

Complaint Investigation Report
Legal Guardian v. South Portland

June 29, 2009

Complaint #09.081C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Legal Guardian

Respondent: Suzanne Godin, Superintendent
130 Westcott Rd.
South Portland, ME 04106

Special Services Director: Kathleen Cox

Student: Student
DOB: XX/XX/XXXX

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on March 12, 2009. The Complaint Investigator was appointed on May 13, 2009 and issued a draft allegations report on May 15, 2009. The Complaint Investigator conducted a complaint investigation meeting on June 4, 2009 (rescheduled from the original date of June 1, 2009 at the Complainant's request), resulting in a set of stipulations. On June 9, 2009, the Complaint Investigator received a 2-page memorandum and 69 pages of documents from the Complainant, followed by an additional memorandum of two pages on June 12, 2009 in response to the submission of the South Portland School Department (the "District"), and received a 3-page memorandum and 47 pages of documents from the District on June 9, 2009. Interviews were conducted with the following: Carol Marcoux, director of student support services; Jon Beausang, case manager; and the Student's aunt and legal guardian.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Other Health Impaired. This complaint was filed by the student's aunt (the "Legal Guardian"), the Student's legal guardian, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to conduct an interest and aptitude evaluation in violation of MUSER § V.5;
2. Failure to adequately consider input from the Legal Guardian regarding needed additional evaluation data in violation of MUSER §V.3.A(2);
3. Failure to amend inaccurate information contained in the IEP team meeting minutes at the Legal Guardian's request within a reasonable period of time, or else notify the Legal Guardian of its refusal to do so, in violation of MUSER §XIV.8;
4. Failure to ensure that the Legal Guardian and Student were present at the May 7, 2009 IEP team meeting by scheduling the meeting at a mutually agreed on time in violation of MUSER §§VI.2.A and VI.2.H(1)(b);
5. Failure to have more than one teacher and the school nurse present at the May 7, 2009 IEP team meeting in violation of MUSER §§VI.2.B (2), (3) and (5);
6. Failure to provide a copy of the full evaluation report to the Legal Guardian at least 3 days prior to the May 7, 2009 IEP team meeting in violation of MUSER §§V.4.G and VI.2.A.

V. Stipulations

1. At the IEP team meeting of 4/1/09, a determination was made to not conduct an Interest and Aptitude Assessment as requested by the Legal Guardian.
2. At the IEP team meeting of 4/1/09, the Legal Guardian requested that the next IEP team meeting be scheduled for Friday 5/8/09 to accommodate her schedule.
3. The Legal Guardian did not receive a copy of the Student's psychological evaluation report until 5/6/09, one day before the scheduled IEP team meeting.
4. The psychological evaluation report delivered to the Legal Guardian on 5/6/09 was marked "draft."
5. At the IEP team meeting of 5/7/09, only one of the Student's teachers (Bryan Hoy, an English teacher) was present; the Student's case manager, Jon Beausang, who is a certified special education teacher, was also present.
6. The school nurse was not present at the IEP team meeting of 5/7/09.
7. The Legal Guardian appeared at the IEP team meeting of 5/7/09, saw who was present, and then left the meeting after first stating her reasons for leaving.

VI. Summary of Findings

1. The Student lives in South Portland with her sister and her aunt, the Legal Guardian, and is presently attending xx grade at South Portland High School. She began receiving special education services under the category Other Health Impaired in xx grade.
2. On March 19, 2009, the District sent home to the Legal Guardian a Parental Consent for Evaluation form. The tests identified were those that were determined at the Student's IEP team meeting of May 12, 2008. The Legal Guardian signed and returned it, adding to it a request for two additional tests: an interest and aptitude assessment and a vision assessment.

3. When the District received the request for two additional tests, it informed the Legal Guardian that the IEP team would need to meet to consider those requests, and a meeting was scheduled for April 1, 2009.

4. At the April 1, 2009 meeting, the Legal Guardian explained that her request for the interest and aptitude assessment stemmed from her concern that the Student seemed to have no interest in getting a job and was not motivated to work. She was concerned about identifying jobs that the Student was capable of performing.

5. One of the members of the Student's IEP team, Susan Giencke, Ph.D., said that there was already some aptitude testing data from the Student that could be reviewed by the Student's guidance counselor. She suggested that, instead of another written assessment, they would get better information from an on-site assessment by a job coach working directly with the Student. The school administrator on the team, Carol Marcoux, suggested a summer program run by Maine Medical Center that would allow the Student to work on a job site with a coach.

6. The team determined not to do the interest and aptitude assessment, but agreed that the Student would receive Extended School Year services of 17 hours per week for 7 weeks at Maine Medical Center's work program, for which the District would provide door-to-door transportation, in order to assess her vocational skills and aptitudes.

7. With regard to vision testing, the Legal Guardian stated that the Student suffers from visual neglect, impairing her ability to see things from her left. The Legal Guardian felt that this created a safety issue for the Student.

8. Dr. Giencke responded to the Legal Guardian's concerns by noting that there was no indication from school staff that the Student was in any way impeded in her school activities by her visual problems. In addition, the most recent neuropsychological exam did not reveal any concerns about the Student's vision.

9. The team determined not to do a visual assessment, but Dr. Giencke suggested that the Legal Guardian may want to consult with an ophthalmologist or neurologist.

10. At the end of the meeting, Ms. Marcoux said that the Student's annual IEP review needed to be scheduled by May 11, 2009. The Legal Guardian stated that she worked every day until 4:00, and requested that it be scheduled for Friday, May 8, 2009 (when it would be easier for her to leave work a little earlier), preferably at 3:30. That date was not convenient for Ms. Marcoux. Several other dates were suggested but none could be identified that were acceptable to both the District and the Legal Guardian. The meeting ended without a date established for the next meeting.

11. On April 2, 2009, the Student's case manager, Jon Beausang, e-mailed the Legal Guardian that Ms. Marcoux was able to rearrange her schedule and offered the date of May 7, 2009 at 2:15 for the meeting. The Legal Guardian wrote back that Friday was better than Thursday, and asked that someone else administer the team since Ms. Marcoux was unwilling to accommodate her schedule.

12. On April 3, 2009, the District sent to the Legal Guardian the IEP team minutes and Written Notice for the April 1 meeting. On April 14, 2009, the Legal Guardian sent an e-mail to Mr. Beausang, stating she wanted “to clarify a few statements” that were put in the minutes. Mr. Beausang wrote back on April 15, 2009 saying he would attach the Legal Guardian’s e-mail to the minutes so her concerns would be reflected in the Student’s file. Mr. Beausang stapled the e-mail to the minutes several days later.

13. On April 6, 2009, Ms. Marcoux sent an e-mail to the Legal Guardian offering 5 different possible meeting times. Friday May 8th was offered at 7:00 a.m. and 12:30 p.m., and three different days, including May 7, at 2:15 p.m. The e-mail address used by Ms. Marcoux for the Legal Guardian was not correct, and the Legal Guardian did not receive the e-mail.

14. On April 16, 2009, Mr. Beausang e-mailed to the Legal Guardian that the IEP team meeting had been scheduled for May 7, 2009 at 2:15 p.m. The Legal Guardian responded the next day that the scheduled date and time was acceptable, but again requested that Ms. Marcoux not administer the meeting.

15. The Legal Guardian went away on vacation, and returned on May 6, 2009. On the day she returned, the Legal Guardian received a copy of the psychological evaluation performed by Dr. Giencke. The report was marked “Confidential Draft.”

16. On May 7, 2009, the Legal Guardian e-mailed to Mr. Beausang that she would be attending the meeting that day, and was assuming that Ms. Marcoux would not be administering the meeting. Mr. Beausang responded by incorporating a message from Ms. Marcoux dated April 29, 2009 (a message the Legal Guardian had not received) stating that it was her job to administer meetings at the high school, but that she was inviting Ms. Cox to attend the May 7 meeting “in order to mitigate any possible concerns” of the Legal Guardian.

17. The Legal Guardian then sent an e-mail to Ms. Cox complaining that Ms. Marcoux’s name still appeared on the Advance Written Notice for the May 7 meeting despite her requests for someone else to administer the meetings.

18. The Legal Guardian arrived at the meeting at around 2:15. Ms. Marcoux was present to administer the meeting. Also present, in addition to Mr. Beausang (case manager and a special education teacher), were a regular education teacher, social worker, guidance counselor and Dr. Giencke, the psychological examiner. The Legal Guardian saw who was present, reminded those present that she had specifically stated that she didn’t want Ms. Marcoux to administer the meeting, and then walked out of the meeting. Shortly after the Legal Guardian left, Ms. Cox arrived to attend the meeting.

19. During an interview conducted by the Complaint Investigator with Carol Marcoux, Ms. Marcoux stated the following: She has been Coordinator for Instructional Support for the District for 5 years. One of her duties is to administer IEP team meetings for students at South Portland High School. When, at the April 1, 2009 meeting, the discussion turned to scheduling the annual review meeting, she didn’t have her appointment book with her. She therefore wasn’t able to firmly commit to certain dates. She knew that the Legal Guardian

wanted the meeting to begin at 3:30, but the school day ends at 1:50, and she doesn't think it's fair to ask staff to wait around for 1 hour and 40 minutes before the meeting begins. Also, she knew that the meeting would last for about 2 hours, and the District as a rule doesn't schedule long meetings for Friday afternoons as a courtesy to the staff. The Legal Guardian used to work for the District and she believes the Legal Guardian was aware of this practice. She may have said something at the meeting about it being much harder to get teachers to stay late on Fridays. Regardless, she had a personal appointment on the afternoon of May 8, 2009, so that date wasn't available.

20. During an interview conducted by the Complaint Investigator with Jon Beausang, Mr. Beausang stated the following: He is a certified special education teacher, and has been the Student's case manager since she started at the school in September 2007. As case manager, he meets with the Student during each week, usually when she is in the learning lab. He monitors the Student's progress, and helps her with her regular education classes' course work and with the IEP goals.

When he received the e-mail from the Legal Guardian seeking to clarify statements in the IEP team meeting minutes, he e-mailed back that he would attach the e-mail to the minutes. A few days later, he printed out the e-mail and stapled it to the minutes that were maintained in the Student's file.

21. During an interview conducted by the Complaint Investigator with the Legal Guardian, the Legal Guardian stated the following: At the April 1, 2009 IEP team meeting, she was not seriously requesting that the next meeting start at 3:30. She was trying to make the point that if the District was serious about scheduling when it was convenient for the parents, then that would be the start time. She had heard before that the District doesn't schedule long meetings on Friday, but the days that are the most convenient for her (holidays and Fridays) are always not convenient for the District. Ms. Marcoux rejected the date of May 8, 2009 for the next meeting because, she said, the team needed as many teachers as possible at the meeting. Then she went to the May 7 meeting and there was only one teacher present.

She was also upset that the school nurse was not present at the meeting. The nurse has always been present at the Student's IEP team meetings. The Student has a shunt in her head that could fail at any time, and the team needs the nurse's input. Also, the nurse was supposed to give her information about visual testing for the Student.

With regard to the psychological evaluation, her husband told her it was placed in their mailbox in a manila folder on May 6, 2009, which was the day she returned from her vacation. She did not review the Student's scores on the evaluation with Dr. Giencke on April 14, 2009. That meeting was for Dr. Giencke to interview her for the Vineland. Dr. Giencke spoke generally about things that the Student had said during the exam, but didn't show her any scores. Dr. Giencke at that point had not finished typing her report. She expected that Dr. Giencke was going to e-mail the report to her, like she did the last time she tested the Student's brother. When she got the report, there was some basic information that was incorrect. For example, on page two, the report refers to a neuropsychologist Dr. John

Goodrick; she believes Dr. Giencke meant to refer to Dr. John Goodrich, the Student's pediatrician.

VII. Conclusions

Allegation #1: Failure to conduct an interest and aptitude evaluation in violation of MUSER § V.5

Allegation #2: Failure to adequately consider input from the Legal Guardian regarding needed additional evaluation data in violation of MUSER §V.3.A(2)

NO VIOLATION FOUND

When the Student's IEP team met on May 12, 2008, they discussed the testing that would be performed the following year as part of the Student's triennial evaluation. The consent form that was sent to the Legal Guardian on March 19, 2009 reflected the determinations that had been made at that meeting. The Legal Guardian signed and returned the form, adding two additional tests. MUSER §V.3.A(2) requires that a student's IEP team, in connection with any reevaluation, make a determination as to what additional data is needed in order to determine whether any additions or modifications are needed to the student's program. As the IEP team had not previously discussed those two additional evaluations, a meeting was required to be held for that purpose.

One of the added tests was an interest and aptitude evaluation. MUSER §V.5 provides that "[e]very student with a disability between the ages of 14 and 20 years *may* be provided an opportunity for an interest and aptitude evaluation. Such evaluations *may* include job sampling and practical experiences if determined to be appropriate." (emphasis added). The use of the word "may" rather than "shall" indicates that the provision of this assessment is optional. The regulation explains that the purpose of the vocational evaluation is to assist the IEP team to identify a student's "vocational interests, . . . vocational strengths and deficits in work skills and behaviors that would interfere with appropriate educational programs and services that would be reasonably expected to result in the gainful employment" of the student.

At the April 1, 2009 IEP team meeting, the Legal Guardian's explained her reason for making the request. She expressed concern that the Student seemed to have no interest in getting a job and wondered what type of employment she would be capable of. She felt that the Student's assessments of her own capabilities were not accurate or realistic. Dr. Giencke commented that information obtained from standard vocational aptitude tests was of limited value, especially with a student whose insights were unrealistic. She suggested that more useful information could be obtained from an on-site assessment by a job coach working directly with the Student. Ms. Marcoux knew of a summer program that would provide just such an opportunity, and the IEP team determined to make this program available to the Student during the coming summer.

The summer program to be provided to the Student appears to be reasonably calculated to provide the kind of information described in the regulation. Especially given the non-

mandatory language of the regulation, the District's determination does not constitute a violation.

The second assessment requested by the Legal Guardian was vision testing, and the Legal Guardian was likewise given an opportunity to explain to the team the basis for her concern. The Legal Guardian stated that a neuro-psychological evaluation performed in 2004 suggested that the Student had a left-sided visual field neglect, and the Legal Guardian was concerned that such a deficit could present a safety issue for the Student due to her not noticing sharp or dangerous objects on that side of her body. The IEP team then had the responsibility to determine whether the additional information expected to be obtained from the requested evaluation was needed to enable the team to make any necessary modifications to the Student's program.

Dr. Giencke noted that there was no indication from any of the reports from the Student's teachers that vision was impeding the Student's performance. In addition, the Student's most recent neuro-psychological examination (from 2007) did not reference a problem with vision. Based on those considerations, the team reasonably concluded that the data in question was not likely to be useful in connection with the Student's program, and determined not to conduct visual testing.

Allegation #3: Failure to amend inaccurate information contained in the IEP team meeting minutes at the Legal Guardian's request within a reasonable period of time, or else notify the Legal Guardian of its refusal to do so, in violation of MUSER §XIV.8
NO VIOLATION FOUND

Under MUSER §XIV.8, a parent who believes that information in an educational record is inaccurate or misleading may request that the information be amended. Although the Legal Guardian's e-mail seeking to "clarify" statements contained in the April 1 IEP team meeting minutes did not clearly request that the document be amended, that purpose can be fairly inferred. Of the two subjects contained in the Legal Guardian's e-mail, only her comments regarding scheduling of the next meeting involved a claim that the minutes were inaccurate or misleading; the comments about the visual testing were supplemental to comments that had been made at the time of the meeting. Under those circumstances, Mr. Beausang's offer to physically attach the Legal Guardian's e-mail to the minutes sufficiently satisfied the District's obligation to amend the record. Had the requested amendment not involved a minor, non-determinative issue, an actual revision of the document may have been required.

Allegation #4: Failure to ensure that the Legal Guardian and Student were present at the May 7, 2009 IEP team meeting by scheduling the meeting at a mutually agreed on time in violation of MUSER §§VI.2.A and VI.2.H(1)(b)
NO VIOLATION FOUND

MUSER §§VI.2.A and VI.2.H(1)(b) describe steps that school districts are required to take in an effort to ensure that a student's parents are present at IEP team meetings. One of those steps is to schedule meetings at "a mutually agreed on time and place." That does not mean

that districts must schedule the meetings whenever it would be convenient for the parents. Districts are expected to make reasonable efforts to accommodate parents' schedules, but parents must recognize that there are constraints on districts' time as well. What the regulations require is good faith efforts on the parts of both parties to find a "mutually agreed on time and place."

Here, the Legal Guardian was offered a choice of a number of dates and times. As the District's school day ends at 1:50, and the meeting was expected to last about 2 hours, the District reasonably chose to start the meeting no later than 2:15. The Legal Guardian's preferred date, May 8, was not available to Ms. Marcoux, who was in any event reluctant to ask other staff members to stay late on a Friday.

Ultimately, the District and the Legal Guardian arrived at a mutually agreed on date and time: May 7 at 2:15. The Legal Guardian not only agreed to the date, she appeared at the meeting. She then chose to leave the meeting because Ms. Marcoux was present and some other staff members were not. The regulations do not confer any right upon parents or guardians to insist on a particular staff member to administer IEP team meetings. The team was otherwise duly constituted. The District owed the Legal Guardian nothing more, and no violation attaches to her unilateral decision to not attend the meeting.

Allegation #5: Failure to have more than one teacher and the school nurse present at the May 7, 2009 IEP team meeting in violation of MUSER §§VI.2.B (2), (3) and (5)
NO VIOLATION FOUND

MUSER §VI.2.B dictates that the IEP team must contain no less than one regular education teacher and no less than one special education teacher. Present at the May 7, 2009 IEP team meeting were Bryan Hoy, the Student's English teacher, and Mr. Beausang, the Student's case manager who is a certified special education teacher. The regulations do not require that a school nurse attend, although MUSER §VI.2.B(5) provides that others with knowledge or special expertise regarding the Student may attend "at the discretion of the parent or the agency." The Advance Written Notice issued by the District did not identify the nurse as a person who was invited to attend. Neither did the Legal Guardian make arrangements for the nurse to attend. Furthermore, the investigation uncovered no evidence that the meeting was expected to include discussion of a change to the Student's program that had implications for the Student's health.

Ms. Marcoux's statement on April 1, 2009 to the effect that it was difficult to get teachers to attend meetings on Friday afternoon did not give rise to an obligation on her part to produce any more than the requisite one regular education teacher and one special education teacher at the meeting.

Allegation #6: Failure to provide a copy of the full evaluation report to the Legal Guardian at least 3 days prior to the May 7, 2009 IEP team meeting in violation of MUSER §§V.4.G and VI.2.A
VIOLATION FOUND

MUSER §§V.4.G and VI.2.A provide that a copy of any evaluation report expected to be discussed at an IEP team meeting be provided to a parent (or guardian) at least 3 days prior to the meeting. In this case, the meeting was scheduled for May 7, 2009, and the report was not provided to the Legal Guardian until May 6, 2009. It also was not a final report, but a draft. The Legal Guardian was entitled to receive a report, delivered no later than May 4, 2009, that was not subject to change between the time she received it and the time of the meeting.

In instances where an evaluator is unable to deliver a final report within the regulatory time frame, and time constraints do not permit a rescheduling of the entire meeting, it may be possible to hold the meeting when originally scheduled but put off discussion of the area involved in the evaluation until a subsequent meeting.

VIII. Corrective Action Plan

The District shall issue a memorandum to all special education staff and contractually engaged providers regarding the necessity for providing to parents a copy, in final form, of any evaluation report expected to be discussed at an IEP team meeting at least 3 days in advance of the meeting. The District will submit a copy of the written memorandum, together with a list of the names and job titles of all those to whom the memorandum is issued, to the Due Process Office and the Parents.