

Complaint Investigation Report
Parents v. R.S.U. #20

February 28, 2012

Complaint #12.049C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parents
Address
City

Respondent: Bruce Mailloux, Superintendent
Box 363
Belfast, ME 04915

Special Services Director: Sharon Goguen

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on January 17, 2012. The Complaint Investigator was appointed on January 19, 2012 and issued a draft allegations report on January 23, 2012. The Complaint Investigator conducted a complaint investigation meeting on February 8, 2012 (rescheduled from the original date of February 3, 2012 at the Respondent's request), resulting in a set of stipulations. On February 15, 2012, the Complaint Investigator received a 5-page memorandum and 57 pages of documents from the Complainant, and received a 10-page memorandum and 64 pages of documents from R.S.U. #20 (the "District"). Interviews were conducted with the following: Sharon Goguen, director of special services for the District; Jane Austin, teacher and principal for the District; Allen Tomasello, behavior analyst contracted with the District; Paul Nao, Ph.D., behavior analyst; and the Student's father.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Multiple Disabilities (Autism, Speech or Language Impairment and Intellectual Disability). This complaint was filed by the Student's parents, (the "Parents") alleging

violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to utilize the IEP Team as the vehicle for determining the services needed by the Student, specifically the provision of services by a behavior analyst, and therefore involve the Student's parents in the decision making, in violation of MUSER §VI.2.I;
2. Failure to provide a related service (applied behavior analysis) by an appropriately certified or licensed professional in violation of MUSER §X.2.A(5);
3. Failure to obtain parental consent before disclosing personally identifiable information to an unauthorized party (the behavior analyst) in violation of MUSER §XIV.11;
4. Failure to properly and adequately implement the student's special education program, specifically with respect to behavior analysis, in violation of MUSER §§IX.3.B(3) and X.2.A(5).

V. Stipulations

1. The decision to have Allen Tomasello train staff to work with the Student was not made by the Student's IEP Team.
2. The District did not obtain the written consent of the Student's parents before releasing to Mr. Tomasello personally identifiable information about the Student.
3. Mr. Tomasello's certification in Behavior Analysis is as a Board Certified Assistant Behavior Analyst ("BCaBA").

VI. Summary of Findings

1. The Student lives in Stockton Springs with the Parents, and is presently attending xx grade at Stockton Springs Elementary School (the "School"). The Student began attending the School in the fall of 2010 after attending a Montessori School for three years. By agreement between the parties, the Student was placed that year in a xx grade classroom, although she was chronologically a xx grader. At that time, the Student had minimal academic readiness skills and minimally engaged in verbal communication, and she began receiving special education services under the category Multiple Disabilities.

2. The Student's IEP Team met towards the end of that year, on June 9, 2011, to conduct the annual IEP review. The Student's special education teacher, Ms. Austin, reported that the Student had met her pre-literacy goal, had learned and could write 12 letters and sounds, could rhyme, knew syllables and was at mid-xx level in math. The Student was reported to initiate conversations and had increased her use of language. The Student was also reported to be following directions and routines 90% of the time. The Student's speech therapist reported that the Student's language had shown tremendous growth over the preceding year, and that speech therapy sessions were going well with no refusals or defiant behavior. The Student's occupational therapist reported that the Student was presenting with few refusals

and was able to self-regulate well in the school environment. The Student was in the regular education classroom setting for opening activities, morning meeting, math, lunch, recess, specials and writing.

3. The Student's IEP dated June 9, 2011 states, in Section 3.C, that the Student "has a global language disorder of attention" and "would profit from considerable individual attention and a high structured program." The IEP identifies the following services to be provided to the Student: specially designed instruction, five times per week for 2 hours; speech/language services once per week for 45 minutes; OT direct services once per week for 15 minutes and OT consult services once per month for 30 minutes; adaptive PE; and ESY services. Supplementary aids and services include a behavior plan, excusal for support, directions clarified, allowance for response delays and additional time, with support provided by a full-time educational technician ("ed tech") III.

4. The IEP contains two behavioral goals as follows: #31521: "[The Student] will follow directions with 85% accuracy as based on her behavior plan and daily charting by her next IEP of June, 2012;" and #31520: "[The Student] will begin a given task independently before asking teacher for assistance with 85% accuracy as measured by a behavior chart by June, 2012." Section 4 of the IEP records the Student's present level of performance with respect to these goals as follows: #31521: "Presently [the Student] is following directions with 85 to 90% accuracy. She needs a visual reminder to follow directions which is embedded in her earning 5 yes smiling faces. When she follows a direction, she earns one smiley face. When she has earned five, she is able to complete a reinforcement activity such as play dough, walk, etc.;" and #31520: "Presently [the Student] needs a visual reminder to initiate a task. This visual reminder is in the form of a yes. She is to earn five smiling faces before she can have a reinforcement activity such as play dough, walk, etc."

5. Due to the Student's continuing behavior issues involving following directions, task attention, non-compliance and destructive or aggressive behaviors, the School staff decided to utilize the services of Alan Tomasello. Mr. Tomasello is certified by the Behavior Analyst Certification Board as an Assistant Behavior Analyst ("BCaBA"), holds Maine Department of Education certification as a special education teacher, and is under contract with the District to provide "[c]onsultation and staff training regarding behavioral analysis and program development for designated students and classrooms." The District's contract with Mr. Tomasello mistakenly identifies his certification as "Associate Behavior Analyst," a certification category which does not exist.

6. On August 31, 2011, Ms. Austin spoke with the Student's father after he had dropped the Student off at the School and told him that staff would like to have its autism consultant see the Student and consult with staff regarding the Student's behavior issues. The Student's father expressed his agreement with that proposal.

7. Mr. Tomasello observed the Student on three occasions between September 13, 2011 and December 12, 2011. Each time, he also met with School staff and worked directly with the Student in order to demonstrate for the staff the program and interventions he was developing with them. After each visit, Mr. Tomasello prepared a written report, and delivered several

copies of the report to Ms. Austin, with the intention that the Parents would receive one of the copies. Mr. Tomasello intended to continue to proceed in this way until the Student's behavior showed sufficient improvement.

8. As part of the work the staff was doing on behavioral programming for the Student, they developed an end-of-day script for the Student, the Student's father and staff to follow when the Student's father picked up the Student at the end of her school day. On September 14, 2011, the Student's father was given a script and asked to follow it when picking up the Student. The Student's father asked when the script had been developed, and told Ms. Austin that he wanted to speak with Mr. Tomasello. The next day, the Student's father told Ms. Austin that he was no longer willing to follow the end-of-day script. Ms. Austin gave Mr. Tomasello's phone number to the Student's father and told him he could call Mr. Tomasello at any time. The Student's father did not call Mr. Tomasello at that time.

9. The Parents did not see Mr. Tomasello's reports from September and October 2011. On or about December 13, 2011, the Student's father found a copy of Mr. Tomasello's December 12, 2011 report in the Student's backpack, and told the District that he no longer wanted Mr. Tomasello to see the Student or to consult with staff. The Student's father also requested a copy of the District's contract with Mr. Tomasello and of all Mr. Tomasello's records regarding the Student. Ms. Goguen told the Student's father that, although the District believed that behavior analysis was a methodology and therefore was not subject to parent approval or input, the District would comply with his wishes. Mr. Tomasello had no further involvement with the Student after that.

10. During an interview conducted by the Complaint Investigator with Alan Tomasello, Mr. Tomasello stated the following: He has been practicing in the field of behavior analysis since 1988, having been trained by many skilled practitioners, and works with children from the ages of 2 to 20. Most, but not all, of those children have been diagnosed with an autism spectrum disorder. He started the first program in Maine that provided early intervention behavioral services for that student population, and is currently director of Discovering Kids Consultation Service, providing training and supervision to its staff of 12. As a Certified Assistant Behavior Analyst, he must be supervised by a Certified Behavior Analyst; that person has always been Dr. Paul Nao. He has direct contact with Dr. Nao at least one hour per month. Twice a year, Dr. Nao directly observes his work. He brings cases to Dr. Nao's attention that are particularly challenging, but the Student's case was not one of those. He reviewed the case with Dr. Nao after he had discontinued his work with the Student.

The Student first came to his attention when he received a referral from Ms. Goguen. He set up a meeting with Ms. Austin and the ed techs, and reviewed the Student's IEP. At the meeting, he reviewed with the staff the Student's behaviors of concern. They were: aggression (physical aggression towards people, such as pinching); destruction of property (such as ripping or crumpling of paper or pushing desks); tantrum behavior (involving behavior such as whining, crying, screaming, or body thrashing); self-injury (such as finger chewing); and off-task behavior (such as crossing of eyes, head shaking and excessive foot movement). He asked the staff what the antecedents were for these behaviors, and what the current consequences were for them (whether through a formal plan or just how staff responded). The referral was not for a full functional behavior assessment; he was asked to

give some guidance on the system that was already being used with the Student. Accordingly, there was no report of a formal assessment, just a list of recommendations.

After the initial meeting, he observed the Student on September 13, 2011 for about 2 ½ hours total. In addition to observing, he also spent some time teaching behavior to the Student, in part to assess the accuracy of the staff members' information and also to look for things they might not have reported. He was trying to understand what functions were being served by the Student's behavior. At the time, the staff had a basic token economy in place for the Student – they would look for appropriate alternative behaviors from the Student and reward them with tokens. There were things that staff members were doing, however, that were delivering mixed messages to the Student and which at least in part explained the frequency with which they were seeing the problem behaviors. He concluded that it was very difficult to determine what was going on due to the level of inconsistency in the staff members' responses to the behaviors, and he decided he needed to better define the baseline of the behaviors, so he could understand the conditions under which the behaviors were occurring and get a better understanding of their function.

He wrote a report (dated September 13, 2011) outlining his recommendations for the staff, and he also worked briefly with the Student to demonstrate what he wanted staff members to do. During the time he worked directly with the Student, she did not engage in the problem behaviors, even though he asked staff members to give him the tasks that were most challenging for the Student. He took the system that was already in place and modified it to promote clarity for the Student (for example, he modified the chart the staff was using to keep track of the number of tokens the Student had received so that she could more readily see how many she had and how many more she needed to obtain the reward), and consistency of staff response to behaviors (by specifying the desired behaviors and then delivering tokens immediately after they occur). He also established a data collection system, under which the staff would record at five minute intervals when behaviors were observed.

One of his recommendations was to not repeat instructions given to the Student. Instead, he suggested that staff wait 30 seconds and then, if the Student did not comply with the instruction, to prompt the Student to comply. He told the staff to be careful to give good, clear instructions, and to make sure the Student was able to hear them. The best way to teach non-responsiveness is to repeat instructions, so that the student learns that she doesn't have to respond until the teacher starts to raise her voice, maybe on the 5th repetition. This idea of not repeating instructions is standard practice in his field. How much time to allow a student to respond varies with the student; 30 seconds is a lot of time.

The next meeting with staff occurred on October 25, 2011. He reviewed the data collected by staff, reviewed the reinforcement system, and again worked with the Student as a demonstration lesson to staff. He also reviewed the time-out procedure that had been instituted by staff since his last visit. The staff told him that the Student's behaviors had reached a point where they felt that they couldn't simply work through them, and they needed to remove the Student from the activity. He determined that the system being used by staff may have been inadvertently reinforcing the Student's negative behaviors. When the Student was engaged in a non-preferred activity and sought to avoid that activity through lower level avoidance behaviors, if the staff successfully worked through those behaviors they would

continue the non-preferred activity with the Student. The Student had learned that the only way to avoid the activity was to engage in more destructive behaviors. He therefore suggested to the staff that when the Student returned from a time-out, she be returned to the earlier activity, and that the number of tokens required to earn her reward be increased from 10 to 20. In this way, the Student would learn that her avoidance behavior would not only fail to free her from the non-preferred activity, but it would make her work even harder.

The next meeting with staff occurred on December 12, 2011. He reviewed the data, which reflected improvement with the Student's problem behaviors, and again worked with the Student as a demonstration lesson to staff. The total time he had spent with the Student was now about 35 minutes. He would have continued these monthly visits following this same format until the Student's behavior had improved sufficiently. After this meeting he received a phone call from the Student's father, who asked him about his background and training. It was clear that the Student's father was concerned as soon as he stated that his approach was behavior analytic. The Student's father reacted by saying "Oh, you're one of those." He understood that there was a philosophical difference regarding the approach the Student's father wanted for the Student. He told the Student's father that he would stop working with the Student, including discontinuing any staff consultation, and he would have done so even if the District had not asked him to stop.

During the time he was consulting with the staff about the Student, he did not seek out input from the Parents because he was only asked to address the Student's behavior in the school environment. His work usually does involve parental involvement, but there were no indications that there were problems in the Student's home, or anything beyond the school setting that was creating problems for the Student at school. He assumed that each of the three reports he prepared were received by the Parents; he always printed out and gave to the District one copy which he labeled "Home."

11. During an interview conducted by the Complaint Investigator with Jane Austin, Ms. Austin stated the following: She is a special education teacher and this year has also acted as interim School principal. She first became aware of the Student several years ago when the Student came in for her pre-xx screening. She was unable to screen the Student due to her disability. The Student didn't enroll in the District at that time, but enrolled in the fall of 2010. The Student was in her resource room for most of the day, but was in the regular education setting for music, physical education, library, morning meeting, reading (when the teacher read to the students) and lunch, and went out with peers during recess.

The Student had been engaging in a variety of problem behaviors, including crying, hitting, kicking and crumpling of paper, and she thought that Mr. Tomasello could help the resource room staff with those behaviors. The District uses Mr. Tomasello for help with students with behavioral challenges. She had worked with him before, and had been very pleased with his services. Mr. Tomasello had helped her with a student who was minimally socialized when he came to the School, and 6 months later the child was toilet trained, was following directions, was doing math and was starting to read. On August 31, 2011, she spoke briefly with the Student's father, telling him that the School's behavior consultant, Mr. Tomasello, was going to be in the classroom. She asked the Student's father whether he would permit Mr. Tomasello to see the Student and consult with staff about her behaviors. The Student's

father said yes, without asking any questions. She told Ms. Goguen that the Student's father had given permission, and Ms. Goguen notified Mr. Tomasello.

Mr. Tomasello observed the Student, talked with staff and developed a behavior plan. He used the staff's concerns as a basis to develop the plan, and then instituted it. He came back periodically to check in and see how the work was going, and to adjust the plan if necessary. When he worked with the Student, he did so in the resource room so that he could model for resource room staff how he wanted his plan to be implemented. This is normal procedure for a behavioral consultant. Mr. Tomasello asked the staff to keep track of behaviors with a data collection system, recording incidences of behavior in five minute intervals. At the end of the day, staff would tally the results and derive percentages. When Mr. Tomasello came back, he would review the data with the staff. The goal was to decrease the problem behaviors. The plan was helping, and the staff was seeing a reduction in certain of the problem behaviors. There was slow, steady improvement. Since December, the Student's behaviors have stayed about the same; she has had good days and bad days.

One of the Student's behavioral issues was non-compliance (the Student sometimes understood directions but chose not to comply with them), and Mr. Tomasello addressed this behavior by suggesting to staff that they not repeat instructions. Staff was to make sure they had the Student's attention when delivering the instructions. If the Student didn't comply within 30 seconds, then they prompted the Student, which generally meant hand-over-hand prompting, and then moved on.

There were times when the Student would become so uncontrollable that she needed to be removed from an activity and given time to quiet down. There was an area in the classroom called the "Stop & Think" area, and the Student would go to that area and sit for about three minutes. She would then ask the Student if the Student was ready to return to the group, and usually she was.

The Student also had difficulty leaving the School at the end of the day. The Student's father wanted the Student to exit by the side door, and the fire chief told her he didn't want students using that door. The staff also didn't like the way the Student behaved when her father came to pick her up (she would jump on him), so they developed a script to be followed for the end of the day transition. The Student's father tried it once and then refused to do it again, but it takes more than one day to change a child's behavior.

When she received reports from consultants, her regular practice was to put papers such as those in children's backpacks so that parents would get them. She specifically remembers doing that with Dr. Tomasello's December report, and assumes that she did so with the earlier reports as well.

12. During an interview conducted by the Complaint Investigator with Sharon Goguen, Ms. Goguen stated the following: She is the director of special services for the District. The Student's teachers were having more difficulty with the Student's behaviors towards the end of last year. At the beginning of the current school year, Ms. Austin asked her if she could involve Mr. Tomasello in helping with the Student, and she said that Ms. Austin could do so.

Ms. Austin later e-mailed to her stating that the Student's father had given permission for that, and she proceeded to contact Mr. Tomasello. She would never have Mr. Tomasello work with a student without notifying the family, but beyond that initial notice communication typically happens between Mr. Tomasello and the staff. Mr. Tomasello comes in the classroom to observe, develops a plan, and he may model the plan with the student for the staff's benefit. He gives copies of the plan to staff, one of which is to be sent to the parent. There may be staff meetings to which parents are invited, although they will happen whether or not the parents attend, and sometimes Mr. Tomasello will be at those meetings. There is no specific protocol for Mr. Tomasello to meet with the family. In this case, Ms. Austin gave Mr. Tomasello's phone number to the Student's father early in the process when the Student's father said he didn't like the end-of-day transition plan.

The District may not have communicated enough with the Student's father, but his reactions have been so extreme, even after he got everything that he wanted, that staff members probably felt intimidated by him. She thinks this made the staff reluctant to communicate with him.

Mr. Tomasello's services would usually only be written into a student's IEP when Mr. Tomasello had been involved with the student for a period of time, and the Team considers whether the services need to continue; it wouldn't typically be written in the IEP where the services were to be provided on a short-term basis. Sometimes Mr. Tomasello only sees a student once or twice. If the staff decides that a big change is needed to a student's behavior plan, this would also be referred to the IEP Team.

Mr. Tomasello, in working with the Student, was using reinforcement strategies to get the Student to comply and enable the staff to teach her. The Student isn't able to participate very well in the classroom. The Student's father, however, doesn't want the School to teach the Student, and doesn't care if she learns. He just wants the Student's tantrum behavior to end. Since December, after the Student's father wrote to the governor and otherwise raised a ruckus, the District has backed off and stopped demanding anything of the Student. They still try to do some instruction, but they're not holding the Student to the same level of accountability. The Student's behavior goes up and down, and she still has meltdowns (tears up paper, screams, etc.) for no apparent reason. Now, instead of the interventions that Mr. Tomasello had recommended, the teachers just tell the Student to take a rest in the special area of the classroom.

13. During an interview conducted by the Complaint Investigator with Paul Nao, Ph.D., Dr. Nao stated the following: He is a Board Certified Behavior Analyst ("BCBA"), and is executive director of Woodford's Family Services. He has known Mr. Tomasello for about 10 years, and he has acted as Mr. Tomasello's supervisor since approximately 2009, when the professional requirement for supervision came into place. As an Assistant Behavior Analyst ("BCaBA), Mr. Tomasello must receive supervision from a Behavior analyst at least one hour per month. At least two of those hours per year must involve direct observation by the BCBA of the BCaBA, but the others may be by telephone. Mr. Tomasello has fully complied with this requirement. The Guidelines are not specific about what is discussed during those sessions, and it is left largely to Mr. Tomasello's discretion which cases he chooses to discuss,

although he may follow up with Mr. Tomasello regarding cases that had previously been the subject of discussion. They may also discuss upcoming regulatory changes, or recent professional articles. He has always found Mr. Tomasello to be a consummate clinician.

With regard to family involvement, he wouldn't think this was necessary where the Behavior Analyst was hired by a school to consult on behavior taking place in school, although it's probably a good idea in most cases. Lots of times a teacher may have a particular behavior issue with a student and seek advice about it, and this wouldn't require involvement with the family. Often, the Behavior Analyst relies on the teacher to make whatever contact with the family is necessary. If one were going to implement a procedure that involved restraint of the student, this might be an example of a situation where family should be brought into the discussion. A decision to not repeat directions followed by prompting would not be in this category; it is a fairly common teaching technique.

After the Parents in this case expressed their concerns to Mr. Tomasello, Mr. Tomasello discussed this case with him. He believes that Mr. Tomasello followed good practice in connection with this case. The staff had a plan and Mr. Tomasello gave advice about the plan. Mr. Tomasello could easily assume that his role did not include relationship with the family, and that staff would be communicating with the family as necessary.

14. During an interview conducted by the Complaint Investigator with the Student's father, the Student's father stated the following: During the conversation he had with Ms. Austin on August 31, 2011, Ms. Austin told him that she knew somebody who had a wealth of information about autism, who had great success working with children with autism, and that she wanted to talk with that person about alternative strategies to use with the Student. She said she wanted to "pick his brain" to get ideas and strategies. She may have used the name "Allen," but didn't give his last name. Ms. Austin didn't say that this person was a mental health professional; he assumed it was more like a special education teacher. She didn't say that the person would "see" or otherwise interact with the Student. He assumed Ms. Austin was referring to an informal arrangement, and he gave his approval.

Within a few weeks, one of the educational technicians ("ed techs") who was working with the Student told him about an end-of-day transition plan they had come up with. He asked when this plan had been developed, and she said the plan was based on ideas that originated with a meeting with Mr. Tomasello. He was shocked to hear this, and he rejected the plan outright. He said that was not acceptable, that the Team would meet and come up with some strategies. He rejected the plan both because it did not involve any input from the Parents, and because the plan itself was seriously flawed. The plan was based upon the Student working for a food reward, and this is not a strategy that works for the Student. Also, the plan was to have the ed tech walk to his car with the Student and him, but the Student was hyper and kept pulling to get away. Simply substituting the Student pulling on the ed tech's arm instead of pulling on his arm was not a successful strategy. The Student was so excited at that time of day that it didn't matter who was with her. The Team subsequently worked out a different strategy and that has been working well. That was the last he heard anything about Mr. Tomasello until December.

Some time shortly before the winter vacation in December 2011, he saw the first page of a report from Mr. Tomasello crumpled up and shoved into the Student's lunchbox or backpack. This is the first time he saw any report from Mr. Tomasello. There is a home/school notebook that the parties use when sending papers back and forth, and no report was ever sent in the notebook. He assumed that after he had rejected the transition plan Mr. Tomasello had discontinued his involvement with the Student.

He believes that Mr. Tomasello is not qualified to provide services to the Student because his title is misidentified in the contract he signed with the District; there is no such thing as an "Associate" Behavior Analyst. When he spoke on the phone with Mr. Tomasello in December 2011, Mr. Tomasello identified himself as a Behavior Analyst, but Mr. Tomasello is actually an Assistant Behavior Analyst. This requires that he be supervised by a Behavior Analyst, but this obviously didn't happen because in his opinion Mr. Tomasello's plan was so incompetent.

He believes that Mr. Tomasello was so negligent in the way he conducted himself that it suggests that Mr. Tomasello was not performing within the scope of his professional credentials. The negligence included the failure to obtain the Parents' consent before obtaining and discussing personally identifiable information about the Student, and the failure to seek input from the Parents before developing plans for the Student. These things are required by the Guidelines for Responsible Conduct for Behavior Analysts published by the Behavior Analyst Certification Board. Mr. Tomasello also failed to identify biological causes for the Student's behavior, as the behavior plan involved staff members refusing to repeat directions to the Student, despite the fact that the Student has profound receptive communication delays and is cognitively disabled.

He also believes that Mr. Tomasello was deliberately distorting the Student's behaviors in order to justify his involvement in the case. He did this in the way he defined the target behaviors, giving labels to behavior that grossly distorted their actual meaning. For example, whining is categorized as "Tantrum," crumpling paper is categorized as "Destruction," and pulling at her skin is categorized as "Self-Injurious Behavior."

During the period from September to December 2011, he heard conflicting reports from School staff about the Student's behaviors. There were very few safety issues during that period as far as he is aware. The intensity of the Student's unhappiness at the end of the day increased during that period; she would often be sobbing when he came to get her, and would stop sobbing as soon as he got her away from the School. After December, he saw dramatic improvement in the Student's behavior, and he thinks that she is now doing very well.

He doesn't believe that Mr. Tomasello was an authorized person within the meaning of FERPA because Mr. Tomasello's services had not been identified in the Student's IEP.

VII. Conclusions

Allegation #1: Failure to utilize the IEP Team as the vehicle for determining the services needed by the Student, specifically the provision of services by a behavior

analyst, and therefore involve the Student's parents in the decision making, in violation of MUSER §VI.2.I

VIOLATION FOUND

The District takes the position that Mr. Tomasello's services with regard to the Student constituted staff training, and were therefore not subject to IEP Team consideration. Although as a general proposition staff training is not properly subject to IEP Team consideration, services could be reasonably described as training only where they were used to provide information to staff that was applicable generally, to a category of children or situations. Here, Mr. Tomasello's services were specifically targeted to one student, and were meant to be used in connection with staff members' efforts to teach that student. Mr. Tomasello's contract with the District calls for the provision of services identified as consultation and staff training, and his services in this instance were clearly in the nature of the former rather than the latter.

The District takes the further position that, as behavior analysis is not included in the list of related services in special education regulations, it is therefore not a related service and not subject to IEP requirements. This overlooks the fact that the list of related services identified in the regulations has been deemed non-exhaustive. *See J.T. v. Missouri State Board of Education*, 51 IDELR 270 (E.D. Mo. 2009), *citing Cedar Rapids Community School District v. Garrett*, 526 U.S. 66 (1999); *see also Letter to Anonymous*, 213:198 (OSERS 1989). Related services are "such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 CFR §300.34. As the Student's teachers had identified behaviors of the Student that were interfering with her ability to benefit from her special education, and Mr. Tomasello's services were seen as required to assist the Student with regard to those behaviors, his services fell under the category of related services.

Moreover, MUSER §XI, in setting forth the services included under the related service category of "Psychological Services," includes the following description: "behavior management including assisting in designing, implementing, evaluation and modifying positive behavioral intervention strategies." Although Mr. Tomasello is not a psychologist, the services he was providing are those described in the foregoing passage, thus refuting the District's attempts to exclude them from the category of related services.

Ms. Goguen makes a further distinction between consultation which is short-term and that which is of longer duration, as a basis for determining whether those services are to be written into the IEP. Ms. Goguen suggests that a consultant meeting once or twice with a student would constitute short-term services, and would not have to be identified in the student's IEP. Wherever that line might properly be drawn, here Mr. Tomasello had worked with the Student and staff on three occasions and, more importantly, would have continued to work with the Student and staff to some unspecified time in the future when the Student's behavior was being successfully managed. This behavioral consultation could not reasonably be considered merely short-term involvement with the Student's program, and the IEP should have reflected the District's intention to provide this service, thus necessitating discussion at an IEP Team meeting.

It goes without saying that a discussion of the nature, duration and reason for Mr. Tomasello's services at an IEP Team meeting would have avoided the situation where the Student's father in December 2011 could claim to be surprised to learn that Mr. Tomasello was still involved in his child's educational programming, and was working directly with her on multiple occasions. As stated in MUSER §VI.2.I, the "IEP meeting serves as a communication vehicle between parents and school personnel." It should also be said, however, that the explosive nature of the Student's father may well have discouraged School personnel from making full and frequent efforts at communication, and it would be in the interests of the Parents and the Student for him to tone down his rhetoric in order to encourage communication that is more free and open.

Allegation #2: Failure to provide a related service (applied behavior analysis) by an appropriately certified or licensed professional in violation of MUSER §X.2.A(5)

Allegation #4: Failure to properly and adequately implement the student's special education program, specifically with respect to behavior analysis, in violation of MUSER §§IX.3.B(3) and X.2.A(5)

NO VIOLATION FOUND

MUSER §X.2.A(5), in relevant part, provides that related services are to be "provided by appropriately certified education personnel, or licensed contractors." Nothing offered by the Parents or discovered during this investigation suggests that Mr. Tomasello's certification as a BCaBA did not appropriately qualify him to provide the consultation services at issue. The Parents' position on this issue is based first upon a mistaken identification of Mr. Tomasello's certification designation in his contract with the District, a mistake with no significance as the misidentified category of certification does not even exist. This investigation uncovered nothing to suggest that the misidentification was intentional, or had any meaningful consequences.

The Parents' allegation otherwise rests upon the contention that Mr. Tomasello's conduct in this matter was so flagrantly incompetent and outside the requirements of his professional certification that he cannot be deemed to be adequately certified. Beyond the question of whether this strained interpretation of MUSER's requirements is tenable, no basis was found for the accusations. Dr. Nao, who reviewed Mr. Tomasello's involvement in the case, found no fault with his performance, including with regard to Mr. Tomasello's failure to have direct contact with the Parents, arguably the Parents' most forceful argument. Again, the absence of more communication between District personnel (including Mr. Tomasello) and the Parents can be viewed as the primary factor leading to this dispute. This lack does not, however, as to Mr. Tomasello, constitute a violation of special education law.

Allegation #3: Failure to obtain parental consent before disclosing personally identifiable information to an unauthorized party (the behavior analyst) in violation of MUSER §XIV.11

NO VIOLATION FOUND

MUSER §XIV.11 requires that parental consent must be obtained before personally identifiable information regarding a student is disclosed to parties unless the disclosure is authorized without parental consent under 34 CFR 99. For example, under 34 CFR §99.31(a)(1)(i)(A), such consent is not required when educational records are to be disclosed to an employee of an educational agency such as the District whom the agency has determined to have legitimate educational interests in those records. 34 CFR §99.31(a)(1)(i)(B) further authorizes such disclosure to a contractor or consultant to whom an educational agency has outsourced services or functions when that contractor or consultant is performing a service or function for which the agency would otherwise use its employees.

Here, Mr. Tomasello was a contracted consultant to whom the District had outsourced the function of behavioral consulting to its teachers, and Mr. Tomasello was performing that function when the District disclosed to him personally identifiable information regarding the Student. Given the function he was performing, Mr. Tomasello had a legitimate educational interest in reviewing the Student's records. Accordingly, the consent of the Parents was not required to be obtained before that disclosure. This is a separate issue from the issue of whether Mr. Tomasello's services should have been identified in the Student's IEP.

VIII. Corrective Action Plan

The District shall promptly convene the Student's IEP Team to discuss whether the Student requires behavioral consultation services in order to benefit from her special education, and if so, the nature and extent of those services. The District is reminded that if, at the conclusion of that meeting, there is no consensus but the authorized representative of the District determines that the Student does require those services, the District must include those services in the Student's IEP even if the Parents object to it. The Parents will at that point be entitled to exercise their due process rights to challenge that determination. The District will submit a copy of the Advance Written Notice, Written Notice and any IEP amendment that results to the Due Process Office and the Parents.