

Complaint Investigation Report
Parents v. Scarborough Public Schools
Complaint 18.103
Complaint Investigator: Jeannette Sedgwick
July 17, 2018

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on June 1, 2018. The complaint investigator reviewed all documents, information, and responses from the parties. On June 21, 2018, the investigator conducted interviews with District staff. Those interviewed were the following: The District's behavioral consultant, the Student's special education teacher from the time the Student entered the District until April 2018, the Student's special education teacher from April until May, 2018, the Student's OT provider, and the District's Assistant Director of Special Education. An interview was conducted with the complainant on June 22, 2018.

Because there has been noncompliance with special education laws and regulations, the District must complete a corrective action plan **by September 28, 2018.**

FACTUAL FINDINGS

1. The Student is twelve and qualifies for special education and related services for the disability of autism. The Student enrolled in the District on December 4, 2017 as a seventh-grader. District staff describe him as "very bright." The Student has very strong mental math skills. The Student's less-preferred activities are reading and writing.

2. The Student received specialized instruction in the District's substantially separate life skills program with 4 other students. The Student also received instruction in the school's functional life skills program, which has three students, in a flexible arrangement where the two classes would work in tandem. Students in the two classrooms have a variety of disabilities, including Intellectual Disability, Emotional Disability, and Autism.

3. The Student's IEP Team initially believed the Student would take part in some general education settings, including art class and the CREW block that functions as a homeroom at the start of each day. The Student did not attend those general education classes during the time he was enrolled in the District.

4. The IEP created in January was in effect January 22, 2018 until being amended in April 2018. This IEP states that the Student will receive instruction by a special educator. This IEP included speech/language services 1x/week for 30 minutes. The Student also received OT 1x30/week, a behavioral consult, speech and social work 1x30/week; and 1x60/three months of speech and OT services. One goal for the Student for OT was demonstrating the ability to independently use the computer for functional school activities, with five objectives, several of

which utilize an AT program such as Google Chrome. The Student's behavioral interventions include a behavioral goal with a 5-point system.

5. The student's IEP also includes functional performance strengths and goals. In this section, the Student's needs are written as follows: "the Student exhibits a variety of oppositional behaviors that impact classroom performance. He will want to negotiate a preferred activity instead of work, refuse or comply with directives, will do the opposite of what is asked or stated, will purposefully read or say words incorrectly, or will become aggressive." This section was carried over from the Student's previous IEP at his former District.

6. As early as January 2018, the Student exhibited unsafe behavior of running from the classroom and aggression against District staff, such as hitting, kicking, punching and pulling hair. In two instances of unsafe behavior, the Student was briefly restrained. After the second incident, on January 22, 2018, the Student was dismissed by being sent home with the complainant. The attendance record for January 22, 2018 states that the Student had an unexcused absence.

7. After these incidents, the complainant requested the District's Behavior Specialist to become involved to establish behavior modification techniques for the Student's behaviors. The District promptly responded.

8. On February 16, 2018, the Student exhibited difficult behaviors while being transported to school and staff were unable to assist the Student to safely exit the van. The Student returned home to the complainant. The attendance record for February 16, 2018 states that the Student had an excused absence.

9. On February 20, 2018, the complainant's Care Coordinator requested an FBA through an email to District staff, after which the complainant also contacted District staff to request an FBA. Emails among District staff on February 27, 2018 state that the complainant asked about an FBA for the Student and that the District wanted to wait for more consistent attendance before doing the FBA. District staff did not send a consent form to the complainant for the FBA at the time of the request.

10. Throughout March, the Student continued to exhibit unsafe behaviors, such as bolting to other parts of the school where classes were being conducted. District staff was collecting behavioral data throughout the spring of 2018. Numerous changes were made to the Student's behavior plans, and District staff altered the Student's morning schedule so that entering the building was no longer a difficulty for the Student. The Student continued to exhibit disruptive behavior and was not accessing his education in the classroom on a regular basis. At the end of April, the Student's disruptive behaviors were declining somewhat but District staff still had concerns about the Student's perseveration and unsafe behaviors.

11. On April 4, 2018, the District created a detailed behavioral support plan that included, among other things, a series of proactive teaching strategies and waiting responses.

12. On April 12, 2018, the Student's IEP Team met. The complainant signed consent for the FBA at the meeting. Staff started the FBA but spent approximately seven weeks, until June 18, 2018, arranging the scheduling of that interview of the complainant for inclusion in the FBA. The FBA was not completed at the time of this report.

13. On May 3, 2018, the Student left the classroom, threw chairs and other property, attempted to bolt outside, and hit and kicked staff. After this incident, which lasted nearly an hour, the District sent the Student home "due to a major upset in aggressive behavior." The attendance record for May 3 2018 does not reflect a dismissal or absence.

14. On May 4, 2018, the District restrained the Student because the Student attempted to leave the classroom, bite staff, and crawl into the hallway. The Student hit himself in the face, causing his nose to bleed. District staff secluded the Student by leaving him in a closed space with the door closed, after which the Student was seen by the nurse and was calmed.

15. The IEP Team met on May 10, 2018 to discuss the restraints performed on the Student and the need for more revisions to the Student's behavior plan. The complainant and the District also discussed the Student's educational needs. District staff and the complainant held somewhat different opinions about what approaches worked well with the Student when the Student was exhibiting escalated behavior.

16. On May 14, 2018, the District amended the Student's behavioral support plan that reflected the changes discussed in the IEP Team meeting.

17. On May 16, 2018, the complainant withdrew the Student from school. The Student is not being homeschooled. The last day of school during the District's 2017-2018 school year was June 21, 2018. The Student is eligible for ESY in the summer of 2018.

18. The Student's Progress Reports show that in Quarter 3, the Student was beginning to meet the standards/learning goals (level 1) in reading and social studies and was meeting the standards/learning goals which indicated progress toward the next level in mathematics and science.

19. In Quarter 4, the Student met the standards/learning goals in one of three language goals and partially met the standards/learning goals in science. Several standards were not measured on the Fourth Quarter Progress Report.

Other relevant facts will be included in the determinations below.

DETERMINATIONS

The complainant alleged the following:

1. The District sent the Student home without being suspended on January 22, February 16, and May 3, 2018, which resulted in a lack of educational services for the Student.
MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

Documentation shows that after the Student experienced difficult behaviors on these three occasions, District staff sent the Student home. The send-homes were not results of violation of the District's Code of Conduct; rather, they were the result of District staff being unable to work with the Student's disability-related behaviors.

The District's response indicates that it is their belief that the District is justified in sending the Student home when existing behavioral supports are not working. However, Districts must provide educational services and implement students' IEPs even on those days when behavioral plans appear to not be effective.¹ An instance of when the District did exactly this was on May 4, when behavioral supports were implemented and the Student was kept at school after an incident requiring restraint.

The practice of sending home a child with a disability whose behavior is related to his disability is an exclusionary practice that prevented the Student from accessing his education. The official attendance record accounts for one of these days as an unexcused absence, one as an excused absence, and does not reflect one of those removals from school at all. By not providing an educational experience for the Student, the District has removed the Student from his educational experience, in effect disciplining him, but has not recorded the disciplinary action in the records. This practice has led to a lack of implementation of the Student's IEP, the inability to count the number of days the Student misses before a change of placement occurs, and the lack of opportunity for the Student to access the curriculum.²

¹ *Nickerson v. Lexington Pub. Sch.* 893 F. Supp. 2d. 276, 285 (Districts must provide 'instruction and support services sufficient to permit the child to benefit educationally from that instruction.' (internal citations omitted); *See Endrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 998, 1002 (2017) (where Student's behavior impacted ability to access education and IEP not individually tailored to Student's needs, reimbursement for private school tuition appropriate); *Dear College Letter on the Inclusion of Behavioral Supports in Individualized Education Plans*, 68 IDELR 76 (August 1, 2016).

² *Nickerson*, 893 F. Supp. 2d. at 285; *See Dist. of Columbia Pub. Sch. v. Dist. of Columbia State Educ. Agency*, 71 IDELR 23 (May 9, 2017) (where Student had history of extreme behaviors and generally unavailable for education because of behavioral crises, nonpublic school is appropriate"); Maine Unified Special Education Regulations (MUSER) IV(4)(A-B); MUSER IX(3)(B)(3).

2. The District has not followed the Student's IEP because there are aspects of the Student's behavioral plans that contradict the provisions of the Student's agreed-upon IEP. MUSER IX(3)(B)(3). **COMPLIANCE FOUND.**

The Student's IEP behavioral goals include a specific point system and specific reward systems, such as time with non-disabled peers during CREW, a homeroom-like block. The complainant expressed concern that because the Student did not participate in those rewards and did not utilize the exact point system on the IEP, that the Student's IEP was not being followed. The Student's behavioral plans, which include other types of rewards and systems to develop more positive behavioral responses, did not include time in CREW and did not specifically use the point system that was outlined in the Student's IEP. In all, however, the Student's behavioral plans worked in tandem with the behavioral goals on the Student's IEP and the District was continuously determining on a day-to-day basis what rewards would be effective for the Student when he participated in class. There is no violation of law or regulation regarding this allegation.

3. The Student is not advancing appropriately toward attaining annual goals, is not making progress in the general education curriculum, and has not received FAPE. MUSER IX(3)(A)(1)(d); MUSER II(14) and 34 CFR 300.101(a).

NON-COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND.

- a. The goal on the Student's IEP regarding Google classroom has not been attempted since January 2018 to the present.

The Student's IEP contains a goal of using AT to independently use his computer for functional school activities. Three objectives reference Google chrome or Google docs as an example of the type of AT program that might be utilized in that goal.

The District has not begun implementing this part of the Student's IEP, which has been in place since January 2018. District staff stated that this goal was not implemented because, although the Student was initially going to attend general education classes that used Google Docs, the Student did not participate in those classes. The District did not implement this objective on the Student's IEP and has not complied with law or regulation regarding allegation 3(a).

- b. The Student's academic performance, as evidenced by progress reports from January 2018 to the present, has declined.

District staff stated that the Student's math and computer skills were very good but that the Student's work refusal for subjects other than math made instruction difficult, particularly with changing preferences for rewards used in behavioral plans. The complainant stated that the

Student was not academically challenged in the substantially separate classroom and that he entered the District with skills he no longer possessed in May 2018, such as double-digit multiplication.

Documentation shows that District staff were recording a variety of data about the Student's academic work, functional needs, and behaviors. Documentation also shows that some instructional time for the Student was shortened or did not occur because of unsafe incidents, including running from the classroom.

During the approximately five months the Student was enrolled, District staff continued to work with the Student to achieve his academic goals. The Student's progress reports from December 2017- May 2018, however, do not show that the Student worked on all goals and objectives during the time he was enrolled in the District and did not make progress towards some goals. For instance, the Student's goal for reading was measured in January 2018 was measured at the QRI reading level 2 with 95% accuracy, but the progress report for March 2018 shows that the was given a modified QRI and there is no score for correct words per minute. The goal for the Student was to be reading at a QRI Level 4 by October 2018, which the Student was not progressing toward as of the spring of 2018. Math goals such as double-digit multiplication had already been achieved but still appeared to be part of the Student's curriculum.

The Student's progress for OT functional goals, certain speech and language goals, and instructional goals of academic reward systems were measured in March 2018 as appropriately progressing. The March progress reports show that the District measured an instructional goal of comprehension skills, including identifying the main idea and supporting details, at 70% accuracy, and could write a sentence independently 40-45% of the time. For an OT goal, the Student met 1/5 objectives in January and 0/5 in March 2018. Many Quarter 4 goals were not measured because the Student did not attend from May 16, 2018 until the end of school on June 21, 2018.

It is undeniable that the District was aware of the Student's history of oppositional behaviors and perseveration that interferes with his learning because that information appeared on the Student's previous IEP and was carried over into the District's IEP. The District knew that the Student was having difficulty accessing his education in January and was having even more difficulty by late April and early May 2018. Overall, however, the documentation does not show that the Student's skills declined or that he was denied FAPE. The IEPs created until the Student was removed from school were reasonably calculated to enable the Student to make progress. The District worked to find ways to increase the Student's participation. Based on the short timeframe, the investigation did not find a lack of progress in the Student's education. The District has complied with law and regulation regarding allegation 3(b).

- c. The Student has missed school because of suspensions, behavioral issues such as not leaving the van, and time away from the classroom.

As discussed above, during the time the Student was enrolled, the Student was exhibiting work refusal behaviors and had missed many hours of instruction. These behaviors increased and decreased, but overall became worse throughout the spring, particularly in April and May 2018.

The District denied the Student educational opportunities through a variety of actions: removal from the classroom through send-homes (see determination #1) and time spent in response to Student work refusal. While the District was working assiduously to find consistent reward of preferred activities, the time the Student spent away from academic programming increased throughout the spring months until the parent removed the Student from school in May 2018. The complainant has not participated in homeschool instruction, and the District, knowing the Student was truant, did not initiate truancy proceedings even though such proceedings are mandatory when a Student becomes truant. The District has not complied with law or regulation regarding allegation 3(c). Documentation, however, does not show that the Student was denied FAPE.

- d. In February, the IEP Team discontinued goals in mathematics, grammar, and other educational goals, as well as speech/language, independent living and functional activities, before the Student reached those goals.

A District must implement an IEP for a student who has transferred from another District until it develops its own IEP for the Student.³ The District created the Student's IEP in January 2018.⁴ The District has complied with law and regulation regarding allegation 3(d).

4. Although the complainant requested a BCBA to perform an FBA in February 2018, the District did not timely respond to the request and the FBA has not been completed as of the time of this memorandum. MUSER V(1)(B)(3); MUSER V(2)(C)(2); MUSER V(2)(E). **NON-COMPLIANCE FOUND.**

³ MUSER IX(3)(B)(5).

⁴ Instructional goals were discontinued on the Student's IEP in January 2018. The District's response states that at an IEP Team meeting in January 2018, the Team discussed changing the goals on the Student's IEP. Written Notice from this meeting, however, discusses changes in some service times but does not discuss changes in goals, with the exception of adding a new goal for computer use. The Department notes that a District "must ensure the child's IEP Team is informed of these changes and the parent is provided prior written notice," MUSER IX(3)(c)(4), and that notice must include choices considered by the Team and reasons why those choices were proposed or refused. MUSER App. 1.

Communications between District staff and the complainant's information regarding communication with special education staff indicate that the Student's care coordinator requested an FBA on February 20, 2018, and the complainant repeated that request to the District a short time after that date. The District did not provide a consent form for this evaluation until the April 2018 IEP Team meeting. Even after receiving consent, the District waited for over six weeks to interview the complainant as part of the FBA.

The District's perspective is that data about behaviors was being collected about the Student for the months he was enrolled. However, the District was obligated to evaluate the Student in all areas of suspected disability, tailor the assessment to assess specific areas of need, and ensure the evaluation was sufficiently comprehensive to identify all of the Student's needs.⁵ The District did not comply with law or regulation regarding this allegation.

5. The District did not provide a representative of the parent the opportunity to inspect or review the Student's educational records. MUSER XIV(3)(C). **COMPLIANCE FOUND.**

The complainant stated that her representative, the Student's care coordinator, requested a copy of the Student's IEP. Email correspondence shows that the complainant provided her with a copy of the IEP but is not entirely clear that the representative had requested one or when that request was made. The District has complied with law and regulation regarding this allegation.

6. The District did not amend information contained in Written Notices that are alleged to be inaccurate or misleading at the request of the Student's parent within a reasonable period of time, or else notify the parent of its refusal to do so. MUSER XIV(8). **COMPLIANCE FOUND.**

The complainant requested that amendments be made to the Written Notice from the May 22 IEP Team meeting on May 29, 2018. The District responded with proposed amendments and explanations on June 14. This is a reasonable timeframe to respond to a request to amend records.

Corrective Action is detailed below.

⁵ MUSER V(2)(C).

CORRECTIVE ACTION to be completed by September 28, 2018 and October 31, 2018.

- A. The District must provide sign in sheets, with names and titles, and agendas for training for all special education staff and service providers at the District's middle school about the following:
- Responding to requests for evaluations. MUSER V(1)(B)(3); MUSER V(2)(C)(2); MUSER V(2)(E).
 - Removal from the classroom through non-disciplinary action, or "send-homes," constitute educational removals and lack of implementation of the IEP. MUSER IX(3)(B)(3).
 - Implementing goals on IEPs. MUSER IX(3)(B)(3).
- B. The District's special education team leadership must draft internal procedures for District special education staff for situations when a student with special education needs repeatedly exhibits unsafe behaviors in the school that cause the Student to miss instruction. The draft protocols must be submitted to the Department for its review and implemented District-wide **by October 31, 2018.**
- C. The District's administrative team must be informed in writing about the requirements to enforce truancy proceedings in accordance with the law, particularly when a student is no longer receiving special education or related services because of removal from school by a parent or guardian who has not provided homeschooling documentation. A copy of the memorandum must be sent to the Department by **September 28, 2018.**