

**Complaint Investigation Report
Parent v. Lewiston School Department
Complaint 18.114C
Complaint Investigator: Jeannette Sedgwick
August 10, 2018**

The Department of Education received this complaint on June 12, 2018. All documents, information, and responses from the parties were reviewed. The complaint investigator interviewed the complainant on July 20, 2018. On July 25 and July 26, 2018, interviews were conducted with the District's Special Education Director, the Special Education Coordinator, the Director of Student Services, the Assistant Principal, the Student's special education case manager, and the School Administrator for the alternative school where the Student attends school. Requests for more information from the District during the last week of July 2018 were responded to in a timely manner.

FACTUAL FINDINGS

1. The Student is fifteen years old and lives in Lewiston. Since April 2017, the Student has attended an alternative program at Auburn High School, which was paid for through a tuition agreement by Lewiston Public Schools.
2. Lewiston is the school district that has fiscal and programmatic responsibility for the Student during the time of this complaint, from June 12, 2017 to the present.
3. The Student has a long history of receiving special education and related services, beginning in kindergarten. In the Student's ninth grade year (the 2016-2017 school year), the Student was referred for special education, found not to qualify and had a 504 Plan, then was re-referred for special education at the end of his ninth grade year, after which he was found eligible for special education.
4. The District conducted a psychological evaluation of the Student in September 2016 ("2016 Evaluation").¹ The evaluation, which was conducted because of concerns regarding the Student's current level of functioning, stated that the Student exhibited behaviors consistent with Oppositional Defiant Disorder and that he engages in behaviors that were purposefully annoying to others, refuses to comply with adult requests, loses his temper, and is often angry and resentful. The evaluation states that the Student presents with symptoms consistent with ADHD, depression, poor self-esteem, and low

¹ This evaluation utilized a file review, clinical interview, Conner-3rd Edition Behavior Rating Scales, the Children's Depression Inventory: Second Edition, the BECK Youth Inventories: Second Edition, and the Vineland Adaptive Behavior Scale: Second Edition.

self-worth. The DSM V categories listed for the Student are Depressive Disorder, Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Disorder. The evaluator, who is a nationally certified school psychologist, wrote that the Student's learning "continues to be affected by a poorly regulated mood."

5. An IEP was created for the Student in April 2017 and is dated 4/24/17-4/23/18.
6. The September 2016 Evaluation was used for the Student's IEP, which is dated 4/24/2017 – 4/23/2018. The Student's IEP includes the following information from the evaluation:
 - The Student has clinically significant concerns with inattention, hyperactivity/impulsivity, defiance/aggression, and peer relations.
 - The Student has trouble sleeping, feels empty inside, and feels like bad things happen to him; he often gets mad at others; and thinks others try to control him. He does not describe himself as wanting to hurt others, but does report that he sometimes does mean things, breaks rules, and swears at adults. These results suggest feelings of depression and anger, and should be considered with other reevaluation data.
 - The communication results from the Vineland Adaptive Behavior Scale suggest weaknesses in how the Student listens, understands, writes, and pays attention. His adaptive functioning fell in the moderately low range.
7. The Student's IEP states that the Student has no academic needs. In the next section of the IEP, the IEP states that the Student is not passing classes/meeting standards sufficient to qualify for the military and that he passed only 4 out of 6 classes at the alternative school and will be attending summer school in the summer of 2016.
8. The PLEP in the Student's IEP states that the Student's learning and academic progress at school has been hampered by feelings of depression, disruptive behavior, and poor peer relations for a number of years. This section also states that the Student "has difficulty managing his depression and anger symptoms, as well as sustained attention and positive peer relations at school. As a result, he has difficulty developing and maintaining positive relationships with peers and teachers, which further contributes to his depressive symptoms and situations where he becomes angry and defiant. As a result, the Student is struggling to meet standards and pass his classes." Under the section asking how the child's disability affects the child's involvement and progress in the general education curriculum, the IEP states that the Student's "disability has led to multiple disciplinary referrals, as well as being able to meet standards in his classes."
9. The Student's IEP contains a behavioral goal: By April 2018, given school counseling, [the Student] will work with a counselor to develop and utilize strategies for managing his depression and anger symptoms, as well as developing strategies to improve sustained attention and positive peer relations, as measured by student self-report and counselor progress notes.
10. On the service delivery grid of the IEP, the Student was to receive counseling services and special education consultation. The space for the person responsible for delivery of

counseling services is blank on the IEP. The frequency for the service is not specified; the IEP states counseling “ ____ per week for 60 minutes.” Also blank on the service delivery grid is the time for the consultation for special education services by a special educator “ ____ per month for 30 minutes.”

11. In early September, 2017, the Student’s living situation changed because of a change in guardianship.
12. In late September 2017, the District learned that the Student was not receiving counseling services as stated on his IEP. District staff attempted to locate other services but the Student received no counseling services for the entirety of the 2017-2018 school year.
13. The Student was suspended from the alternative school on September 18, November 7, 2017 and January 11 and 12, 2018.² Suspensions from the alternative school were for “disrespect,” “insubordination and disrespect,” and “breaking safe school culture while waiting for the bus.”
14. After not finding a counselor for the Student for approximately 4 months, the District decided to reconvene the IEP Team to discuss the lack of counseling services. Because the annual review was to be held in April 2018, the District determined that the Team should meet to discuss the Student’s needs and continuing eligibility for special education two months earlier than the annual review date. The IEP Team met on February 15, 2018.
15. The Student’s parent, the student, the school psychologist, and the Student’s case manager attended the meeting on February 15, 2018. The Student’s general education teacher from the alternative school did not attend the meeting.³
16. At that meeting, the District found the student was no longer eligible for special education and related services. Written notice for this meeting was sent to the Student’s parent on February 15, 2018, the same day as the meeting. Notice stated that special education services would be discontinued that day.
17. At the meeting, the parent, student and District agreed that the District’s High School was not a good fit for the Student based on his behavioral needs.
18. In March 2018, just a few weeks after the finding of ineligibility, the Student experienced three behavioral incidents which led to four days of suspensions. One was a threat, one was inappropriate behavior, and one was breaking and entering.⁴ After these instances, staff from the alternative school was in frequent communication with staff from the District, particularly the District’s Director of Student Services and the District’s

² The Student had also been suspended from the alternative school twice in May and June 2018 for “insubordination.”

³ The District’s assistant principal is listed as the Student’s general education teacher on the written notice.

⁴ The Student left school and entered a closed Catholic church, where he reportedly had found refuge in the past. Police were informed; no criminal charges were filed against the Student.

Assistant Principal. The District's Special Education Director was not generally involved in conversations about discipline at the alternative school.

19. In March, the alternative school called the Student's parent and told the parent that the Student could no longer attend school. The Student has been at home since March 20, 2018, with the exception of attending an off-site, welding class at the New England School of Metalwork.⁵ The attendance records for the Student do not show any disciplinary action taken against the student during this time, except a two-day suspension in March 2018.
20. The District's Director of Student Services knew in March 2018 that the alternative school had not allowed the Student to return to the school and required an evaluation before returning to school. Internal communication within the District shows that the Assistant Principal and Director of Student Services discussed setting up a risk assessment March 28, 2018.
21. The District's Special Education Director arranged for a psychologist to conduct the assessment. The report, dated April 24, 2018 was given to the parent on May 8, 2018.
22. The District's risk assessment includes some information from the 2016 evaluation and recommends a re-referral for special education "because the previously diagnosed emotional and behavioral characteristics are seen as a clear interference in his ability to access his education."
23. On May 21, 2018 the Student's guardian requested a complete copy of all of the Student's educational records. Some of the Student's special education records were made available. On June 4, 2018, the complainant again requested educational records and clarified in an email to the District on June 5, 2018 that records pertaining to the alternative program, discipline, attendance, progress, and correspondence had not been included. On June 22, 2018, the complainant again requested records and on Tuesday, July 3, 2018, the District made available more records, such as additional special education files and the cumulative files.
24. The District referred the Student for special education on June 9, 2018, two months after the Student's risk assessment was completed and over two months since the Student was asked to leave school. At the time of this report, the District has referred the Student for special education, plans to expedite evaluations, and stated that it will hold an IEP Team meeting prior to the start of the 2018-2019 school year to determine eligibility. District staff stated that the referral was considered to be a new referral "because additional information is needed because we did not have evidence of adverse effect for 6 months."
25. The Student has been attending the District's summer school but is not likely to earn credit because of lack of written work completed.

⁵ The alternative school has partnered with the New England School of Metalwork for students to attend a basic welding program. The course was designed for high school students and meets two or three times/week during the school year. The Student was responsible for his own transportation to and from his home to the program.

Other relevant facts are included in the discussion of determinations below.

DETERMINATIONS

The complainant alleged the following:

1. The District has not provided a Free Appropriate Public Education because of the following: **NON-COMPLIANCE FOUND.**
 - (a) The District found the Student ineligible for special education and related services in February 2018 because of procedural and substantive errors;
 - (b) The District told the Student, who has a disability of emotional disturbance, to not attend school;
 - (c) The Student has been out of school since March 20, 2018 without being suspended or expelled;
 - (d) The District has conditioned the Student's participation in school on an being assessed through an evaluation provided by the District; taking specific classes, and attending counseling. 34 CFR 300.101(a); MUSER II (14).

Federal and Maine regulations mandate that Districts provide eligible children a free appropriate public education that includes special education and related series designed to meet the child's unique needs.⁶ The District has not provided FAPE to the Student during the time of this complaint.

- (a) There were errors in the District's IEP process for the Student during the 2017-2018 school year, including finding the Student ineligible for special education and related services.

Documentation does not show that the Student's guardian received advance written notice for the February meeting. First, the Notice explaining the District's proposed actions is dated the same day as the meeting, February 15, 2018 and states that the parent received the Notice the same day as the meeting. Written notice from the meeting also states that the Student's special education services would be ending that day. When interviewed, the parent

⁶ 34 CFR 300.1; MUSER I.

stated that he did not know that the District was going to be discussing special education eligibility that day.

The District's determination of ineligibility in February 2018 was faulty. In order to determine eligibility for special education and related services, a child with a disability listed in the Maine Unified Special Education Regulations (MUSER) must need special education.⁷ In order to determine whether a child is eligible for special education and related services, the IEP Team must draw upon a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, and adaptive behaviors. The Team must also ensure that information obtained from all of these sources is documented and carefully considered.⁸

Written notice for the February 2018 meeting states that the Team relied on a discussion among the team members present, a review of current grades, and a review of the previous IEP. The Notice also stated that the Student "appears to be successful" in the alternative school setting, and that the team filled out the "adverse effect form" in its determination of eligibility.

The Department's Form for the Determination of Adverse Effect on Educational Performance was created to assist Districts in creating a written record regarding determination of adverse effect on educational performance.⁹ The District used this mandatory form in its determination. The responses on the form do not indicate that the Team drew upon a variety of sources, used data sources to support the decision to remove eligibility, and did not carefully consider the student's educational needs.¹⁰

Of the 10 questions asked on the form, the District responded with no data for 6 questions, no documentation of parent input, and non-specific references to teacher reports for 6

⁷ "A child 'needs' special education and related services when, because of the disability, the child can neither progress effectively in a regular education program nor receive reasonable benefit from such a program in spite of other services available to the child. The need is best established through evidence of a distinctly measurable and persistent gap in the child's educational or functional performance that cannot be addressed through services or accommodations available through the general education program. MUSER VII(2).

⁸ 34 CFR 300.306(2)(c); MUSER V(2)(F).

⁹ The Maine State Required Forms Procedural Manual ("Manual") provides the regulatory definition of adverse effect: "to have a negative impact that is more than a minor or transient hindrance, evidenced by findings and observations based on data sources and objective assessments with replicable results"). The Manual also states that the IEP Team's determination of adverse effect must be based upon the results of assessments and/or data sources determined by the Team to be necessary to verify the effect of the disability on educational performance." Directions in the manual are very specific as to how the Team should utilize data sources to answer each question and instructs the IEP Team to "*explain* its decision regarding whether the student needs specialized instruction... and summarize how the data sources support the Team's determination." Manual, at 8-14.

¹⁰ MUSER V(2)(F). MUSER VII(3).

of 10 questions.¹¹ Most telling, as a response to question 9, which asks, “do the student’s social or emotional deficits (if any), as observed by professionals or parent/guardians in multiple settings (whenever possible) on clinical rating scales or in clinical interviews, demonstrate adverse effect, District staff wrote in “Teacher reports from Alternate school.”¹² This answer does not address any of the functional needs of the Student as documented in multiple settings, does not utilize the District’s 2016 assessment which discusses the Student’s functional needs in depth, and does not take into account any parent input about social or emotional deficits observed by the parent. Documentation does not show that the functional needs of the Student, other than to say that District High School was not an appropriate placement, were discussed during this meeting.

Regarding other data used to complete the form, District staff wrote three of the subtests of the Woodcock-Johnson, not the entirety of the report or information from the summary, as verification data. Notably, the written notice for the meeting does not list the 2016 Evaluation as a source of information used when determining eligibility. When interviewed, District staff stated that they thought the Student was “doing well” because he was attending and passing classes. This understanding appears on the adverse effect form.

In all, the Team did not thoroughly consider the Student’s educational needs based on his disabilities of depressive disorder, ODD, and ADHD. In February 2018, the Student had received multiple referrals for disciplinary infractions such as insubordination and had been suspended several times. His grades during the fall semester were 1 B, 4 C’s, and 2 D’s. The Student’s grade for welding class, which had been in the A range during the first term, dropped to C’s in the second and third terms. When interviewed, staff at the alternative school reported that during the 2017-2018 school year, the Student engaged in behaviors that interfered with his and others’ classroom learning.¹³

¹¹ For instance, #3 on the form asks, “Do any reports prepared by the SAU or presented by the parent/guardian that reflect academic or functional performance document adverse effect? Under verification, the District wrote ‘Teacher reports he is passing all classes at Franklin school.’ The District checked n/a and did not provide data verification for question #4, which asks, “Does the student’s performance on comprehensive assessments based on a system of learning results, or the Common Core, demonstrate adverse effect?” For questions numbers 5 and 6, which ask if criterion reference assessments of academic or functional performance demonstrate adverse effect and if student work products, language samples or portfolios demonstrate adverse effect, the District responded with no data verification and the statement, “teacher reports that [the Student’s] responding to the alternative school behavioral approach with no significant adverse effect impacting his education.”

¹² No documentation of teacher reports was provided and the Student’s teacher at the alternative school was not present at the meeting.

¹³ In the case of a child whose behavior impedes the child’s learning or that of others, the IEP Team must consider – and, when necessary to provide FAPE, include in the IEP – the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR §§300.324(a)(2)(I) and (b)(2); and 300.320(a)(4). OSEP has issued significant policy guidance regarding Students with behavioral needs: “To the extent a child’s behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other

It was error to find the Student ineligible for special education and related services.¹⁴ The general feeling by the District that the Student was “doing well” because he was passing classes is not a clearly articulated reason for the IEP Team discontinue eligibility.¹⁵ The Team did not use multiple sources to document its finding and did not rely on enough data or verification.

In addition, the IEP in place for the Student during the 2017-2018 school year until February 2018 did not contain a properly- completed service grid that reflected the special education and related services the Student was to receive. Spaces were left blank in two of two service areas on the IEP. The Student did not receive at least one of those services on the service delivery grid, as discussed in determination 3.¹⁶ Based on the pattern of behaviors that impeded the Student’s learning, the fact that the Student did not receive behavioral supports, as well as the disciplinary removals during the 2017-2018 school year for conduct that impeded the Student’s learning and that of other students, the IEP was likely not reasonably calculated to provide a meaningful educational benefit.

(b) The alternative school, with whom the District contracts for a certain number of seats each year, banned the student from attending classes at the alternative program. District staff knew about the ban nearly immediately, on March 21, 2018.

In the District’s response, the District states that because the student was no longer a student who received special education, it had no obligation regarding the Student’s discipline or education. Certain procedural protections apply, however, where a District has knowledge that the Student is a student with disabilities.¹⁷ The District knew that the Student had several qualifying disabilities based on his long history of special education services, the 2016 evaluation, the staff’s personal knowledge of the Student, and the fact that the District had found

exclusionary disciplinary measures) impede the child’s learning or that of others, the IEP Team must consider when, whether, and what aspects of the child’s IEP related to behavior need to be addressed or revised to ensure FAPE. If the child already has behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP team should meet to consider whether the child’s behavioral supports should be changed.” OSEP Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education (August 1, 2016).

¹⁴ The Department notes that it appears that the District may have an unwritten policy to only examine a Student’s educational performance during the 6 months prior to the Team meeting when holding meetings concerning eligibility. When interviewed, District staff stated that the student’s “very recent” performance was important in the referral process. Documentation from the District to the Student’s guardian states that the new referral is needed for special education because the District does not have evidence of adverse effect for 6 months.

¹⁵ *Andrew F. v. Douglas Cnty. School Dist.* 137 S. Ct. 988, 999 (2017).

¹⁶ The documentation for the investigation did not include information about how the consultation services on the IEP were delivered at the alternative school.

¹⁷ 34 CFR 500.534. MUSER XVII(5).

him ineligible for special education approximately three weeks prior to the behavioral incidents. The Assistant Principal and the Director of Student Services knew about each of the disciplinary incidents that occurred in March up to and including the incident that prompted the alternative school to tell the Student's parent that the Student could no longer attend school. The alternative school had expressed to the District its concerns about the patterns of behavior, including insubordination, that the Student demonstrated in the alternative school.

Even if the Team had given consideration and consulted many sources during the February 2018 IEP Team meeting to find the Student ineligible, the District would still have child-find responsibility for this compulsory-school-age Student, whose disability was impacting his educational experience such that he did not access the curriculum.¹⁸

(c) Districts shall provide special education services to all children with disabilities whose parent resides within the District. This shall include all eligible children who attend the public schools of the unit, or who attend other public schools or private schools on a tuition or contract basis at public expense.¹⁹

The alternative school has been sending work home to the Student. The Student did not pass classes this spring and is unlikely to earn any credit recovery this summer. As stated above, the District's responsibility for FAPE extends to students about whom the District has knowledge of a disability that may require special education or related services.²⁰

(d) The alternative school required the Student to undergo an evaluation prior to returning to school. The District, although it knew about these arrangements and the Student's long history of special education, did not initiate a referral or educational programming for this Student after the Student was asked to leave school.

The practice of the alternative school is for the alternative school to continue its enrollment of the child, even after discipline such as this, where the student is not allowed to come to school. In this instance, the District did not offer any alternate education for the Student, with whom District staff is very familiar because of past disciplinary incidents, the Student's multiple referrals to special education, and certain staff members' good relationships with the Student. Despite an approximately three-week gap between the District's ineligibility determination and the Student's subsequent outbursts in March, and again later in May, there were no discussions of the Student's educational needs or of any other kind of placement for the Student, other than the most restrictive home setting where the alternative school put him despite the Student being of compulsory school age.

¹⁸ MUSER IV(2) ("An SAU that tuitions or contracts for educational services for some or all of its children is responsible for child find, either through appropriate arrangement with the receiving unit or school or through direct child find services by unit personnel or contracted personnel").

¹⁹ MUSER IV (4).

²⁰ MUSER IV(2)

2. During the February IEP Team meeting for the Student,
 - (a) The District did not perform evaluations of the Student prior to the decision to find him ineligible for special education and related services. MUSER V(3)(F).
 - (b) the District did not consider whether the Student needed special education as determined through evidence of a distinctly measurable and persistent gap in the Student's educational or functional performance that could not be addressed through services or accommodations available through the general education program. MUSER VII (2).
 - (c) the IEP Team did not review whether the annual goals for the Student were being met and did not review any information about the Student that was provided by the parent. MUSER VI(2)(J)(5).

As discussed above, the Team did not review the Student's behavioral goal in any significant way and based its determinations without data and without careful consideration. Based on the documentation, no evaluations were conducted or reviewed prior to finding the Student ineligible.

3. The District did not implement the Student's IEP, including counseling services, during the time of this complaint. MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

If a school unit is unable to hire or contract with the professional staff necessary to implement a child's Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options. This IEP Meeting shall occur no later than 30 days after the start of the school year or the date of the IEP Team's development of the IEP. The IEP Team shall determine any amendments to the IEP necessary to reflect the inability to commence services as originally anticipated by the IEP Team.²¹

The District has acknowledged that the Student did not receive counseling services from September 2017 to Feb. 15, 2018. Based on the IEP, it is apparent the Student's goal required counseling services on some sort of regular basis – the space for amount of service has been left blank.

Additionally, the District did not convene an IEP Team to identify alternative service options when it learned at the end of September that the Student was not receiving counseling. The District must provide compensatory services and training to its staff as detailed below.

²¹ MUSER IX(3)(B)(3).

4. The Student did not have an IEP that was written so that he could make progress in the general education program. MUSER IX(3)(A). **NON-COMPLIANCE FOUND.**

As stated above, the service delivery grid on the IEP does not specify frequency of consultation services and does not specify personnel providing counseling. Additionally, given the depth of detail about the Student's educational needs as impacted by his disabilities in the 2016 report, the District's IEP does not contain any direct specialized instruction and contains only a minimal behavioral goal which was not adequate to address his educational needs, particularly because the Student did not receive services,.

5. The Student's disability has affected his ability to access education and adversely affects his education such that he continues to need special education and related services. MUSER VII (3). **NO FINDING.**

The Student is currently undergoing evaluations. The Department will review the information and the Team's procedures regarding eligibility as part of the corrective action detailed below.

6. The District has not provided the Parent the opportunity for inspection and review of the Student's educational records. MUSER XIV (3). **COMPLIANCE FOUND.**

MUSER XIV states, "Each SAU must permit parents to inspect and review any education records relating to their child which are collected, maintained, or used by the SAU under these regulations. The SAU must comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing pursuant to 34 CFR 300.507 or 300.530 through 300.532, or resolution session pursuant to 34 CFR 300.510, and in no case more than 45 days after the request has been made under Part B."

On May 21, 2018 the Student's guardian requested a complete copy of all of the Student's educational records. On Tuesday, July 3, 2018, the District made available more records, such as additional special education files and the cumulative files. The District states that the cumulative files and the special education files for the Student have been received. This timeframe is less than the 45-day requirement as specified in regulation.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. The District's administrative team must meet to do the following:

A. Review its responsibilities to provide FAPE for students with IEPs who attend alternative schools.

B. Establish an internal procedure for communicating with alternative schools with whom the District tuitions students. The internal procedure should contain the following information: The procedures for communicating responsibilities for students who are, or who are known to have, disabilities that require special education and related services among the administrative team; the responsibility for discussions about FAPE with the alternative school; the presence of teachers at District IEP Team meetings, and specific roles for each person involved in procedural changes. This procedure must be shared with the Department for its review by **September 15, 2018** and, if approved by the Department, be put in place by **October 15, 2018**.

C. An agenda for this meeting and sign in sheet, with names and titles, must be submitted to the Department by September 15, 2018.

2. The District's Special Education Director and all special education staff who run or coordinate IEP team meetings at all District schools must meet to do the following:

A. Review the Department's adverse effect form in detail and in accordance with Department guidance. An agenda and sign in sheet, with names and titles, must be submitted to the Department by October 15, 2018.

B. Review the requirements of MUSER V(3)(F), MUSER VI(2)(J)(5), MUSER IX(3)(A), and MUSER IX(3)(B)(3),

C. Review the requirements of an IEP and establish internal procedures to ensure that all sections of students' IEPs are completed properly.

3. The District must compensate the Student for 40 hours of missed counseling services. These services are to be offered in addition to any services if the Student is found eligible for special education and related services. Documentation of counseling must be provided to the Department by **May 1, 2019**.

4. The District must offer twelve weeks of 8 hours/week of special education instruction, a total of 96 hours. The instruction must align with the District's curriculum for the Student's current grade and with the Student's skills. Instruction must be given by a certified special education teacher. Documentation of counseling must be provided to the Department by **May 1, 2019**.

5. As part of corrective action, the Department will conduct an on-site review of the District's findings of eligibility for special education students at the high school level. The Department and District will meet no later than **October 15, 2018** to discuss any further findings.