

Complaint Investigation Report
Parent v. RSU #35/MSAD #35
Complaint 18.110C
Complaint Investigator: Jeannette Sedgwick
July 25, 2018

The Department of Education received this complaint on June 11, 2018. The complaint investigator reviewed all documents, information, and responses from the parties. The complaint investigator interviewed the complainant on July 3, 2018. Interviews were conducted with the District's special education director and the Student's special education teacher on July 5, 2018.

FACTUAL FINDINGS

1. The Student is an eight-year old who was in the second grade during the 2017-2018 school year.
2. The District provided reading instruction from the time the Student was in kindergarten until the time of eligibility, the middle of her second-grade year (December 2017).
3. The Student was referred for special education services on June 13, 2017, at the end of her first grade year, for eligibility for special education and related services because of lack of progress in all academic areas.
4. On September 25, 2017, the District convened an IEP Team meeting. At that time, the Student was still reading at the kindergarten level. The Team discussed, among other things, a family history of dyslexia and the Student's continued lack of progress in mathematics and reading.
5. The complainant signed consent to evaluate in several areas on September 25, 2017. The District conducted a variety of assessments, including a Wechsler Intelligence Scale for Children, 5th ed. (WISC-V), some subtests of the Woodcock Johnson Test of Cognitive Abilities, 4th ed. (WJ-IV), some subtests of the Delis-Kaplan Executive Functioning System (D-KEFS), the Children's Auditory Verbal Learning Test, 2nd Ed. (CAVLT-2), and the Comprehensive Test of Phonological Processing 2nd ed. (CTOPP-2). Evaluations were conducted on November 2, 3, 6, and 13, 2017.
6. In December 2017 the District proposed an IEP for the Student based on the qualifying eligibility of Specific Learning Disability. The Student's IEP states that the Student will receive 5x45 minutes/week of special education instruction in Reading/Written Language and 5x45 minutes/week of special education instruction in Mathematics.
7. The Student's special education teacher, who has been a special educator in a self-contained classroom for 6 years, has completed 30 hours of instruction in Orton-Gillingham reading methodology as well as training in other reading methodologies and curricula such as Recipe for Reading.

8. The Student receives reading instruction in a small group setting of about 8 children. The learning instruction in this class is a systematic literacy instruction that does not rely on one methodology. Progress is monitored according to the curriculum of the classroom. At times during the school year, Educational Technicians (Ed Tech 3's) have instructed the class under the guidance of the special education teacher.
9. The complainant and the District communicated in April and May about some of the complainant's concerns, including class size of the specialized reading class, utilizing Title I services, discussing the Student's needs with the Student's former reading teacher at the District, and the Student's increasing feelings of not wanting to go to school.
10. On May 12, 2018, the complainant shared a list of concerns with the District that she hoped would be discussed at the next IEP Team meeting.
11. On May 14, 2018 the Student's IEP Team met. At that meeting, the complainant and the Team disagreed about the level of progress in reading the Student has made, including what level of reading the Student had achieved according to DRA benchmarks. Some of the complainant's concerns, including the Student's increasing anxiety, were discussed at that meeting; the District responded to other concerns in a communication to the complainant dated May 17, 2018.
12. In the second half of the 2017-2018 school year, the Student has missed some days of school for illness and for family vacation.
13. The Student's annual achievement will be measured in December 2018, the date of the next progress report. Progress reports dated June 29, 2018 show the Student has met one of her mathematics goals and has achieved satisfactory progress in reading goals, with the exception of limited progress in oral reading fluency. At the end of the year, the Student could read only 28 words per minute (WPM); the WPM goal is to read 48 WPM with 80% accuracy by December 2018. The progress reports and other documentation indicate that the District does not measure WPM for fluency until a certain level of sight word recognition, so that the WPM "is not actually calculated".
14. The complainant requested ESY services in reading for the Student. The District invited the Student to join a generalized summer program for elementary students.
15. The District will conduct further evaluations of the Student during the summer of 2018 to assess emotional needs of the Student.

DETERMINATIONS

The complainant alleged the following:

1. The Student's IEP is not designed to ensure access to the general curriculum so that the Student can meet educational standards. Specifically, the complainant alleges that the Orton-Gillingham reading instruction is not meeting the Student's needs and therefore, the Student is not making progress in the general education program. MUSER X(2)(A)(2). **COMPLIANCE FOUND.**

The Student is receiving special education, specifically reading instruction and mathematics instruction, as pull-out instruction in a small group setting. This instruction occurs 5x60/minutes each week. The reading instruction is not strictly Orton-Gillingham instruction; rather, it is a District curriculum based on a selection of systemized reading methodologies. It is primarily based on the Recipe for Reading sequences.

The complainant and District disagree about the level of progress in reading that the Student has made since December 2017 when the Student became eligible for special education. According to the District, the Student has met educational standards in certain areas, such as mathematics, and is approaching meeting standards in reading. Evaluation data from the District shows that the Student is reading at a late first-grade level.

The complainant, who is a reading instructor, is concerned that the District's data is inaccurate, particularly because the District has not evaluated the fluency rating in its evaluations, hence making the District's measurement of achievement of moving from a level 4 to a level 14 of the DRA inaccurate. The complainant also remains concerned that even if the Student is reading at a late first-grade level, the Student remains well behind her peers and is not accessing second-grade reading material.¹

The Student's progress in mathematics, as described in progress reports, has been very good, particularly in that she achieved one goal having to do with money by May 11, 2018. Reading goals are specific to the Student's needs and are measurable. In a few months since determining eligibility, the Student has made some progress in reading.

In all, the IEP is written for the Student to gain significant progress in her reading by the annual review date of December 2018.

2. The Student's IEP is not being implemented because reading instruction does not occur according to the Student's IEP. MUSER IX(3)(B)(3). Specifically, the complainant alleges that the instructor is not instructing classes on a regular basis.

COMPLIANCE FOUND.

The Student's IEP states that the Student will receive mathematics and reading instruction by a special education teacher in reading 5x45 minutes/week. The District provided that instruction to the Student. While there may have been approximately three dates in the spring of 2018 when the special educator did not conduct reading instruction, on those days the Student was taking school-wide assessments or participating in special events days with her peers, and when the special educator was unavailable, Ed Tech3s continued instruction under her guidance. No violation of law or regulation has occurred.

¹ There is no information in the record about why the RTI process lasted two years when it was evident the Student was not reading at grade level.

3. A type of rules-based reading methodology, specifically the Orton-Gillingham program, should appear on the Student's IEP as part of the Student's specially designed instruction or related service. MUSER X(2)(A)(2). **COMPLIANCE FOUND.**

The complainant alleged that the reading instruction provided by the District is not sufficient to meet the Student's needs and that a specialized methodology such as Orton Gillingham should be implemented to compensate for the low level of Student's reading compared to her peers. The District, on the other hand, believes its program to be sufficient. (Also see determinations 1 and 11).

The District has provided data concerning many aspects of the student's reading to show progress since December 2017, the time the Student became eligible for special education. Based on data collected, the Student has progressed in the goal of spelling word patterns with digraphs, blends, long vowels, and vowel teams; the goal of writing a sentence using correct capitalization, punctuation and spacing; and the goal of answering inferential questions about a text. The Student's reading rate (words per minute) increased from 23 in December 2017 to 28 in April 2018, and the student's goal is to read 48 words per minute with 80% accuracy for 4 out of 5 consecutive opportunities by December 2018. The level of the Student's reading achievement is a point of disagreement between the complainant and the District.

Documentation shows that the Student is progressing in her reading goals with the current instruction provided by the District. There has been no violation of law or regulation regarding this allegation.

4. After the May 14, 2018 meeting, the District did not provide notice of the school's proposals or refusals, or both, regarding the Student's educational program. MUSER VI(2)(I). **COMPLIANCE FOUND.**

Prior to the May 2018 Team meeting, the complainant had emailed the District with a list of twelve specific concerns. Written notice from the May 2018 meeting shows that some of these concerns were discussed but that the District responded to several other concerns through writing rather than through the IEP team process. Notice shows that the District proposed and/or refused several courses of action during the meeting and in its subsequent letter to the complainant, which was timely provided. The District has complied with law and regulation.

5. The Student's IEP Team did not consider input from the parents at the May 14, 2018 Team meeting. MUSER VI(2)(J). **COMPLIANCE FOUND.**

As noted above, there is a disagreement between the District and complainant about how to measure the Student's progress in reading. The complainant is particularly concerned that her understanding of the Student's progress is vastly different than that of the District. The written notice shows that the District considered this and other concerns at the May 2018 Team meeting. (Also see determinations 4 and 9). No violation of law or regulation has occurred.

6. The District did not respond to a request in May 2018 to inspect and review Student educational records. MUSER XIV(3). **NON-COMPLIANCE FOUND.**

The complainant has requested access to Student work, such as the weekly assessment sheets in reading to determine acquisition of skills and monitor progress. The District has provided access to the Student's special education file and the Student's general file. The District has not provided access to the specific student work requested by the complainant.

Education records are the type of records covered under the Family Educational Rights and Privacy Act of 1974 (FERPA).² FERPA defines education records as "those records that are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution."³ Therefore, student work maintained by the District to show educational skills or progress, such as the records requested by the complainant, are educational records. The District has not provided access to those education records in accordance with the regulations.⁴

7. The Student's educational program is not meeting the Student's emotional needs such that the Student can progress in the general education curriculum. MUSER X(2)(A)(2). **COMPLIANCE FOUND.**

During the spring of 2018, the Student would arrive to school in tears or very sad after indicating to her parents that she did not want to attend school. The District has shared that the Student does not routinely exhibit unusual or significant anxiety while at school.

The IEP Team discussed the Student's emotional needs at the May 2018 meeting. At that time, the complainant discussed the Student's anxiety about going to school each morning and the Team recommended an evaluation to gain information about the Student's needs. The complainant signed consent to evaluate in May 2018 and the evaluation will be conducted during the summer of 2018. There has been no violation of law or regulation.

8. The Team did not consider a neuropsychological evaluation of the Student provided by the parents. MUSER IX(3)(D). **NO FINDING.**

This allegation was not in the request for state complaint investigation and was therefore not part of the complaint investigation.

9. The District did not did not provide a complete and accurate summary of the parents' concerns in the Written Notice after the Team meeting in May 2018. MUSER App.1; 34 CFR 300.503(9). **COMPLIANCE FOUND.**

² MUSER XIV(2).

³ 34 CFR 99.3.

⁴ MUSER XIV(3).

The complainant stated that some of the aspects of the written notice were inaccurate or did not contain enough information to respond, and that the notice referenced a previous meeting that did not occur.

Written Notice from the May 2018 meeting shows that some of the complainant's concerns were discussed but that the District responded to several concerns through writing rather than through the IEP team process. According to the Written Notice, the District proposed and/or refused several courses of action during the meeting. The District also responded to the complainant's concerns in a letter which was timely sent. The notice also states that an IEP Team meeting would be scheduled at a mutually agreeable date to continue discussion. That meeting did not occur prior to the end of the school year. In all, the written notice is detailed, thorough, and reflects discussion by the Team. The District has complied with law and regulation.

10. The District did not evaluate the Student in all areas in suspected disability, specifically, assistive technology for a reading disability. MUSER V(2)(C)(4). **NON-COMPLIANCE FOUND.**

The Student's evaluations that were conducted in November 2017 demonstrate that at the time of testing, the Student had below average skills in reading and mathematics and had significant difficulty in the area of reading comprehension and fluency. The complainant requested an assistive technology (AT) evaluation in an email to District staff on May 1, 2018, after the Student had been determined to be a child with a specific learning disability and after the IEP was created and implemented. District staff responded to the complainant that the Team would discuss the request for an evaluation during the IEP Team meeting in May 2018.

In a follow-up email to the District dated May 23, 2018, the complainant wrote to District staff indicating that she had asked the District about a 'technology evaluation' at the IEP Team meeting and that the District staff had told her that she did not know what that was. The complainant specified in the email that she wished the Student to have access to a talk-to-text program. These communications comprise a request for an assistive technology evaluation.

In the District's response to this allegation, the District states that AT supports are inappropriate for struggling readers. This statement indicates that the District has made determinations about this particular Student without any assessment or evaluation and may have a school-wide policy about AT evaluations for struggling readers in general. The Department notes that Districts must be able to articulate cogent and responsive explanations for each student's services based on each student's educational needs.⁵

On the written notice from the May 2018 meeting, the District indicated that the Team was not able to address the twelve parent concerns, of which the AT evaluation was one, and a plan was made for the District to respond in writing. The IEP Team did not address the request for an AT evaluation at the meeting and in the following correspondence. The District has not complied with law or regulation regarding this allegation.

⁵ *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

11. Given the lack of progress, the Student should receive the following in order to receive FAPE: **COMPLIANCE FOUND.**

- a. ESY services during the summer of 2018; MUSER X(2)(A)(7)
- b. Assistive technology. MUSER XI(2)(C)(4)

The IEP Team discussed ESY services for the Student at the May 2018 meeting and determined that the Student was unlikely to regress in her reading skills over the summer. Written notice provides specific information by two team members specifically about this issue. Given the Student's progress in reading since December 2017 (see determination 1), there has been no denial of FAPE.

Likewise, there has been no denial of FAPE that warrants the District offering assistive technology. However, the Department notes that there are several AT options for young readers who are reading below grade level because of a disability. Regarding the assistive technology evaluation, as discussed in the determination above, the District may wish to include these as accommodations for the Student after the results of the AT evaluation have been discussed by the Team.

12. The Parents were not provided with Procedural Safeguards one time during the school year. MUSER XV. **COMPLIANCE FOUND.**

Districts must provide procedural safeguards one time a school year, with two exceptions: upon initial referral or parent request for evaluation; and upon receipt of the first State complaint and upon receipt of the first due process hearing request. The complainant stated that she received the procedural safeguards only after requesting them at the time of the complaint. Documentation shows that procedural safeguards were mailed to the complainant on September 6, 2017 and that the complainant certified receipt of those safeguards with her signature. Additionally, the procedural safeguards were provided on June 18, 2018 in response to the request for a state complaint investigation.

Based on the information provided, the complainant has received a copy of the procedural safeguards.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

The District must complete the following

1. The District must immediately provide access to the educational records (student work) that was requested by the complainant. The District must document the date(s) the access was provided and submit that information to the Department **by September 15, 2018**.
2. The District must review the definition of educational records with District administration in a memorandum. The District must send a copy of that memorandum and a list of District recipients with name and titles to the Department **by September 15, 2018**.
3. The District must provide a consent form for an AT evaluation to the complainant within **5 calendar days after receiving this report** and, if consent is given, arrange for the AT evaluation to occur as soon as reasonably possible and no later than the regulatory timeframes. Documentation of the consent form and arrangements must be provided to the Department **by September 15, 2018**.
4. The District must review in writing with all special education staff in the District the requirements for consent forms to be provided when there has been a request for an evaluation by a parent or guardian of a student who has been identified as a student with a disability. The District must send a copy of that memorandum and a list of District recipients with name and titles to the Department **by September 15, 2018**.