

Complaint Investigation Report
Parent v. RSU #54/MSAD #54
Complaint 19.019C
Complaint Investigator: Jeannette Sedgwick
October 25, 2018

The Department of Education received this complaint on August 29, 2018. Interviews were conducted with the complainant on September 21, 2018 and with the District's special education co-director, the Student's physical therapist, occupational therapist, and special education teacher on September 26, 2018. The complaint investigator also interviewed the Student's targeted caseworker and the Student's family support partner on September 27, 2018. All documents, information, and responses from the parties were considered for this report.

FACTUAL FINDINGS

1. The Student is 13 years old and qualifies for special education and related services under the criteria of Autism, Intellectual Disability, and Other Health Impairment.¹
2. The Student was educated in the District during the 2017-2018 school year. The Student's educational programming during much of the 2017-2018 school year consisted of the Student in one room by himself with educational technicians and service providers and a device so that the special education teacher could see him in the room. The District stated that the reason for placing him in this highly restrictive educational environment was that his loud vocalizations, flopping, and self-injurious behaviors affected other students' educational programming. The Student was not mainstreamed for any significant amount of time and did not spend time regularly with peers. The District rotated educational technicians on a 40-minute schedule because of the Student's needs.
3. The most recent evaluations conducted by the District, dated in May 2017, consisted of educational, occupational and physical therapy assessments. Those assessments show that the Student has severe symptoms of Autism Spectrum Disorder based on the Childhood Autism Rating Scale, 2nd Ed. and performs in the "Low" range in communication, daily living skills, socialization, and adaptive behavior based on the Vineland Adaptive Behavior Scales, 3rd Ed.
4. On October 16, 2017, the IEP Team met to review a Functional Behavioral Assessment that had been completed by the District. At that meeting, the Team decided to add a behavioral support plan and crisis intervention plan for the Student. The Team also added a weekly check-in by a BCBA to assist with the Student's programming. Methods to engage the Student, such as using more or different types of reinforcers and offering more choices of activities, were also discussed.

¹ The Student's OHI is based on his mitochondrial disorder.

5. At the meeting in October 2017, the Team discussed the possibility of the Student attending a special purpose private school. The complainant signed a release for two such schools on October 16, 2017. These proposed placements did not become available during the rest of the 2017-2018 school year.
6. Currently, the Student requires hand-over-hand assistance when completing life skills such as brushing his teeth. He is unable to toilet himself and is on a toileting routine at school. He communicates using the Picture Exchange Communication System (PECS), pointing, stating yes and no, and using some signs such as 'more', 'please', and 'finished.' An IPAD with the Language Acquisition through Motor Planning program that the Student used with his speech therapist was not utilized regularly because the Student would take it from the speech therapist's hands and throw it.
7. The Student's current behavior plan details the Student's targeted behaviors of self-injury (slapping or pinching himself, loud vocalizations), aggression towards others (attempted hitting, pinching, biting, and hair pulling), and property destruction (throwing or clearing material from table tops). The plan also discusses the antecedents and reinforcers for the Student's behavior.
8. On June 6, 2018, the Student's IEP Team met for the Student's Annual Review. The Team heard reports from the Student's occupational therapist, physical therapist, speech therapist, and special education teacher. The District proposed that the Student would receive special education and related services in a day treatment program; that the Student's goals would remain the same; and that there would be a decrease in occupational therapy and speech/language services.
9. At the June meeting, the complainant shared with the Team that she did not wish the Student to attend a day treatment program and wanted the Student to remain in his current educational placement. The District had invited a representative of the special purpose private school to the meeting. The complainant did not consent to have the representative present.
10. Written notice from the meeting on June 6, 2018 states that the Student had "not made progress on his goals due to his behaviors".
11. The IEP proposed after the June 2018 meeting includes the following specially designed instruction (SDI) and related services:
 - SDI in a day treatment program 29.5 hours/week;
 - Direct speech and language services by a speech language pathologist 1x30 minutes/week;
 - Direct physical therapy services 1x30 minutes/month by a physical therapist;
 - Social work services (the sections on the grid are left blank for this service);
 - Consultation for Speech/Language services 1x15 minutes/quarter;
 - Consultation for occupational therapy services 1x30 minutes/month;
 - Specialized transportation daily to and from school.

12. On August 30, 2018, the IEP Team met to discuss educational placements. The District told the complainant that the District would continue to look for programs in a special purpose private school and would provide tutoring in a District school that is not the Student's school while awaiting placement.
13. At the August meeting, the complainant stated that she did not agree with the tutorial services offered by the school and stated that she wanted the Student to attend school full time as he had in the past. The Student's caseworker and the complainant's family support partner were present at this short meeting.
14. The Amended IEP resulting from the on August 30, 2018 IEP Team meeting includes the following:
 - Under special education services, a line of "tutorial instruction" by a special educator 2 hours/day for 5 days/week;²
 - All SDI and related services that appear on the previous IEP.
15. Written Notice from the August 30, 2018 meeting states that the Student's "IEP Team rejected the option of having [the Student] attend a full day within MSAD #54 until a day treatment program is secured... MSAD #54 does not have a program that meets [the Student's] needs on a full school day basis."
16. The District advertised for a tutor on September 6, 2018 and secured one approximately one week later. The District plans to train the tutor in Safety Care practices prior to beginning the Student's instruction.
17. The Student's IEP Team met on September 21, 2018 to continue discussing options for the Student. The District continues to look for appropriate educational opportunities for the Student outside of the District.
18. The Student has been at home without any educational services since August 29, 2018, the first day of school and the date the request for a State complaint investigation was filed.

DETERMINATIONS

1. The District has not provided special education to the Student during the 2018-2019 school year. MUSER IV(4). **NON-COMPLIANCE FOUND.**

The District has acknowledged that it has not provided special education to the Student during the 2018-2019 school year. Corrective action is specified below.

The Maine Unified Special Education Regulations state that Districts are "responsible for providing special education services to all resident children... within its geographical jurisdiction, who are identified as children with disabilities."³ This obligation extends to all

² The District has called the proposed tutoring program an "alternate interim educational program."

³ MUSER IV(4).

students with disabilities, including those with severe or significant disabilities.⁴ Districts do not have the option to cease providing special education and related services to a child identified as a child with a qualifying disability under IDEA, even while waiting for or establishing an educational program that is out-of-district, as is the case here.⁵

In this case, the complainant rejected the proposed day treatment placement. The record indicates that after the June IEP meeting, the IEP contained agreed-upon special education and related services, but in an agreed-upon educational setting where those educational services would take place.⁶ In June, the District was entitled to proceed with its proposed day treatment placement, and the complainant had the right to challenge it which she did on August 29, 2018.

At that point, “stay-put” went into effect. Students must remain in their current placements during the pendency of a State complaint investigation.⁷ When the complainant filed the request for a State complaint investigation, the District had the responsibility to continue to implement the last agreed-upon IEP.⁸ District had, and still has, the obligation to provide an educational program for the Student that meets his needs.⁹ Removing this Student while applications for day treatment programs were in process constituted a change in placement to a highly restrictive setting for a reason not compliant with law and regulation.

The Department notes that there is a difference between educational programming and educational placement. Decisions about programming occur prior to decisions about the type of educational setting where the programming takes place.

2. The District has not implemented the Student’s IEP during the 2018-2019 school year. MUSER IX(3)(B)(1); MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

⁴ *Andrew F. v. Douglas Cty Sch. Dist.*, 137 S. Ct. 988 (2017). See *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993); *Letter to Wentzell*, 69 IDELR 79 (December 7, 2016) (SDI and related services include those addressing behavioral, emotional, physical, and functional needs).

⁵ *Andrew F.*, 137 S. Ct. at 999 (each child’s educational program must be appropriately ambitious in light of his or her circumstances).

⁶ Although it is not entirely clear, the complainant stated in June 2018 that she did not wish the Student to attend one particular program, not all day treatment programs. In August 2018, the parent did not agree to the IEP that specified tutoring as special education.

⁷ MUSER XVI(20)(A).

⁸ The IDEA specifies stay put during the pendency of due process hearings. Stay put during due process hearings “does not mean that a student must remain in a particular site or location.” *Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (P.S. 79) v. New York City Bd. of Ed.*, 629 F.2d 751, 754 (2d Cir. 1980) (hereinafter *Concerned Parents*); See *Letter to Baugh*, 211 IDELR 481 (July 2, 1987).

⁹ *Concerned Parents*, 629 F. 2d at 756; See *Letter to Anonymous*, 60 IDELR 47 (February 9, 2012).

The District has acknowledged that it has not implemented the Student's IEP during the 2018-2019 school year. Corrective action is detailed below.

Districts must have a current individualized education program in effect at the start of each school year.¹⁰ The Student is currently enrolled in the District and the District is responsible for implementing the child's IEP.¹¹ Awaiting acceptance at a private school placement does not alleviate a District's responsibility to provide special education and related services.¹² It was not appropriate to remove the Student from last year's placement while a day treatment option is being secured. The District has excluded this Student, who is 13 years old and has significant educational, functional, and behavioral needs, from his education.¹³

3. The Student is not being educated in the least restrictive environment. MUSER VI(2)(I). **NON-COMPLIANCE FOUND.**

The District has acknowledged that it has not educated the Student in the least restrictive environment during the 2018-2019 school year. Corrective action is detailed below.

A child's educational placement must be in the least restrictive environment given the child's educational, functional, and behavioral needs as specified in the child's IEP.¹⁴ Least restrictive environment means that "to the maximum extent appropriate, children with disabilities are educated with children who are not disabled." Least restrictive environment does not necessarily mean, however, educational programming in a public school environment.¹⁵

Tutorial instruction is not to be used to replace specialized instruction to students with disabilities.¹⁶ Providing tutoring services, while permissible in certain instances, is providing

¹⁰ MUSER IX(3)(B)(1); MUSER IX(3)(B)(3).

¹¹ MUSER IV(4).

¹² *Sch. Dist. of Philadelphia v. Post*, 70 IDELR 96 (July 5, 2017); *Ms. M. v. Falmouth Sch. Dep't.*, 875 F.3d 19, 29 (D. Me. 2016) ("failure to provide special education and related services in conformity with the IEP as [the IDEA] requires is a substantive violation").

¹³ 34 CFR 300.116(b-e); MUSER IX(3)(B)(3).

¹⁴ 34 CFR 300.114; MUSER VI(2)(J). See *Andrew F.*, S. Ct. at 1001; *Roland v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir. 1990) ("requirements of educational benefit and least restrictive environment operate in tandem").

¹⁵ *Dist. of Columbia Pub. Sch. v. Dist. of Columbia State Ed. Agency*, 71 IDELR 23 (May 9, 2017) (where Student was generally unavailable for education because of behavioral crises, nonpublic school is appropriate").

¹⁶ "The IEP Team may consider tutorial instruction as a component of a child's program while assuring consistency with the federal requirements of least restrictive environment... Tutorial instruction is to be used in conjunction with abbreviated school day (Section VI.2.L) or Discipline of Children with

education in a very highly restrictive environment.¹⁷ The Department issued guidance about tutoring on November 17, 2017: “When students are out of school because of discipline, an abbreviated school day, or medical reasons, tutoring may be provided as a short-term measure to ensure that students receive instruction. Tutoring is not specially designed instruction. Schools should make every effort, including re-entry plans and proposals for definitive placements, to ensure that students with disabilities are enrolled and attending school.”¹⁸

Although the District considers tutorial instruction to be an “interim alternative educational setting,” the IDEA uses this term when discussing educational placements after a child has been disciplined and Maine regulations use the term when discussing discipline and an abbreviated school day.¹⁹

In this case, the District did not offer tutoring to the Student because of discipline or a medical reason. The documentation does not show that the District offered tutoring because of an abbreviated school day.²⁰ Rather, the Student’s IEPs and interviews with District personnel indicate that the Student has not received instruction, other than the offer to provide tutoring “due to behaviors” and the District’s belief that it does not have appropriate programming for this Student.

The program offered by the District during the 2017-2018 school year is still currently available and has been since the filing for this complaint investigation. The District’s position is that FAPE can only be provided to the Student in a day treatment placement given the Student’s needs. District staff stated that the Student’s educational needs warrant the provision of staff who have been trained in Safety-Care methods. Staff also stated that, when properly trained, staff can manage the Student’s attempted physical behaviors. Safety of the Student and staff is paramount; however, based on the staff interviews, it appears that the Student can be safely educated in his former placement while a day treatment placement is secured. In addition, the Team may wish

Disabilities (Section XVII), but in no other circumstances... Tutorial instruction may not be used in lieu of specialized instruction.” MUSER X(2)(A)(4).

¹⁷ “It is the full expectation that children with disabilities will attend school the equivalent amount of time per day as children without disabilities in the same school and/or school program.” MUSER VI(2)(L).

¹⁸ “*Tutoring for students who receive special education.*” Available at <https://mainedoenews.net/2017/11/15/tutoring-for-students-who-receive-special-education/>

¹⁹ CFR 300.530; 34 CFR 300.531; MUSER XVII(1)(B, G); MUSER XVII(2).

²⁰ There is no documentation that the Student’s IEP Team discussed an abbreviated school day as an educational need. Even if the Student’s educational needs warranted an abbreviated school day, the IEP Team did not document the regulatory requirements: addressing how the Student would meet learning results and access the general curriculum and IEP; developing a plan to return to a full-time school day as soon as possible; or documenting the basis for the determination of an abbreviated school day based on the Student’s individual needs. MUSER VI(2)(L).

to continue discussing the Student's educational services in light of his functional and behavioral needs.

4. The District has not offered the Student a free and appropriate public education (FAPE). MUSER I; MUSER VI(2)(J)(4); 34 CFR 300.17. **NON-COMPLIANCE FOUND.**

The District has acknowledged that it has not provided FAPE for the 2018-2019 school year. Corrective action is detailed below.

FAPE is comprised of specially designed instruction... to meet the unique needs of a child with a disability. [] It is through the IEP that the 'free appropriate public education required by the Act is tailored to the unique needs of a particular child.'²¹

The complainant stated that the Student has the right to continue his education in the District with his peers. The complainant also stated that she believes the Student's behaviors may be linked to his entering adolescence and believes the District has the capability to educate the Student, particularly in Life Skills where he would learn essential skills such as expressing his desires and self-care such as toileting. She also stated that the Student does not display aggression in the home and that she understands that the restrictive setting of school may lead to different reactions by the Student.

The District proposed an IEP in June 2018 that is procedurally and substantively compliant. The District has proposed this IEP based on clearly articulated reasons.²² However, that IEP has not been implemented, the "stay-put" IEP (developed prior to the June 2018 meeting) has not been implemented, and the tutoring option for the Student was not in compliance with law and regulation. The District continues to pursue educational opportunities for the Student in order to meet his needs and will educate the Student while awaiting placement (see corrective action below).

²¹ *Endrew F.*, 137 S. Ct. at 999 (citing *Bd. of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176) (internal citations omitted).

²² *Id.* at 1000 (citing *Bd. of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (school authorities' expertise and exercise of judgment deserve deference by courts)).

CORRECTIVE ACTION PLAN

In conjunction with this corrective action plan, the Department offers technical assistance to the District upon request.

1. **Within one week of receipt of this Report**, the District shall return the Student to his educational placement within the District where the Student will remain until an opening in an appropriate program is available.

The District must implement the Student's special education and related services that are listed on the Student's last IEP that specified the District as the educational placement.

2. A compensatory services plan must be developed by the District in conjunction with the parent **by November 15, 2018**.

The compensatory service plan must consider all aspects of the Student's June 2018 IEP and previous IEP, the findings in this Report, and the Student's current educational, functional, and behavioral needs. The plan must include the following elements for compensatory SDI and each related service for missed SDI and services from August 29, 2018 to the date the Student returned to the District:

- (a) The agreed-upon number of hours for SDI and each related service;
- (b) The agreed-upon timeframe for delivery;
- (c) The agreed-upon time and place of delivery;
- (d) The certified and licensed providers as chosen by the District.

3. If the District and parent do not come to an agreement about what compensatory services are owed, each party must submit a compensatory services plan with the elements above to the Department **by November 15, 2018**.

The Department will review the two proposed compensatory services plans and create the final plan in order to ensure the provision of FAPE to the Student.

4. The District must provide an in-person training to all special education directors, coordinators, and others who write IEPs about the following laws and regulations
 - Stay put during pendency of a dispute. MUSER XVI(20)(A).
 - Tutorial Instruction. MUSER X(2)(A)(4).
 - Least Restrictive Environment. MUSER X(B).

Training must occur by November 15, 2018. The District must send the sign in sheet, with names and titles of participants, to the Department by **November 15, 2018**.

5. The District must seek assistance from the University of Maine's Autism Institute for Education and Research, after which the IEP Team must meet to discuss and determine options for educational placement and programming.

The District must send (a) the steps taken to secure assistance from the Autism Institute and (b) the Written Notice from the IEP meeting to the Department **by November 15, 2018.**