

Complaint Investigation Report

█ v. Scarborough Public Schools

December 27, 2019

Complaint # 20.033C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: October 29, 2019

I. Identifying Information

Complainant: █ Parent

█
Scarborough, ME 04074

Respondent: Scarborough Public Schools
Sanford Prince IV, Superintendent
P.O. Box 370
Scarborough, ME 04074

Alison Marchese, Director of Special Education

Student: █

DOB █

II. Summary of Complaint Investigation Activities

On October 29, 2019 the Maine Department of Education received this complaint. The complaint investigator was appointed on October 29, 2019. Therefore, the current investigation covers the time period of October 29, 2018 to present. See MUSER XVI(4)(B)(3).

The complaint investigator received 123 pages of documents from Scarborough Public Schools and 120 pages of additional documents and an audio file (approximately 80 mins long) from the Student's parent. Interviews were conducted with the following individuals between November 26, 2019 and December 6, 2019: █ Mother; Alison Marchese, Director of Special Education for Scarborough Public Schools; and Dr. Steffanie Brackett, Director of the Center for Autism & Developmental Disorders ("CADD") Day Treatment Program.¹

¹As per the standards of practice for conducting complaint investigations, the Complaint Investigator used █ discretion with regard to witnesses interviewed; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation.

III. Preliminary Statement

The Student is 13 years old. ■■■ is currently enrolled at the Center for Autism & Developmental Disorders (“CADD”) Day Treatment Program in South Portland, Maine as a 7th grade student. The Student resides with ■■■ parents in Scarborough, Maine.

This complaint was filed by the Student’s parent (“Parent”) alleging that Scarborough Public Schools (“District”) violated the Maine Unified Special Education Regulations (“MUSER”). After the receipt of the Parent’s complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on November 5, 2019, alleging three violations of the MUSER. A telephonic Complaint Investigation Meeting was held on November 6, 2019.

IV. Allegations

The Parent alleged that the District did not provided a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)) because of the following three violations:

- A. The Student was not educated in the least restrictive environment (LRE). MUSER X(2)(B). Specifically, the Student was not educated to the maximum extent appropriate with children who are not disabled. Id.
- B. The District did not provide special education, related services, and supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining ■■■ annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children. MUSER IX(3)(A)(1)(d).
- C. The District did not provide the parent with a complete copy of the IEP within 21 school days following an IEP team meeting on September 26, 2019. MUSER IX(3)(G).

V. Factual Findings

1. The Student is 13 years old and began attending the Center for Autism & Developmental Disorders (“CADD”), a private day treatment program, on February 13, 2018. ■■■ is currently in the 7th grade, and ■■■ resides at home with ■■■ parents in Scarborough, Maine. Scarborough Public Schools maintain educational responsibility for the Student.

2. The Student has been diagnosed with Autism, and [REDACTED] is eligible for special education services.
3. The most recent evaluations conducted by the District, dated August/September 2019, consisted of educational, speech and language, functional living skills, and occupational therapy assessments. The Student's performance on WISC-V showed extremely low in verbal comprehension, visual spatial, fluid reasoning, working memory, processing memory, processing speed, general ability, and full scale IQ. The Student's performance across multiple assessments demonstrated severe developmental disabilities, consist with [REDACTED] diagnosis of Autism Spectrum Disorder. For example, [REDACTED] communication skills which were rated below the first percentile.
4. The most recent Functional Behavioral Assessment ("FBA") was completed in September 2018. Based on the recommendations of the FBA, the IEP team updated the Student's behavior plan in September 2018 to add components of differential reinforcement of other behaviors ("DRO"), time-out from reinforcement, and backward chaining for classroom groups.
5. The Student's most recent Individualized Education Program ("IEP"), dated September 26, 2019, requires 27 hours per week of Specially Designed Instruction, 60 minutes per week of Speech/Language Services, 60 minutes per week of Occupational Therapy, 60 minutes per week of Social Work Services, Special Transportation, and Extended School Year Services. [REDACTED] IEP specifies that the Student spends 0% of [REDACTED] educational time with non-disabled children as a result of [REDACTED] placement in a private school day treatment setting.
6. Back on February 13, 2018, the IEP team met and agreed to place the Student at CADD's Day Treatment Program due to the nature and severity of the Student's emotional regulation and behavioral needs.² The team agreed that a private school day treatment setting was the Least Restrictive Environment ("LRE") for the Student to access [REDACTED] educational needs. Written notice dated on February 13, 2018 indicates that the IEP team considered, but rejected, placement in a public school setting.

² Specifically, the Student's most severe emotional regulation and behavioral obstacles included aggressions, disrobing, property destruction, bolting, self injurious behaviors, emotional outbursts due to being denied a preferred activity or presented with a new expectation, and disruptive vocal scripting.

7. Written notice from February 13, 2018 also demonstrates that all members of the IEP team, including the Parent, agreed that CADD's Day Treatment Program was the LRE for the Student. In fact, the Parent expressed her concern during the IEP team meeting that the "CADD staff will see intense behaviors from the Student and will decide they cannot work with [REDACTED]." Dr. Steffanie Brackett, Director of the CADD Day Treatment Program was present at the February 13, 2018 IEP team meeting, and Dr. Brackett assured the Parent that CADD staff has worked successfully with many students with intense behavioral needs.
8. The IEP team met again on March 30, 2018 to conduct a 30-day review of the Student's program at CADD. According to Written notice dated March 30, 2018, the IEP team was again in agreement that placement at CADD was the most appropriate, least restrictive environment to meet the Student's needs. After approximately one month at CADD, the Student was already beginning to demonstrate progress in some areas. However, the Student continued to struggle with emotional regulation and behavioral needs. The Student's social worker reported difficulty with emotional dysregulation and interfering behaviors such as bolting, self-injury, aggression, and non-compliance. Importantly, however, the IEP team also noticed that the Student's aggressions had decreased overall since transitioning to CADD's Day Treatment Program, and there had been no property destruction.
9. The IEP team reconvened on April 25, 2018 for a Chapter 33 review. At that time, a change was made to the Student's behavior plan, and the team agreed to conduct a Functional Behavior Assessment ("FBA"). The IEP team met again on August 27, 2018 for another Chapter 33 review, and again on September 11, 2018 to review the completed FBA. Written notice from September 11, 2018 indicates that changes were made as necessary to the Student's behavior plan.
10. The IEP team then held an annual review on October 16, 2018. A number of the Student's goals were updated at that time, but, according to the Written notice, the IEP team members all agreed that the Student needed to make more progress before transitioning back to public school. At this point, the Parent expressed that "[m]aking progress on seeking out peers is one of the benchmarks [the Parent] is looking for in terms of when [the Student] might be ready to return to public school." See Written Notice, dated October 16, 2018.

11. Another IEP review was held a few months later on March 29, 2019. The Parent and the District disagree about the accuracy of portions of the Written notice from this IEP team meeting. Therefore, the Parent has provided an audio recording of the March 29, 2019 meeting for the complaint investigator's review.
12. Review of the 80-minute audio recording, indicates that on March 29, 2019, the IEP team proposed and accepted a number of new academic goals for the Student in English Language Arts and Math. The Student had already met several of [REDACTED] academic goals set in October 2018, and the team believed [REDACTED] rapid academic achievement was possible because the Student's emotional regulation and behavioral incidents had decreased significantly. The team found that the Student's severe behaviors were less likely to interfere with [REDACTED] academic progress.
13. During the audio recording of the March 29, 2019 IEP meeting, there was no specific discussion about whether CADD remained the Student's LRE, and there was no specific reference to a timeline for the Student's transition back to public school. However, no one on the IEP team – not even the Parent – raised any concerns about the Student's continuation in [REDACTED] current program or about the Student's lack of access to non-disabled peers at the CADD Day Treatment Program. To the contrary, the IEP team's conversation during the March 29, 2019 meeting was extremely positive about the Student's recent progress, and the team seemed focused on moving the Student forward as much as possible both academically and behaviorally. Additionally, the team members, including the Parent, all discussed preparations for the Student to remain in [REDACTED] current educational setting for the rest of the school year, continue at CADD into the summer months through Extended School Year Services, and remain enrolled at CADD start of the next school year.
14. Finally, during the March 29, 2019 meeting, multiple members of the IEP team discussed emotional regulation and behavioral improvements that the Student still needed to achieve, prior to a transition into public school. Approximately 46 minutes into the audio recording of the meeting, the Parent states, "But the participation piece was key if we are going to get [REDACTED] back in public school. If [REDACTED] cannot participate, we can't even hope that, with one-on-one, [REDACTED] would be able to do it. If [REDACTED]'s bolting, it's just too dangerous." While no IEP team member directly stated during the March 29, 2019 meeting that the Student was

still being educated in ■■■ LRE, the conversations that occurred during the meeting suggested to the complaint investigator that all IEP team members felt additional time in the CADD Day Treatment Program was both critical and valuable for the Student's ongoing academic and social-emotional growth.

15. Furthermore, the Student's behavior graphs tracking "outburst duration" during the end of 2018 and during the first three months of 2019 show that the Student made significant gains in the area of emotional regulation and behavioral needs. According to the Parent during ■■■ interview with the complaint investigator, by early 2019, CADD staff had stopped tracking altogether on certain dangerous behaviors (such as single-contact aggressions and self-injurious behavior). However, as the graphs tracking "outburst durations" show, the Student continued to face specific challenges in emotional and behavioral regulation during March and April 2019.
16. During an interview with the complaint investigator, the Director of CADD's Day Treatment Program explained that the Student's academic gains were often paired with behavioral progress. However, full achievement of the emotional regulation and behavioral goals that brought the Student to CADD in the first place did not perfectly correlate with the accomplishment of ■■■ academic goals, in many instances. Prior to beginning a transition back to public school, the IEP team hoped to see consistent peer participation in a safe, academic, and social manner. At this point, no IEP team member had expressed a concern during the IEP process that the Student was not in the LRE.
17. On August 12, 2019, the Parent requested an updated psychoeducational evaluation. According to Written notice, the IEP team agreed to add additional testing as an amendment without a further IEP team meeting, noting that "updated testing would be useful for programming and services." See Written Notice, dated August 12, 2019.
18. On September 26, 2019, the IEP team conducted an Annual Review. While the team agreed that CADD was still the least restrictive environment for the Student, the IEP team now also felt that a program review meeting should be scheduled in January 2020 to begin transition planning and discussions. The IEP team agreed to move forward with caution, however. The Written notice dated September 26, 2019 indicates that the Student had ongoing difficulties with interfering

behaviors when experiencing emotional dysregulation. These behaviors include bolting, self-injury, aggression, and non-compliance.

19. The new IEP from the September 26, 2019 meeting was emailed to the Parent on October 29, 2019.
20. Also on October 29, 2019, the Parent filed the present complaint with the Department of Education.
21. The Director of Special Education for the Scarborough School District emailed the Parent on November 4, 2019. The Director asked the Parent about correcting some information accidentally left off the Student's September 26, 2019 IEP, and the Director asked the Parent whether she wanted to "schedule a program review prior to January to discuss [the Student's] progress, ESY, and transition." See Email from Director of Special Education to Parent, 'IEP,' dated November 4, 2019.
22. The Director of Special Education and the Director of the CADD Day Treatment Program both confirmed during interviews with the complaint investigator that the IEP team held a subsequent IEP review meeting on December 5, 2019, and the IEP team is making further arrangements for the Student's potential transition to public school, although the duration of the transition could be lengthy depending on a number of factors. No Written notice or further information was provided to the complaint investigator about this IEP meeting.
23. The Parent noted multiple times during her interview with the complaint investigator that she is extremely satisfied with the level of special education services that the Student has received at CADD's Day Treatment Program. Specifically, the Parent expressed gratitude to CADD's staff for helping the Parent meet "the wonderful person who has been inside my [REDACTED] forever, the person I only got glimpses of in the past."
24. The Parent also expressed to the complaint investigator that she feels strongly that the Student is ready to begin the transition back to public school, a far less restrictive setting. The Parent feels that prolonging the Student's transition will create irreparable harm because the Student will not be afforded sufficient time to acclimate to public middle school prior to facing a second transition into public high school.

25. Finally, in her interview with the complaint investigator, the Parent expressed a very clear and specific rationale for her concerns about the Student not being educated in the LRE. One of the Student's unique strengths is learning through mimicking. While the Parent believes that the Student will continue advancing in certain academic goals while at CADD, the Student cannot gain the benefit of exposure to ■ non-disabled peers as long as ■ remains a student at the CADD Day Treatment Program.

VI. Determinations

- A. The Complaint alleged that the Student was not educated in the least restrictive environment (LRE). MUSER X(2)(B). Specifically, the Student was not educated to the maximum extent appropriate with children who are not disabled. Id. **COMPLIANCE FOUND.**

Children with disabilities must be educated in the least restrictive environment, with children who are not disabled, in a regular education environment, to the maximum extent appropriate. 34 CFR 300.114; MUSER X(2)(B); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir., 2004). MUSER X(2)(B) elaborates further:

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 education environment shall occur only when the nature and 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.

Id.; 20 USC §1412(a)(5); 34 CFR 300.114.

The mandate for the least restrictive environment has been described by the U.S. Supreme Court as “embodying a ‘preference’ for ‘mainstreaming’ students with disabilities in ‘the regular classrooms of a public school system.’” *C.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621 (1st Cir. 2019) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202-03 (1982)). See *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2017). Nonetheless, the IDEA's preference for mainstreaming “is not absolute.” *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162 (2d Cir. 2014).

Children with disabilities are entitled to access a continuum of alternative placements that are available to meet a child's special education needs. 34 CFR 300.551. The placement decision must be based upon the child's IEP and must be as close as possible to the child's home. 34 CFR 300.552; MUSER X(2)(B).

After 1997 IDEA Amendments, parents always have a right to be part of the group of persons who make placement decisions about the child based on evaluation data and the placement options available. 34 CFR 300.552. However, parental preference can neither be the sole nor the predominant factor in a placement decision. See Letter to Burton, 17 EHLR 1182 (OSERS 1991). Additionally, there is no suggestion that parental preference should be given any more weight now than prior to the 1997 Amendments, even when the parent challenges their child's placement in a due process complaint.

Looking at the present case, the Student's IEP team has been carefully focused on advancing the Student's academic and behavioral skills, with an aim towards transitioning the Student to public school as soon as the team believes that the public school can fully meet the Student's significant needs. For various reasons, since the Student's transition to CADD in February 2018, the IEP team has convened on at least eight different occasions: in March 2018, April 2018, August 2018, September 2018, October 2018, March 2019, September 2019, and December 2019. The Written notices and IEP amendments over the past 22 months document the IEP team's consistent and thoughtful monitoring of the Student's progress towards a less restrictive setting. Additionally, the various steps the IEP team took to address the Student's emotional regulation and behavioral needs, by modifying the Student's behavior plan, obtaining an FBA, and working closely with the Student's BCBA, also demonstrate a clear commitment to the IDEA's preference for mainstreaming, to the maximum extent possible.

While there was not an explicit conversation at every IEP team meeting about whether CADD remained the LRE for the Student, the tenor of the IEP team discussion on March 29, 2019 and Written notices from each IEP team meetings suggest that the IEP team never lost focus of the LRE-driven goal – moving the Student forward academically, emotionally, and behaviorally until [REDACTED] is able to fully and successfully reintegrate into a public school setting.

During her interview with the complaint investigator, the Director of the CADD Day Treatment program stressed her belief that the Student should transition to a less restrictive environment after an appropriate and safe transition. However, the same Director believes that any conversation about a transition for the Student would have been premature when the IEP team met in March 2019.

During her interview with the complaint investigator, the Parent was similarly committed to a thoughtful, step-by-step, and methodical transition for the Student, who struggles significantly with all transitions.

It is also important to consider that no one on the IEP team, not even the Parent, raised the idea of moving the Student to a less restrictive educational placement in March 2019 or between March 2019 and the annual IEP meeting in September 2019. To the contrary, the entire discussion during the March 2019 IEP team meeting revolved around the goals and skills the Student would need to obtain *before* [REDACTED] transition to public

school could become appropriate, and there seemed to be no outstanding disagreement between the IEP team members at the conclusion of the meeting on March 29, 2019.

Of course, MUSER VI(2)(I) provides that the District has the ultimate responsibility to ensure that the Student's placement is in the least restrictive educational placement. *Id.* Therefore, it is never the responsibility of a parent or a single IEP team member to identify the issue of LRE. Still, since it appears in this specific case that all the IEP team members – those who knew the Student's academic, emotional, and behavioral history the best – believed that CADD's Day Treatment Program remained the least restrictive, most appropriate environment for the Student, it makes it even more likely that CADD program is, in fact, the Student's LRE.

At this time, the IEP team appears to be moving forward with additional discussions and plans about the Student's LRE and the Student's possible transition to Scarborough Middle School or Scarborough High School. Considering all the reasons outlined above, no violation of the MUSER is found.

- B. The original complaint also alleged that the District did not provide special education, related services, and supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining ■■■ annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children. MUSER IX(3)(A)(1)(d). **COMPLIANCE FOUND.**

After interviewing the Parent, the complaint investigator was able to narrow the scope of this investigation significantly because the Parent was absolutely clear that her ■■■ was receiving the right combination of special education services, related services, and supplementary aids to enable the Student's progress towards ■■■ goals. The Parent repeatedly expressed satisfaction with the gains seen by the Student – both academic and social/behavioral – due to the Student's education at the CADD Day Treatment Program. Although the Parent feels that CADD is no longer the Student's least restrictive environment, the Parent attributes the Student's growth between February 2018 and present to the special education services offered by CADD.

The documentation provided by the District and the Parent for this complaint investigation additionally support the conclusion that the CADD Day Treatment Program is properly implementing the Student's IEP and the Student is receiving the special education services ■■■ requires to make progress in the general education curriculum, to participate in extracurricular and other nonacademic activities, and to be educated with non-disabled children as soon as possible. Therefore, no violation of the MUSER is found.

C. Finally, the Complaint alleged that the District did not provide the parent with a complete copy of the IEP within 21 school days following an IEP team meeting on September 26, 2019. **COMPLIANCE FOUND.**

The annual IEP meeting in question occurred on September 26, 2019. The District emailed the completed IEP to the Parent on October 29, 2019. MUSER IX(3)(G) provides that a parent copy of the Student's IEP must be given to the parent "at no cost to the parent *within 21 school days of the IEP Team Meeting.*" See also, 20 U.S.C. 1414(d)(1)(B)(i); 34 CFR 300.322(a-f).

The Parent argues that the District committed a procedural violation by emailing the Student's new IEP on October 29, 2019 because the IEP copy was emailed more than 21 school days after the IEP meeting. However, the District argues that the Parent's IEP copy was sent within 20 school days because October 11, 2019 was a "staff-only" day, October 14, 2019 was a holiday, and October 17, 2019 was a storm cancellation day.

Although MUSER does not define the term "school days," the specific language choice of "school days" indicates a regulatory intent to distinguish this procedural deadline from other terms frequently used in MUSER, such as "calendar days" and "business days." With the help of these comparable terms, the plain meaning of "school days" becomes clear. Additional guidance can be found in Maine Revised Statute, Title 20-A, § 4801, "School Days," which requires all school administrations to maintain 180 days of school per year, with at least 175 of those 'school days' being used for instruction. *Id.*

Therefore, this complaint concludes that October 11, 2019 was considered a "school day" (even if it was not an "instructional day"). However, because school was closed entirely on both October 14, 2019 and October 17, 2019, those two dates cannot be considered "school days." Therefore, the IEP was emailed to the Student's parent exactly 21 school days after the IEP Team Meeting, and no procedural violation of the MUSER is found.

VII. Corrective Action

As this complaint investigation has found no violations of the MUSER by the District, no corrective action is required.