not the disability of OHI based on anxiety, as the change in qualifying disability was a month later in June 2019.

⁷ The Student did not complete much of the testing although the District attempted to administer tests at least two times.

on the characteristics of ED and the Student's overall performance. The Team discussed the qualification of Other Health Impairment based on the Student's anxiety and agreed that the Student demonstrates a "heighted alertness to environmental stimuli that can result in a more limited alertness to the educational environment."

The parent stated that she believes the Student's primary disability should be emotional disturbance. The parent does not, however, have concerns with the amount or type of services the Student is receiving for her behavioral needs. These services are appropriate and address the Student's individual needs. Based on the information gained during the investigation, the IEP Team created IEPs that were reasonably calculated to provide educational benefit to the Student, including the decision of the Student's primary disability on the IEP.⁸ The Student benefitted from the behavior-related goals, SDI, and related services regardless of the designation of the disability on the IEP. There has been no violation of law or regulation regarding this allegation.

3. The IEP Team has proposed transportation and an educational placement that are not the least restrictive environment for the Student. MUSER X(2)(b). **COMPLIANCE FOUND.**

MUSER X(2)(b) provides that, "[t]o the maximum extent appropriate, children with disabilities... 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." In considering whether a proposed placement in a special education setting was the student's least restrictive environment (LRE), courts have held that the issue was "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child."⁹ In considering this, several factors must be considered, including: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class."¹⁰ *Id.* As to that third factor, the court in *Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1217 (3d Cir. 1993) stated that if the disabled child's inclusion in a regular class excessively disrupts the class or requires so much of the teacher's attention that the other students are ignored, a general education placement may be inappropriate."

⁸ *Endrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

⁹ *Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 11, 120 (2d Cir 2008).

¹⁰ *Id.*

Transportation can be provided as a related service for children with disabilities if a Student's IEP Team determines that the service is required in order for the student to benefit from special education.¹¹ In this case, the IEP Team has determined that the Student's anxiety-related behaviors warrant transportation on a van instead of on the school bus. The parent believes that transportation on a van, rather than on the school bus, is too restrictive for the Student. Documentation shows that the District's practices and determination about transportation to and from school are reasonable and appropriate for the Student's disability-related needs.

The Student's disability, OHI, can result in "inconsistent patterns of behavior and functioning," according to a recent assessment of the Student. Her discipline records has included instances threats and intimidation on the bus, the Student bullying/harassing a peer based on perceived sexual orientation, and a physical altercation during which she injured a peer. District staff stated that when the Student arrived in the District, she had a plan for riding the bus, and although the Student was able to ride with her peers at one point in the school year, her unsafe behaviors create the need for specialized transportation.

Regarding the proposed placement, which is more restrictive than the programming currently offered to the Student, the District has made reasonable efforts to accommodate the child, both in the general education setting and through accommodations on the IEP. The Student was educated in the special education setting when she opted to remove herself from the general education social studies class. The District created a behavioral plan but did not have it fully in place until the end of the school year. The IEP team took many factors into account when discussing the Student's needs, as required by law, and determined based on the facts that a more restrictive setting could offer the best educational benefit to the Student. Although these efforts created a plan that would enable the Student to be successful in the School, the Student's behaviors over the last year continued to increase and extended to behaviors in the general education setting and behaviors directed at peers. The Student has not made significant academic gains in the current educational placement. There is no non-compliance regarding this allegation.

4. The IEP Team has not considered the use of positive behavioral interventions and supports or other strategies the Student's behavior, which is a result of bullying by other students. MUSER IX(3)(C)(2). **COMPLIANCE FOUND.**

Children in Maine, birth to twenty who have disabilities, may not be excluded from the benefits of services to which they are entitled under IDEA. The Department of Education shall

¹¹ 34 CFR 300.34; MUSER XI; See OSERS, *Questions and Answers on Serving Children with Disabilities Eligible for Transportation* (November 2009).

ensure the provision of appropriate services regardless of the nature and severity of the child's disability or developmental delay.¹²

The District has considered and used positive behavioral interventions for the Student. Documentation shows that the behavioral interventions have resulted in a more successful 2018-2019 school year than previous school year. Documentation for this investigation included a behavioral support plan for the Student dated May 29, 2019.¹³ This document, in conjunction with the behavioral supports on the IEP, have provided the Student with special education and related services pertaining to the functional needs of the Student.¹⁴

What is not clear; however, is whether the IEP Team has considered these supports in light of the reported bullying/harassment of the Student by peers. The parent stated that the Student's behavior is in part a result of being taunted by her classmates because of her race, perceived sexual orientation, and disability and that she has reported the bullying to the principal, the guidance counselor, and the school nurse. The District did not address bullying and racial harassment of the Student in its response to this allegation.

If the nature of conduct towards the Student is based on race, color, national origin, gender or disability and creates a hostile environment, the District is obligated to respond in accordance with federal civil rights statutes and regulations.^{15, 16} If the school addressed the adverse changes in the Student's academic performance or behavior, by determining whether the Student's educational needs were still being met and changing the IEP to ensure FAPE was provided, there would be no IDEA violation.¹⁷

In this case, it may be that other students' actions are causing an environment that affects the Student's access to her educational services. When the Student's academic performance decreased and her non-desired behaviors increased in the spring of 2019, it is possible that

¹² MUSER I(2).

¹³ Written notice from the April 2019 meeting states that a behavioral plan would be created for the Student; the parent states that she has not seen this behavioral plan.

¹⁴ MUSER IX(3)(C)(2); *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

¹⁵ The provision of FAPE can be affected when bullying substantially restricts a disabled child in educational opportunities. *T.K. v. New York City Dep't of Education*, 779 F.Supp.2d 289, 295 (E.D.N.Y. Apr. 28, 2011). See The U.S. Department of Education Office for Civil Rights, *Dear Colleague Letter: Responding to Bullying of Students with Disabilities* (October 21, 2014).

¹⁶ The U.S. Department of Education, Office for Civil Rights, explains that the "label used to describe an incident (e.g., bullying hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights violations." U.S. Department of Education, Office for Civil Rights *Dear Colleague Letter: Harassment and Bullying*, (October 26, 2010).

¹⁷ Bullying in schools may result in other, non-IDEA claims, as well. *McCann v. York Sch. Dept.*, 365 F. Supp 3d 132 (D.C. Maine, 2019). U.S. Department of Education, Office for Civil Rights *Dear Colleague Letter: Harassment and Bullying*, (October 21, 2010).

bullying interfered with the Student's ability to benefit from the special education and related services on her IEP. The parent stated that the in-school racial comments by one peer had stopped when the District disciplined the peer, but that otherwise, the bullying was ongoing during the full school year. Information gained in interviews shows that the school is aware of at least one of the incidents of racial harassment, which it addressed. The Student refused to attend a social studies class because of the presence of a peer in that class, and the District provided instruction by another teacher.¹⁸ The Student's non-desired behaviors occurred in many arenas and after various interactions both with peers and adults; for instance, the Student swore at a teacher and was subsequently disciplined for that behavior.

The Student's previous behavior plan that had been in place when the Student started school in the District also shows that the Student participated in similar behaviors in her previous school. That plan offers responses to the Student in cases of swearing, threatening violence, using insulting words towards another person, being out of program by staying in the hallway, aggression, leaving the building, and property misuse such as turning over desks, dumping materials, and swiping the teacher's desk clear. These details suggest that the Student's actions have been ongoing and are not always or necessarily the result of bullying or harassment.

The most recent evaluation of the Student states that when the Student believes she is in a situation in which she does not feel a sense of control or has been "provided an expectation or compliance parameter that she does not support," that results in challenging behaviors such as leaving the area or stating that she will not comply with directives. The District convened the Student's IEP Team in the spring of 2019 and continued to examine and modify the supports and services offered to the Student.

Documentation shows the Student's skills in reading and mathematics remain below grade level, a fact that could also be impacting the Student's behavioral needs. It is possible that the IEP team may have focused on the Student's behaviors and may not have fully addressed the Student's slow progress in core subjects. The District has proposed a day-treatment level of educational services, which is reasonable given the facts here, and the parent does not agree with that placement. If this disagreement is not resolved at the next IEP Team meeting, the parties are encouraged to participate in the Department's mediation process to resolve the dispute.

As there have no violations of law or regulation, there is no corrective action plan and the Department will close this matter.

¹⁸ Information gained during the investigation was that the Student believed the peer had been treated different than the Student in some way, not that the peer had participated in any racial harassment of the Student.