

# Complaint Investigation Report

July 14, 2017

Complaint # 17.073C

Complaint Investigator: David C. Webb, Esq.

Date of Appointment: May 19, 2017

## I. Identifying Information

Complainant: \_\_\_\_\_, Parent

Respondent: \_\_\_\_\_, Superintendent

\_\_\_\_\_, Director of Special Education

Student:

DOB \_\_\_\_\_

## II. Summary of Complaint Investigation Activities

On May 18, 2017, the Maine Department of Education received this complaint. The complaint investigator was appointed on May 19, 2017.

The complaint investigator received 294 pages of documents from the respondents and no documents from the parent. Interviews were conducted with the following people: \_\_\_\_\_, Parent; \_\_\_\_\_, Special Education Director; \_\_\_\_\_, Principal; \_\_\_\_\_, Regular Education Teacher; \_\_\_\_\_ and \_\_\_\_\_, Special Education Teachers; \_\_\_\_\_ and \_\_\_\_\_, Educational Technicians; and \_\_\_\_\_, case worker, MAS Community Health.

## III. Preliminary Statement

The Student is \_\_\_\_\_ years old and currently attends the \_\_\_\_\_ School as a \_\_\_\_\_ grader pursuant to a determination made at an IEP team meeting convened on December 6, 2016. She receives special education services under the exceptionality of Speech/Language Impairment and Emotional Disturbance.

This complaint was filed by the Student's parent ("Parent") alleging that MSAD ("School") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on May 22, 2017, alleging 3 separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on May 25, 2017.



education classroom with a frequency of one to two times per week. She would become frustrated and angry, requiring her to leave the regular classroom and go to the special education classroom with her special education teacher .

6. Ms. \_\_\_\_\_ stated that while the school may have exceeded the amount of time called for in the IEP for the Student to spend in the resource room, the special education staff worked with the Student on her regular education curriculum with her while she was in the resource room. Ms. \_\_\_\_\_ stated that the Student's progress notes and NWEA test results showed improvement in her reading and math scores over the previous year.
7. In an interview with the complaint investigator, \_\_\_\_\_, the school principal, stated that she was primarily involved with responding to the Student's threats to herself and other students. She said that in January of 2016 the Maine Department of Health and Human Services (DHHS) was contacted by the school due to concerns about her wellbeing. In February or March of 2016, the Student had also tried to tie her shoelaces around her neck in front of \_\_\_\_\_, an Ed Tech working with the Student. Ms. \_\_\_\_\_ stated that the Parent refused to follow up with DHHS with regard to the recommended crisis planning for the Student. In 2017, the Student threatened to bring guns to school and had developed a list of other students that she wanted to "kill". Ms. \_\_\_\_\_ said that she worked with \_\_\_\_\_, LCSW, the Sweetser School Based Clinician, to develop specific crisis responses for the Student, in addition to the School's established Suicide Prevention Protocols. [S-271].
8. In an interview with the complaint investigator, \_\_\_\_\_, the Student's regular education \_\_\_\_\_<sup>th</sup> grade teacher, said the Student had a lot of "emotional baggage" and that it was hard for her to process information in the regular classroom setting. Ms. \_\_\_\_\_ stated that the Student would demonstrate her anger by ripping papers and "snapping pencils" and that the educational technician working with her would try to help her so that she could stay in the room, but if unsuccessful, she would escort her outside of the classroom or to the resource room. Ms. \_\_\_\_\_ stated that over the course of the year, she has seen fewer behavior incidents, and that her math skills are inconsistent, the Student's reading skills have improved.
9. Ms. \_\_\_\_\_ stated that she assigns homework for all of her students each day consisting of 20 minutes of reading, studying "math facts" and flash cards. She said that typically the Student does not do any homework, and that she does not usually send completed school work home with her students. Rather, she keeps school work in a "portfolio" in the

classroom that is then shared with parents during the parent-teacher conferences. Ms. \_\_\_\_\_ said that the Parent did not come to either of the scheduled Parent/Teacher conferences, and that she has tried to communicate with the Parent who has not returned her phone calls.

10. In an interview with the complaint investigator, \_\_\_\_\_, the Student's former special education teacher in the self-contained behavior program, said that he started working with the student on or about April 2016 after the Student's suicide attempt. Mr. \_\_\_\_\_, stated that he has many years of experience as a Special Education teacher focusing on behavior issues. In addition, he has over 25 years of experience as a therapeutic foster parent.
11. Mr. \_\_\_\_\_ said he worked extensively with the Student to help her develop better language skills-for example, instead of the Student saying "I want to kill myself" when she gets frustrated, he would work with her to use language to figure out ways to solve her problem. Mr. \_\_\_\_\_ used a "rewards" system for the Student which he said worked well, and that he saw a decrease in her violent language incidents. He said that some of the rewards included the Student being able to spend time on the computer. He said that computer time was supervised, but he agrees that he might have looked more closely at the Student's viewing of certain videos, such as "5 Nights with Freddie."
12. Mr. \_\_\_\_\_ said that when the Student was experiencing behavior issues in the regular education classroom, she would be directed to work with him in the self-contained room. He said that he worked closely with her regular education teacher to make sure that he covered the regular education curriculum with the Student. He also said that he does not assign homework to his students. Mr. \_\_\_\_\_ said that at the Parent's request he is no longer directly working with the Student. However, he is consulting with the Student's current special education teacher,
13. In an interview with the complaint investigator, \_\_\_\_\_ the Student's Educational Technician from February 2016 through June, 2016, said that she worked with the Student in small groups in the resource/behavior room, primarily in literacy and math. She said that she noticed the Student's academic progress and growth during the time she worked with her. Ms. \_\_\_\_\_ said that while she didn't have general concerns regarding her behavior, she was surprised while working with the Student in February or March of 2016 when the Student had put her shoelaces around her neck in a manner to suggest self-strangulation. Ms. \_\_\_\_\_ said that she immediately notified Ms. \_\_\_\_\_, the school principal. She said that she wasn't given follow up information from school staff with regard to the cause of the incident, nor was she given

any further information in the event that the Student had any repeat behaviors of this nature.

- 14.** In an interview with the complaint investigator, \_\_\_\_\_, the Student's Educational Technician for the current 2016-2017 School year, said that he works with the Student in the resource/behavior room on her writing skills for 30 minutes per day. Mr. \_\_\_\_\_ said that her writing and language skills were weak, but that she has made improvements. He said that he was aware of the Student's behavior issues in the regular education room, and that he has been involved with helping her to deescalate in the resource/behavior room. Mr. \_\_\_\_\_ said that homework is not assigned to children in the behavior/resource room.
- 15.** In an interview with the complaint investigator, \_\_\_\_\_, Case manager for MAS community health, stated that he began working with the Student on February 11, 2016 after concerns arose regarding self-harming statements and gestures made by the Student. Mr. \_\_\_\_\_ primarily worked with the Parent and the Student with regard to the Home and Community Therapy program (HCT), developing ways to give the Student more effective self-regulating skills. Mr. \_\_\_\_\_ also worked on developing a crisis plan for the Student, which he said was intended primarily for the Parent and Student, and not meant to replace the crisis plan that was developed by the School. Mr. \_\_\_\_\_ coordinated with school personnel, including \_\_\_\_\_, LCPC, the school social worker. Mr. \_\_\_\_\_ said that Ms. \_\_\_\_\_ and other school personnel had developed a strong rapport with the Student. Mr. \_\_\_\_\_ also said that the Parent worked very hard to help the Student, who made significant gains during the time that he worked with her.
- 16.** In an interview with the Complaint Investigator, \_\_\_\_\_, the Student's current special education teacher, said that she first started working with the Student in the fall of 2015 until Mr. \_\_\_\_\_ was assigned in April of 2016. She said that she was recently reassigned to work with the Student in late May of 2017 at the Parent's request. She said that Mr. \_\_\_\_\_ consults with her regarding the student on a regular basis.
- 17.** Ms. \_\_\_\_\_ said that when she first started working with the Student, she noticed that she was "sad" much of the time, and that she would comment that her twin brother was favored by her parent and others. She said that in addition to the Student's scheduled time in the resource/behavior room, she would work with the Student on "calming" exercises after she exhibited behavior issues in the regular education classroom, which occurred approximately twice a week.

## VI. Conclusions

**Allegation #1:** Failure to fully and adequately implement the Student's IEP in violation of MUSER §IX.3.B(3). **NO VIOLATION FOUND**

State regulations mandate the implementation of an IEP to occur as soon as possible. MUSER §IX.3.B(3) provides as follows:

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30 days after the IEP Team's initial identification of the child as a child with a disability in need of special education and supportive services. All identified children with disabilities shall have a current Individualized Education Program in effect at the start of each school year.

The Student's January 15, 2016 IEP states that the Student is eligible for special education services based on her speech and language impairment. This IEP calls for specially designed instruction in reading, (200 minutes/week), specially designed instruction in writing (100 minutes/week), specially designed instruction in mathematics (300 minutes/week), and related services of speech and language (90 minutes each week).

At the Parent's request, the School convened an IEP team meeting in May of 2016 to address the School's crisis protocol in connection with the Student's "recent unsafe incidents" including suicidal threats. At this meeting, the IEP team noted that the Student's "inappropriate behaviors have decreased with the implementation of new case management and services being provided in the self-contained setting." As a result of this meeting, the IEP team added social work counseling services and extended school year services to the Student's IEP. The team did not modify the School's crisis plan, as requested by the Parent.

The Student's January 15, 2017 IEP also states that the Student is eligible for special education services based on her speech and language impairment. This IEP continued the calls for specially designed instruction in reading, (200 minutes/week), specially designed instruction in writing (100 minutes/week), specially designed instruction in mathematics (300 minutes/week), and added the related services of speech and language supports (3x30 minutes each week), occupational therapy (2x30 minutes/week), and social work services (2x30 minutes each week).

The Written Notice from the December 6, 2016 IEP team meeting specifies that the “team supports student special education eligibility in the area of Emotional Disturbance.” The January 15, 2017 IEP specifies that the Student needs positive behavioral interventions and supports to address her behavior issues, and reflects those supports in the goals and accommodations section of the IEP. This IEP also contains two goals in the area of behavior: the first involving talking to an adult and developing coping strategies for frustrations at school, and the second involving a positive behavior reinforcement plan and teacher supports to decrease attention-maintained behavior that presents as disruption, such as ripping papers or breaking pencils. The Student has a Behavioral Intervention Plan (BIP) in addition to the behavioral goals and accommodations listed on the January 15, 2017 IEP.

Parent has concerns that the Student is spending too much time away from the regular education classroom, and is not showing meaningful academic progress. The information gathered in the course of this investigation, however, reveals that the Student’s use of the special education classroom and staff to access the accommodations on her IEP is appropriate in these circumstances. Her special education and regular education teachers stated that the Student spends time with her peers unless her “occasional” frustrations would result in using the special education resources listed in her IEP. These witnesses specified that if the Student was referred to the resource room for a behavior issue, the special education staff would work with the Student on her general education curriculum. While this practice has resulted in an increase in the time the Student spends in the resource room, it is a de minimis change in her IEP and does not warrant a remedy in this case. *See, Houston Independent School. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Regarding the Parent’s allegation that the Student does not receive meaningful academic programming in her general education classes, information from both the School and the Parent demonstrates that the Student is making measurable progress and is participating in the regular education alongside her non-disabled peers.

As the First Circuit stated in *Lenn v. Portland Sch. Comm.* 998 F.2d 1083, (1<sup>st</sup> Cir. 1993) the law does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. *Id* at 1086. The Individuals

with Disabilities Education Act (IDEA) sets more modest goals: it emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than optimal, IEP. Appropriateness and adequacy are terms of moderation. *Id.* at 1089.

In *Roland M.*, the First Circuit described the goal as to provide the student with “demonstrable” benefits. *Roland M.*, 910 F.2d at 991. As the First Circuit explained:

The issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate education" as defined in federal and state law . . . For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. See 34 C.F.R. Pt. 300, App. C.

Id.

In the present case, the Student’s disabilities impact her ability to access the general education curriculum. The services and accommodations listed in the Student’s IEP, however, are reasonably calculated to allow the Student to access the general education curriculum and to provide the Student with an appropriately ambitious program. While the Student’s IEP has not achieved ideal results, the School has undertaken additional evaluations and has modified the Student’s IEP to provide additional supports and services for her emotional and behavioral issues. The investigation also reveals that the Student is making measurable progress in math and reading according to her teachers and her NWEA scores.<sup>1</sup>

**Allegation #2:** Failure to provide a free appropriate public education in violation of MUSER §II.13 and 34 CFR §300.101(a). **NO VIOLATION FOUND.**

In *Board of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982), the Supreme Court ruled that an IEP is sufficient if it is reasonably calculated to enable the child to receive "educational benefits." See *Rowley*, 458 U.S. at 206; *Lessard*, 518 F.3d at 27. More

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<sup>1</sup> The Parent expressed a concern about the “lack of assignments or school work coming home” with the Student. Both Ms. \_\_\_\_\_, the Student’s regular education teacher and Mr. \_\_\_\_\_ the Student’s special education teacher, stated that they do not usually assign homework nor do they send completed school work home with students. Rather, school work is kept in a “portfolio” in the classroom that is then shared with parents during the parent-teacher conferences. Ms. \_\_\_\_\_ said that the Parent did not come to either of the scheduled Parent/Teacher conferences, and that she has tried to communicate with the Parent who has not returned her phone calls.



recently, the Supreme Court explained its Rowley standard as follows:

Educational programming must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

*Endrew F. v. Douglas County School District* 137 S.Ct. 988, 992, *RE-1*, 2017 WL 1066260 (Mar. 22, 2017).

Among the related services which must be included as integral parts of an appropriate education are “such development, corrective, and other supportive services (including psychological services . . . and counseling services) as may be required to assist a handicapped child to benefit from special education.” 20 U.S.C. § 1401(17).

The First Circuit Court of Appeals has declared that “the IDEA entitles qualifying children to services that target ‘all of [their] special needs,’ whether they be academic, physical, emotional, or social.” Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1089 (1<sup>st</sup> Cir. 1993). “Educational performance in Maine is more than just academics.” Mr. and Mrs. I v. Maine School Administrative District No. 55, U.S. Court of Appeals, First Circuit 06-1368 06-1422 107 LRP 11344, March 5, 2007.

MUSER §II.21 defines “positive reinforcement interventions and supports” as “the use of positive techniques designed to assist a child to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive or defiant behaviors.”

The School has provided the Student with a Free and Appropriate Public Education (FAPE) during the 2015-2016 and the 2016-2017 school years. The Student’s IEP, which calls for specific criteria to address educational and emotional needs of the Student, is appropriately ambitious for her circumstances. The Student has services and accommodations that are appropriate to meet the Student’s educational needs. Additionally, the Student’s IEP provides that the Student will attend extended school year programming in order to prevent regression.

Of note is the Student’s most recent testing, which shows that she is performing below average in reading, writing and math. The previous amended IEP (dated

5/11/2016) shows that the Student had difficulties in certain speech and language skills, such as regular past tense verbs and irregular past tense verbs. These deficits in speech and language have continued during the 2016-2017 school year. Her teachers have noted that she has made some progress in these areas, although this progress may only be minimal. These deficits are important to note when the IEP Team next meets.<sup>2</sup>

Ultimately, however, the Student's IEP sets forth goals and benchmarks for progress, including speech and language and math where the Student is experiencing the most difficulty. The standards have been broken into sub-skills and components which target a reasonable expectation of progress for the development of each sub-skill, with the goal of the Student ultimately meeting grade level standards.

The Student's IEP takes into account the Student's need for extra time to process information and her cognitive abilities. The Student's regular education teacher, \_\_\_\_\_, also made clear that she is coordinating with the Student's special education staff to implement strategies necessary for this Student's unique needs. For example, she will discuss with them the strategies of giving the Student additional time to complete projects and developing coping strategies with the Student's educational technician.<sup>3</sup> Given that the Student's needs are complex, and given that the school continues to offer academic and behavioral supports in accordance with an appropriately designed IEP, it is evident that FAPE is being provided.

**Allegation # 3:** Failure to adequately consider the concerns of the Parent in the IEP decision making process in violation of MUSER §§V1.2(I) and IX.3.C(1)(b). **NO VIOLATION FOUND**

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<sup>2</sup> The school psychologist's report dated December 2, 2016, reports that the Student's "special education status seems to include nonverbal learning disorder (NVLD), primary auditory inattention on a neurocognitive level, and affective dysregulation similar to a mood disorder." The IEP Team may wish to discuss further the Student's educational needs and available supports available to the Student as a result of these disorders.

<sup>3</sup> Ms. \_\_\_\_\_ also noted that over the course of this year, the Student has had fewer behavior incidents, and her reading skills have improved. Mr. \_\_\_\_\_ stated that his "rewards" system for the Student worked well, and that he saw a decrease in her violent language incidents.

MUSER §IX.3.C provides that an IEP Team must consider the concerns of the parents when developing each child's IEP.<sup>4</sup> Educational methodology, however, generally falls within the discretion of the school district unless the method is distinctive or exclusive. *Central Bucks School District* 40 IDELR 106, 103 LRP 52413, Pennsylvania State Educational Agency, November 13, 2003; see *Medina Valley Independent School District*, Texas State Educational Agency, 106 LRP 29730 October 10, 2005; *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (d. Me. 1993), quoting *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7<sup>th</sup> Cir.), cert. denied, 109 S.Ct. 308 (1988).

The Parent participated in the IEP Team meetings of December 2015, May 2016 and December 2016. Although the Parent was not able to attend scheduled Parent/Teacher conferences, the investigation revealed that the Student's teachers have made reasonable efforts to communicate with the Parent regarding the Student's educational needs. The Parent's concerns having to do with school personnel and the use of a particular crisis plan, however, are matters of local control. The investigation revealed that the crisis plan for the Student's behavior is currently being met through the School's school-based clinician and the School's Suicide Prevention Protocols. The

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<sup>4</sup> MUSER §VI.2(I) confirms that the IEP Team must consider the parents' concerns but the District has ultimate responsibility, with due process rights afforded to parents, to ensure that a child is receiving appropriate special education services and supports. MUSER §VI.2(I) provides in relevant part as follows: The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding:

- (1) The child's needs and appropriate goals;
- (2) the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and
- (3) the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.

The IEP Team should work toward consensus, but the SAU has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child's placement is in the least restrictive educational placement. It is not appropriate to make evaluation, eligibility, IEP or placement decisions based upon a majority "vote." If the team cannot reach consensus, the SAU must provide the parents with prior written notice of the school's proposals or refusals, or both, regarding their child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing or a State complaint investigation.

rewards system put into place by the School has been adjusted according to the Parent's requests, and documentation shows that these behavioral interventions have been moderately successful in addressing the Student's needs.<sup>5</sup>

The School has actively monitored and modified behavior plans in accordance with the Student's needs and the Parent has had opportunity for input into these plans. In May 2016, the Student's more alarming behaviors were reported to have decreased with the implementation of a new case management and services provided.

## **VII. Corrective Action Plan (CAP)**

Because there are no findings of violations of special education law or regulations, the Department orders no corrective actions.

Dated: July 14, 2017



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David C. Webb, Esq.  
Complaint Investigator

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<sup>5</sup> In light of Mr. \_\_\_\_\_ comment about looking more closely at the Student's viewing of certain on-line videos, such as "5 Nights with Freddie", it is recommended that the IEP Team create better safeguards to monitor the Student's computer usage and, in particular, to preview any material or content before the Student reviews it to make sure that it is age appropriate and consistent with her developmental, emotional and academic needs.